

THE REPUBLIC OF UGANDA

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

APPLICATION NO 2 OF 2018

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC
PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY
REGARDING THE PROCUREMENT FOR KAMPALA WATER –
LAKE VICTORIA WATSAN PROJECT-PACKAGE 48 DRINKING
WATER TREATMENT PLANT AND NSUMBA PUMPING MAIN
AND RESERVOIR PROCUREMENT REFERENCE NO NWSC-
HQ/WRKS/2016-17/162209: ACCIONA AGUA –EIFFAGE JV.**

APPLICANT: ACCIONA AGUA –EIFFAGE JV

**1ST RESPONDENT: PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
AUTHORITY**

2ND RESPONDENT: NATIONAL WATER & SEWERAGE CORPORATION

**(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO SC- MEMBER,
DAVID KABATERAINE-MEMBER AND ABRAHAM NKATA- MEMBER)**

DECISION OF THE PPDA APPEALS TRIBUNAL

1.0 BRIEF FACTS

- 1.1 On 8th and 9th August 2016, National Water and Sewerage Corporation (1st Respondent) advertised the prequalification of Contractors for the design and construction of the Katosi Water Treatment Plant in the Daily Monitor and New Visions Newspapers respectively. The bidding document was issued to thirty seven bidders of which eleven submitted applications on 20th September 2016.
- 1.2 On 21st December 2016, the Contracts Committee approved the pre-qualification evaluation report and shortlisted three bidders namely Acciona Agua-Eiffage JV, Strabag International GmbH and SOGEA SATOM & Suez International JV.
- 1.3 On 2nd February 2017, the Contracts Committee approved the restricted bidding method following Expression of Interest and the bidding document.
- 1.4 On 23rd November 2017, the Contracts Committee approved the Technical Evaluation Report and the opening of the financial bids.
- 1.5 On 24th November 2017, NWSC notified the bidders whose proposals had attained 80% at technical evaluation and invited them to the opening of the financial bids on 1st December 2017.
- 1.6 On 1st December 2017, financial bids were opened with the information: M/s Acciona Agua Eiffage JV (phase 1a & phase 1b) with a total operational costs for 15years 65,034,673.36 Euros; Strabag International GmbH (phase 1a & phase 1b) of total operational costs for phase 1a 46,646,842.8 Euros & phase

1b 95,803,447.3; SOGEA SATOM & Suez International JV with no summary of total costs for 15 years indicated although details of the costs are indicated for both phase 1a and phase 1b and SOGEA SATOM & Suez International JV (Alternative bid) phase 1a and phase 1b with no summary of total costs for 15 years indicated although details of the costs are indicated in the price schedules for both phase 1a and phase 1b.

- 1.7 The Financial Evaluation Report recommended award of the contract to SOGEA SATOM & Suez International JV's Alternative proposal 2 as the Best Evaluated Bid at a contract price of Euro 131,352,727 (phase 1a and phase 1b) which is a combination of the cost of the works and the lifecycle O & M cost (15 years).
- 1.8 On 5th December 2017, M/s Acciona Agua Eiffage JV (the Applicant) applied for administrative review to the Accounting Officer of the 2nd Respondent.
- 1.9 On 14th December 2017, the Accounting Officer of the 2nd Respondent issued a decision rejecting the Applicant's application for administrative review.
- 1.10 The Applicant being dissatisfied with the decision of the Accounting Officer, filed a complaint with the 1st Respondent, the Public Procurement and Disposal of Public Assets (Authority) and on 8th February 2018 the application was rejected.
- 1.11 On 15th February 2018, the Applicant being dissatisfied with the decision of the Authority filed this application to the Tribunal challenging the decision of the Authority.

2.0 ISSUES

Issue No.1: The Authority erred in law and fact when it rejected the Applicant's complaint to reject Sogea-Satom/ Suez International's (Best Evaluated Bidder or BEB) Financial bid because it was non-responsive, non-compliant, incomplete and in contravention of the PPDA Act 2003 and Regulations.

Issue No.2: The Authority erred in law and fact when it refused to pronounce itself on the 2nd Respondent's lack of transparency and ethics when the 2nd Respondent discriminatorily communicated with the BEB without notifying other bidders.

Issue No.3: The Authority erred in law and fact when it refused to cause the 2nd Respondent to produce its correspondence with the BEB dated 12th September 2017 and 31st October 2017.

Issue No.4: The Authority erred in law and fact when it refused to declare the actions of the 2nd Respondent fraudulent and to uphold the Applicant's complaint when through their correspondence of 12/9 and 31st October 2017, the 2nd Respondent and the BEB were allowed to amend the contents of the Technical bid.

Issue No.5: The Authority erred in law and fact when it refused to uphold the Applicant's submission that the BEB had a close business relationship with GKW, the Consultant for the Project.

Issue No.6: The Authority erred in law and fact when it refused to rule upon the Applicant's submission that the sharing of offices in Kampala by the Consultant for the Project (GKW/Alliance Consultants) with

Sogea-Satom/Suez International, a fact not denied by the 2nd Respondent during the hearing at the Authority, compromised the Consultants' role and impartiality and disqualified them from evaluating a bid where Sogea-Satom/Suez International were bidders.

Issue No.7: The Authority erred in law and fact when it refused to rule upon the Applicant's submission that the 2nd Respondent's Accounting Officer was invited, transported, treated and accommodated by Sogea-Satom in Paris during the time of evaluation process.

Issue No.8: The Entity erred in law and fact when it refused to suspend the proposed procurement process during the period of administrative review.

Issue No. 9: What remedies are available to the parties?

3.0 **APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.**

3.1 On 15TH February 2018, the Applicant applied to the Tribunal for a review of the Authority's decision, which recommended the continuation of the procurement process to its logical conclusion after rejecting the Applicant's complaint which sought among others the disqualification of the financial bid of the BEB, pursuant to section 75 of the Act because its operational costs were not indicated and read during the financial bid opening.

3.2 The Applicant sought the following reliefs:-

- a) Rejection of the BEB bid.
- b) Evaluation of the bids submitted by the Applicant and Strabag International.

- c) Costs accrued by the Applicant at all stages of their complaint including the instant appeal.
- d) Issuance by the Tribunal of an Interim order suspending the procurement process pending disposal of the complaint.

3.3 The grounds for the Application to the Tribunal were as follows:-

- a) The Authority erred in fact and law when it rejected the Applicant's Complaint/Application to have the Best Evaluated Bidder's bid rejected because the impugned bid was non-responsive, non-compliant, incomplete, incompetent and contravened the provisions of regulation 21 (4) of the PPDA (Evaluation) Regulations, 2014, S. 19 of 2014.
- b) The Authority erred in fact and in law when it refused to pronounce itself on the Applicant's submissions to the it on the 2nd Respondent's lack of transparency and lack of ethics when the 2nd Respondent discriminatorily communicated with the BEB without notifying other bidders, contrary to section 43(a), (b) and (f) of the Public Procurement and Disposal of Public Assets Act (Act).
- c) The Authority erred in fact and law when it refused to cause the 2nd Respondent to provide its correspondence with the BEB dated 12th September and 21st October 2017 to the Applicant and the 1st Respondent, before hearing the Applicant's complaint thereby suppressing evidence to the prejudice of the Applicant.
- d) The Authority erred in fact and in law when it refused to declare the actions of the 2nd Respondent and the BEB fraudulent and to uphold the Applicant's complaint when through their correspondence of 12th September and 21st October 2017, between the 2nd Respondent and the BEB was allowed by the 2nd Respondent to amend the contents of the Technical Bid during the evaluation stage, contrary to section 43(a), Section 72, Section 95 (1) (d), of the Act, and Regulation 9 of the PPDA (Evaluation) Regulations, 2014, S.I 9 of 2014.
- e) The Authority erred in fact and in law when it refused to uphold the Applicant's submissions that the BEB through Suez International had

very close business relationship with GKW the consultant for the suit project contrary to sections 43, 5 48, 49, 93 and 95 (1) (d) of the Act and Agence- Francaise De Development (AFD) Guidelines for the procurement of AFD- Finance Contracts in Foreign Countries 2015 Edition. The AFD Guidelines prohibit conflict of interest cases such as this one where Suez International has a business relationship with the Consultant GKW who are engaged in the selection process of the bidders for the suit project (among whom is Suez International) and further Suez International and GKW are under common control.

- f) The Authority erred in law and fact when it refused to rule upon the Applicant's submission that the sharing of offices in Kampala by the Consultant for the project (GKW/ Alliance Consultants) with the BEB a fact not denied by the 2nd Respondent during the hearing, compromised the Consultants role and impartiality and disqualified them from evaluating a bid where the BEB were bidders.
- g) The Authority erred in law and fact when it refused to rule upon the Applicant's submission that the 2nd Respondent's Accounting Officer was invited, transported, treated and accommodated by Sogea- Satom in Paris, France during the process for the suit project which was not only unethical but lacked transparency and Sogea- Satom/ Suez International's bid should have been rejected as a result.
- h) The Authority erred in law and fact when the 2nd Respondent refused to suspend the procurement process during the period of Administrative Review contrary to section 90(2) (a) of the Act.
- i) The Authority erred in law and fact when it declined to investigate the allegations of illegality raised by the Applicant in grounds, (b), (c), and (d) above, prior to making the decision to reject the application for Judicial Review (sic).

4.0 DISPOSAL OF APPLICATION

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

- (1) The Applicant's Application to the Tribunal dated 15th February 2018, annexes to the Application, the written and oral submissions.
- (2) The Authority's response to the Application, annexes to the response, the written and oral submissions.
- (3) The 2nd Respondent's response to the Application annexes to the response and its written and oral submissions.

4.2 The Tribunal conducted a hearing for the Parties on 1st March 2018, The Applicant was represented by Mr. Enos Tumusiime, and the Authority was represented by Mr. John Kalemera. The 2nd Respondent was represented by Mr T. Kawuma.

5.0 SUMMARY RULING

5.1 In accordance with the Act, the Tribunal delivered a summary of this ruling on Friday 2nd March 2018. What follows is the detailed reasoning in support of our decision.

6.0 ISSUES

6.1 Nine (9) issues were formulated for resolution by the Tribunal as follows;-

(i) Whether the Authority erred in law and fact when it rejected the Applicant's complaint to reject BEB's financial bid because it was non-responsive, non-compliant, incomplete and in contravention of the of the Act and Regulations thereunder.

(ii) Whether the Authority erred in law and fact when it refused to pronounce itself on the 2nd Respondent's lack of transparency and ethics when the 2nd Respondent discriminatorily communicated with the BEB without notifying other bidders.

(iii) Whether the Authority erred in law and fact when it refused to cause the 2nd Respondent to produce its correspondence with the BEB dated 12th September 2017 and 31st October 2017.

- (iv) Whether the Authority erred in law and fact when it refused to declare the actions of the 2nd Respondent fraudulent and to uphold the Applicant's complaint when through their correspondence dated of 12th September and 31st October 2017, the 2nd Applicant and the BEB were allowed to amend the contents of the technical bid.*
- (v) The Authority erred in fact and law when it refused to uphold the Applicant's submission that the BEB had a close business relationship with GKW, the Consultant for the project.*
- (vi) The Authority erred in law and fact when it refused to uphold the Applicant's submission that the sharing of offices in Kampala by the consultant for the project (GKW/Alliance Consultants) with the BEB, a fact not denied by the 2nd Respondent during the hearing at the Authority, compromised the Consultant's role and impartiality and disqualified them from evaluating a bid where Sogea- Satom /Suez International were bidders.*
- (vii) Whether the Authority erred in law and fact when it refused to rule upon the Applicant's submission that the 1st Respondent's Accounting Officer was invited, transported treated and accommodated by Sogea- Satom during the time of evaluation process.*
- (viii) Whether the 1st Respondent erred in law and fact when it refused to suspend the proposed procurement process during the period of administrative review.*
- (ix) Remedies available to the parties.*

7.0 SUBMISSIONS BY COUNSEL

- 7.1 In support of Ground 1 of their appeal which is summarized as the first issue, Counsel for the Applicant argued that the impugned procurement was governed by: (a) the Act and Regulations, (b) the terms of the Tender (Instructions to Tenderers- ITT which included the request for clarification by bidders and the 2nd Respondent's answers thereto. (c) AFD Guidelines for the Procurement of AFD Financial Contracts in Foreign Countries, (AFD Guidelines). Submitting in detail on the governing law and principles that

applied to the tender, Counsel cited regulation 21(4) of the PPDA (Evaluation) Regulations 9/ 2014, which provides that a financial bid shall be determined to be complete if the prices of all items required and included in the corresponding technical are indicated in the financial bid. Counsel cited *ITT 12.1* which provides that *"The Tender price shall be complete, including for all items of the works described in Tender Documents to complete the turnkey, design build scope of the contract without exception"* Counsel argued that the Applicant sought clarification on the second set of documents under Question 25 thus *"Could you please clarify if the Letter of Tender the LUMP SUM will be in writing including duties and taxes"*? The 2nd Respondent in Answer No 25 stated, *"The GRAND TOTALS as calculated in GRAND SUMMARIES shall be reflected in the Letter of Tender. The Letter of Tender shall include taxes and duties"*. Counsel also cited the Applicant's request for clarification, *second set question 4 Volume 1, General Tenderers/E- Tender Opening and Evaluation /29 EVALUATION OF TENDER AND REJECTION CRITERIA/29.5 –Item 8.8 Overall Operational and Management Costs, the bidders asked "We would like to clarify the items on the total costs for O & M" FIXED COSTS..... Annex 2 VARIABLE COSTS..... To which the 2nd Respondent answered "We confirm the above"*. Counsel cited the Applicant's request for clarification 3rd set Question 3, and the 2nd Respondent's response thereto in which it said *"The Employer will read out the Tender Prices, the total amount of each Tender. If upon examination the employer determines that any of the required documents are missing or are not in accordance with the Instructions to Tender then the Tender shall be considered non-responsive and will not be given further consideration.* Counsel argued that the responses given by the 2nd Respondent above formed the premise upon which it filed their application for Administrative Review before the 2nd Respondent's Accounting Officer, to declare that the bid presented by the BEB was non –compliant, non-responsive and in contravention of the Regulations. Counsel in addition argued that the BEB's bid did not have the total Opex costs and the grand total of the Capex and Opex as required by the bid document, and that was why the 2nd Respondent's financial bid opening forms included a column for total Opex costs (15 years). Counsel argued that the bid presented by the BEB did not follow the methodology stipulated in the Instructions to Bidders (ITT) and clarifications and therefore the 2nd Respondent's evaluation of their bid was flawed, frustrating the provisions of Section 52 of the Act.

- 7.2 Counsel argued ground 2 and ground 3 of his appeal together which are reproduced in issues 2, 3, and 4. In support of those grounds, Counsel argued that after the Applicant filed their application for Administrative Review before the 2nd Respondent's Accounting Officer on 5th December 2017, it received a copy of a whistle blowers letter addressed to the Inspector General of Government (IGG) regarding "corruption and influence peddling at the 2nd

Respondent in connection with the tender". The whistle blower's letter (which was attached to the Applicant's pleadings) alleged that the 2nd Respondent wrote to the BEB on 12th September 2017 and 31st October 2017, requesting the bidder to change their technical bid and that the letters were not copied to the other bidders including the Applicant. Counsel argued that the Authority had breached sections 7 and 8 of the Act, when it declined or neglected to obtain copies both letters. Counsel also argued that the 2nd Respondent had not denied that the letters existed. In his opinion the 2nd Respondent breached the basic principles of public procurement set out in Section 43 of the Act when it corresponded with the BEB to the exclusion of other bidders during the evaluation period of technical proposals.

7.3 Submitting in support of ground 4 which was agreed as issue 4, Counsel for the Applicant argued that under the request for clarification 2nd set Question 9, the 2nd Respondent was asked to *"Please confirm if it is necessary to achieve 25% of the sludge dryness in the first stage 1(a) if there aren't thickeners"* The Answer was *"25% DS content is the requirement for all stages."* Counsel argued that this response was restated by the 2nd Respondent in response to clarification sought under Question 1 of the 5th set. Citing the whistleblower's letter to the IGG, Counsel argued that the 2nd Respondent allowed the BEB to amend their technical bid to provide for a mechanical treatment process, after realizing that the solution proposed by the BEB would not achieve 25% dryness all year round. Counsel argued that the clarification sought in the letters dated 12/9/17 and 31/10/17 were not request for clarifications but were an invitation to the bidder to change their technical bid contrary to sections 72 and 74 of the Act, and regulation 9 of the PPDA (Evaluation) Regulations, 2014. He further argued that the 2nd Respondent had allowed a material deviation to the terms of the bid.

7.4 Counsel argued grounds 5 and 6 together which reproduce issues 5 and 6. He submitted that the Applicant had established from the Suez International website that that the Consultant to the 2nd respondent, GKW was indirectly through other intermediate companies part owned by a company known as Engie, with whom Suez International (Sogea JV partner) had a close business relationship arising out of Engie's 32% shareholding in Suez International. Counsel argued that both Engie and Suez International had the same Chairman, and that six other directors of Engie sat on the Suez board. Counsel concluded that owing to the cross shareholding and directorships above, there was blatant conflict of interest between Suez International and the Consultant for the project GKW. Counsel cited the *AFD guidelines 1.3.3* which prohibit conflict of interest in the following terms; *"in order to ensure fair competition,.....natural or legal persons.....may not take part in a competitive bidding process if they.....(2) have a business.....relationship with*

a beneficiary staff involved in the selection procedure or the supervision of the resulting contract” to buttress his argument. In closing Counsel invited the Tribunal to reject the Sogea – Satom/ Suez bid because it offended both the AFD guidelines and the provisions in the Act in the Fifth Schedule and bidding document which barred conflict of interest.

7.5 In support of ground 8 which was reproduced as issue 7, Counsel argued that the 2nd Respondent’s Accounting Officer had been invited to the headquarters of Sogea- Satom/Suez International during the technical evaluation period contrary to regulation 5 of the Fifth Schedule to the Act which bars public officials from receiving gifts or hospitality during the bidding process.

7.6 In support of ground 9 which was reproduced as issue 8, Counsel argued that the Applicant had applied for administrative review to the Accounting Officer of the 2nd Respondent on 5th December 2017, requesting him to suspend the procurement process, however as demonstrated in the report of the IGG at pages 7 and 8, the 2nd Respondent had not suspended the procurement process contrary to the Act.

7.7 In conclusion Counsel requested the Tribunal to:-

- (a) Allow the appeal;
- (b) Reject the BEB’s bid;
- (c) Order production of (i) Minutes of the Evaluation Committee Meetings and Report, (ii) Letters of 12/9/17 and 31/10/17 and Sogea- Satom reply;
- (d) Minutes of negotiations between the 2nd Respondent and the BEB;
- (e) Passport of Dr. Silver Mugisha, the 2nd respondent’s Accounting Officer;
- (f) Evaluation of the Applicant’s bid; and
- (g) Costs of the Appeal and applications for administrative review.

7.8 In response to the submissions on ground 1, Counsel for the Authority submitted that the financial bid opening was conducted on the 1st December 2012 at the 2nd Respondent’s offices. That the 2nd Respondent received two bids from the BEB, Acciona Agua- Eiffage JV, and Strabag International GMBH. Counsel submitted that a representative of the Applicant requested that in addition to the total tender price submitted by each bidder, the total Opex cost for 15 years for each bidder should be read out. Counsel argued that despite the fact that the prices were read out it was not a requirement under the ITT that the Opex costs were supposed to be read out at the bid opening. Counsel argued that details of the operational costs were indicated in the first

and alternative proposals presented by the BEB in the detailed proposal presented by the bidder. Making reference to Clauses 10.1 11.1 and Volume 1 of the General Tender document, Counsel concluded that there was no provision or form in the tender document requiring bidders to indicate a grand summary or total of the operational costs and further that Guideline 2, 2, 4 of the AFD procurement guidelines which provide that bids shall be evaluated subject to the criteria in the bidding document was strictly complied with. Counsel cited Clause 23.3 of the Tender document which provided that no evaluation of bids should take place at technical or financial evaluation. Counsel pointed out that Clause 29.7 of the ITT provided for the factors that ought to be considered during the evaluation of financial tenders and one of the factors was addition to the Tender price of the operating costs over the 15 years' operating period based on the Performance Security's consumption levels and the unit rates in effect at the time of the tender discounted to NPV. Counsel argued that the Tender price was exclusive and/ or different from the Opex costs as provided for in clause 29.7 of the ITT as well as Clause 12, 2, 12.3 and Item 1.9.2 (Schedule of Particulars) of Volume 1 of the Tender document. Referring to the clarifications sought by the Applicant, Counsel argued that the clarification by the 2nd Respondent (second set) question 4 was to conform the items to be included in the total costs for operation and maintenance in respect to fixed cost and variable costs, Counsel argued that the Applicant was mistaken if it understood the answer to the clarification to mean that all bidders were required to provide a summary or total of the operation and maintenance costs.

- 7.9 In respect of the rest of the grounds argued by the Applicant, Counsel for the 2nd Respondent cited Section 90(3) of the Act and Regulations 6 (4) and (7) of the PPDA (Administrative Review) Regulations, 2014, S.I 16 of 2014, in support of their contention that no response was required from the Authority to rebut the submissions made by the Applicant because these grounds were not raised before the Accounting Officer, and therefore there was no decision taken on these grounds which required the Authority's response. Counsel in conclusion invited the Tribunal to reject the appeal.
- 7.10 Counsel for the 2nd Respondent in response to the grounds of appeal argued that the bids presented by the BEB complied with regulation 21(4) of the PPDA Evaluation Regulations 9/2014. Counsel defended the decision made by the Authority and argued that the Authority conducted an investigation into the whistleblower's complaint about the procurement process and found that these complaints had no merit. Counsel pointed out that the IGG had arrived at similar conclusions. Counsel argued that the allegations made by the Appellant relating to lack of transparency and ethics with respect to communications with the BEB were thoroughly investigated under the

directions of the IGG and were found to be without merit. Counsel supported the Authority's position that it would not deal with grounds of appeal not raised before the Accounting Officer. Counsel argued that the trip to France of the 2nd Respondent's Accounting Officer was investigated and the complaint was found to be devoid of merit because the trip was undertaken during the bidding period. Counsel concluded that the bid was conducted in accordance with the principles of transparency, accountability and fairness and within the confines of the law. In conclusion, Counsel invited the Tribunal to disregard the Appeal and allow the procurement process to continue because there was a deadline on the draw down period which was due to expire on 30th April 2018. Counsel argued that the continued suspension of the procurement process would lead to accrual of financial penalties by the Government of Uganda since the Government had to start repaying the loan in September 2018. Counsel invited the Tribunal to reject the Appeal.

8.0 RESOLUTION BY THE TRIBUNAL

- 8.1 The Tribunal will resolve all the issues in the same order as raised by the Parties.
- 8.2 The mandate of the Tribunal is derived from **Section 91 I in Part 7** of the Act which provides (in part), as relevant to the instant application as follows:

91 I Tribunal to review decisions by the Authority

(1) A bidder who is aggrieved by a decision made by the Authority under section 91(4) may make an application to the Tribunal for a review of the decision of the Authority.

(2)

(3)

- 8.3 Guidance on the exercise of this mandate, by the Tribunal which is an external administrative review tribunal has been provided by The **Hon Mr Justice Stephen Mubiru in High Court Civil Appeal 5/2016 Public Procurement and Disposal of Public Assets Authority -vs- Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd where he held at ppg 19 as follows;-**

“Unlike judicial review which holds public officials accountable for the correct exercise of their powers, rather than fairness of their decision with reference to merits of the case, administrative merits review concerns the reconsideration of both the factual basis and the lawfulness of a decision, and thus wider than judicial review, which is limited to the latter.”

- 8.4 Expounding further on these principles the learned trial judge in **Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd (supra)** at ppg **20** held “Administrative merits review tribunals, resources permitting may inquire more widely than courts, and may adopt a function closer to that of pursuing truth than that which Court may adopt. As statutory agencies both the Public Procurement and Disposal of Public Assets Tribunal and the Appellants (**Authority**) lie in the correct and preferable application of the relevant legislation and policy to procurement decisions, rather than on the procedural limitations of arguments as found in the Courts of law.
- 8.5 The Tribunal agrees with the learned Judge and is bound by these principles which form the undelaying basis for resolution of matters before the Tribunal.
- 8.6 We now turn to ground 1 of the appeal which is restated in issue I formulated by the parties, **Whether the Authority erred in law and fact when it rejected the Applicant’s complaint to reject the BEB’s financial bid because it was non-responsive, non-compliant, incomplete and in contravention of the of the Act and Regulations thereunder.**
- 8.7 The Tribunal examined the tender document and made the following observations:

Clause 10.1 of the Instruction to Tenderers provides for the documents to be included in the Contractor’s Tender inclusive of the Schedule of prices. Clause 11.1 of the ITT provides that a Tenderer shall complete the Tender Form and the appropriate Schedule of prices furnished in the Tender documents...following the requirements of ITT Clauses 12 and 13. Volume 1 of the General Tender Document’s and Schedules at item 1.9.2 (Schedules of Particulars) provided for a form for the schedule of prices to be included in the bids. The schedule of prices includes a grand summary of the five (5) bills for 1a measures as well as the grand summary of the five (5) bills for 1b Measures

(Capital/CAPEX costs). The schedule also included the specific items for each of the five (5) bills immediately subsequent to the grand summary of the bills for both 1a and 1b. The Tribunal also considered Clause 29.7 of the ITT which provides for factors to be considered during the evaluation of financial tenders and specifically 29.7 (d) which provides the Tender price shall be added to the operating costs over an operating period of 15 years based on the Performance Security's consumption levels and the unit rates in effect at the time of tender discounted to Net Present Value. In our opinion, having regard to the afore-cited clauses, it was a requirement of the tender documents that the tender price be quoted separately from the operational costs especially since the contract was a turn-key contract. We also find that the various requests for clarification were to confirm the items to be included in the total costs for Operation and Maintenance. The request made by the Applicant at bid opening for a breakdown of the operation and maintenance costs was in contravention of ITT Clauses 23.1 , 23.2 and 23.3 , which stipulate the manner in which the bids would be opened and include a specific bar on any form of technical or financial evaluation of bids at that stage. The Tribunal is satisfied that the BEB bid was compliant with the Bidding Document and regulation 21(4) of the PPDA Evaluation Regulations, 2014.

We therefore find no merit in the first ground of Appeal.

- 8.8 We now turn to issues 2, 3, 4 and 7, issues 2,3, and 4 were argued together, whilst issue 7 was argued separately, these issues are interrelated. We shall not reproduce the arguments made by the parties which have been summarized above. The Tribunal recalls the guidance given by The **Hon Mr Justice Stephen Mubiru in High Court Civil Appeal 5/2016 Public Procurement and Disposal of Public Assets Authority -vs- Arua Kubala Park Operators and Market Vendors Cooperative Society Ltd(supra).**
- 8.9 In that case the trial Judge observed that the Tribunal should not restrict itself to procedural matters but instead adopt a wider mandate than Court to establish the truth in a matter before it. It is in this vein that we reject the arguments made by the Authority urging us not to consider the issues raised in 2, 3 and 4 above because they were not canvassed before the Accounting Officer at the Administrative Review stage. In our opinion, the Authority's reliance on Section 90(3) of the Act and Regulation 6 (4) and (7) of the

Administrative Review Regulations 2014, to reject further scrutiny of the complaint was mistaken in as far as the complaints impinged on the procurement process thus bringing such complaint squarely within the statutory mandate of the Authority, **see section 8 of the Act**. Having said that, we find that the allegations in the whistle blower's letter dated 4th December 2017 addressed to the IGG, which as discussed above revolved around allegations of corruption and influence peddling with respect to the impugned procurement, were the subject of a formal investigation by the Authority. In its comprehensive report dated January 2018, the Authority found as follows: (i) The Accounting Officer of the 2nd Respondent did not travel to Paris France, on the invitation of Sogea- Satom as alleged by the whistle blower; (ii) The Authority found that there was no proof that the alleged contacts between Sogea – Satom and the 2nd Respondent related to the impugned procurement since Sogea – Satom had three (3) running contracts with Sogea –Satom on other projects;(iii) There were no anomalies at the financial bid opening and that a bidder could not be automatically disqualified at the opening of bids since evaluation is not undertaken at this stage; (iv) The Tender process was conducted in accordance with the AFD Procurement Guidelines and the Tender Document which precluded the 2nd Respondent from copying the requests for clarification to other bidders; (v) That the contents of the requests for clarifications dated 12th September 2017 and 31st October 2017 did not allow the BEB to amend its bid and neither did the responses to the clarifications replace the proposed technical solution of sludge dewatering process using dry bed filters with mechanical dewatering process as alleged; (vi) The Evaluation Committee properly evaluated the technical requirements of the BEB, which was confirmed by AFD which reviewed the Technical Evaluation report and granted a “No Objection” to the Entity; (vii) The Evaluation Committee properly evaluated the alternative bids of other bidders with respect to the water treatment step (using devolved air flotation technology) (viii) GKW and Sogea- Satom did not share premises provided by the 2nd Respondent. In conclusion the Authority did not find merit in the whistle blower's complaint.

- 8.10 The Tribunal has examined the terms of reference of the investigation as well as the objectives pursued during the investigation which derived from the complaint. It is our finding that the investigation thoroughly dealt with the issues raised in the whistleblower's report which formed the basis of the

grounds and issues raised above. We therefore find no merit in the arguments advanced by the Applicant in support of issues 2,3, 4 and 7 .

- 8.11 We will deal with issues 5, 8 and 9 together for the sake of brevity. In its complaint, the Applicant argued that the website of Suez International established that GWK, the Consultant for the project was indirectly owned by Suez International one of the bidders in the successful consortium. Counsel argued that there was a conflict of interest between the Consultant GWK and Suez International because the two had a very close business relationship. Counsel annexed various documentation including extracts from Lahmeyer website to buttress his submission. The Applicant also argued that the Accounting Officer of the 2nd Respondent did not suspend the procurement process contrary to Section 90(2) (a) of the Act, after receiving an application for Administrative review of the impugned process. In response the Authority maintained that these grounds were not raised at Administrative review, but when confronted with the allegations of conflict between the consultant GWK and Suez International, the Authority Counsel informed the Tribunal that the new allegations were under investigation by the Authority. With respect to the Applicant's complaint that the Accounting Officer had not suspended the procurement process during the Administrative Review period contrary to Section 91(2) (a) of the Act, the Authority argued that they had no way of knowing whether the Accounting Officer had complied with the Act and suspended the procurement at the time the complaint was filed, and in any event there was no obligation on them to remind the 2nd Respondent to fulfill its statutory obligations. In response to the issues, Counsel for the 2nd respond argued that the fresh claims of conflict of interest had been comprehensively dealt with by the IGG who found such claims devoid of merit. Counsel for the 2nd Respondent did not deny that certain actions had been taken during the administrative review period after the Applicant had filed its complaint, instead they argued that no contract had been signed during the Administrative Review period and that no further steps had been taken in the procurement after 20th December 2017.
- 8.12 The Tribunal perused the 2nd Respondent's written submissions and noted that there was no rebuttal by the 2nd Respondent of the alleged conflict of interest arising from the alleged relationship between Suez International and the Consultant GWK as suggested by the extract annexed to the Applicant's

submissions. The Tribunal examined the objectives of the Investigation conducted by the Authority and noted that the eight (8) objectives that formed the basis of the investigation which resulted in the findings and conclusion of the report summarized above, did not include as one of its objectives an investigation into whether there was a conflict of interest between Suez International JV and the Consultant GWK.

8.13 The Tribunal finds the allegations of conflict of interest between Suez International and the Consultant GWK sufficiently serious to warrant a careful investigation of the allegations. The Tribunal notes that the AFD Guidelines specifically prohibit conflict of interest at Guideline 1.3.3 which provides that ***“In order to ensure fair competitionnatural or legal persons.....may not take part in a competitive bidding process if they(2) have a businessrelationship with a beneficiary staff involved in a selection procedure or the supervision of the resulting contract.....”***. The Tribunal is also cognizant of the Fifth Schedule of the Act which at section 2 thereof obliges all employees at the 2nd Respondent including experts to; ***“reveal a personal interest that may impinge or that might be reasonably deemed by others to impinge on an employee’s business dealings with an Industry.”*** The allegations of conflict of interest are sufficiently serious to warrant a speedy investigation and resolution of the allegation, more so having regard to the vast amount of the procurement which is estimated at 75 million euros. We now turn to the matter of the 2nd Respondent’s actions during the Administrative review period. In its investigation report, the Authority found at page 7 of 24 as follows;-(xxi) *On 13th December 2017, NWSC sought a “No objection “to the financial evaluation report which included a recommendation for negotiations with the best evaluated bidder. (xxii) On 14th December 2017, AFD gave a promissory “No objection “to the evaluation report and contract award. It also requested NWSC to engage technical negotiations and submit the draft contract for a “No objection” (xxiii) On 20th December 2017, 638/17 the Contracts committee approved the draft contract at Euro 82,213,231.24 exclusive of local taxes and Euros 97,011,612.86 inclusive of taxes.*

8.14 The Tribunal finds that the 2nd Respondent continued with the procurement process well after the Applicant had filed an application for Administrative Review by the Accounting officer on 5th December 2017. The 2nd Respondent’s continuation with the impugned procurement in the face of the pending

application for Administrative Review by the Accounting Officer was a breach of the Act specifically section 90(2) thereof which provides:

8.15 “90 Review by the Accounting Officer.

(1) A bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity.

(1a) A complaint by a bidder.....

(a).....

(b).....

(2) On receiving the complaint and the prescribed fee, the Accounting Officer shall-

(a) Immediately suspend the procurement proceedings; and

(b).....

8.16 The Tribunal notes that the statutory direction to the Accounting Officer is couched in mandatory terms. In our view the Act does not vest any discretion in the Accounting Officer to decide whether to suspend or continue a procurement process after receipt of complaint, whatever circumstances that pertain including borrower or grant guidelines. When an aggrieved bidder initiates the Administrative Review process under Part VII of the Act, the Accounting Officer must prior to taking any further steps suspend the procurement process. The purpose of this mandatory statutory direction for the Accounting Officer to suspend further action in the procurement process is to preserve an aggrieved bidder’s right to Administrative review. In the premises, the Tribunal finds merit in this ground and finds the 2nd Respondent’s actions after 5th December 2017, when the Applicant had filed an application for administrative review before the Accounting Officer, illegal and therefore null and void. This ground of review is upheld

8.17 Before we take leave of this Application, the Tribunal notes that it inadvertently omitted in its summary decision to order a refund of the administrative review fees paid by the Applicant to the Accounting Officer of the Entity, since this Application has succeeded in part.

9.0 Decision of the Tribunal

- i) The Application succeeds in part.
- ii) The Tribunal affirms the decision of PPDA that there was no requirement in the Tender Document for bidders to state a summary or total of the operational costs .
- iii) The Tribunal nullifies all the actions taken by the Entity from 7th December, 2017 to 8th January 2018 when the application for administrative review process commenced. The Tribunal notes that the Entity conducted an evaluation of the financial bids, sought a 'No Objection' from AFD to the financial evaluation report which included a recommendation for negotiations with the best evaluated bidder during the administrative review period contrary to Section 90 (2) (a) of the PPDA Act, 2003.
- iv) The Tribunal notes that PPDA is conducting an investigation with respect to the alleged conflict of interest between the Entity's consultant and one of the Bidders in the impugned procurement. PPDA is directed to conclude the investigation with respect to conflict of interest between the Bidder and the Consultant and submit a report to the Entity within 21 days from the date hereof.
- v) The Tribunal sets aside the decision of the PPDA advising the Entity to continue with the impugned procurement process to its logical conclusion and in its place directs the entity to stay the procurement pending the outcome of the PPDA investigation into the alleged conflict of interest.
- vi) Upon submission of the PPDA investigation report on conflict of interest to the Entity, the Entity is directed to re-constitute an Evaluation Committee to conduct fresh evaluation of the bids taking into account the findings of the investigation into the alleged conflict of interest.
- vii) The Entity is directed to refund the administrative review fees paid by the Applicant to the Accounting Officer of the Entity.