

THE REPUBLIC OF UGANDA

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

APPLICATION NO 9 OF 2019

**APPLICATION FOR REVIEW OF THE DECISION OF THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY IN RESPECT TO THE PROCUREMENT OF CONSTRUCTION OF SEED SECONDARY SCHOOLS IN SELECTED SUB COUNTIES IN UGANDA OF RWENGWE IN BUHWEJU DISTRICT, KEIHANGARA IN IBANDA DISTRICT, MPUMUDDE IN LYANTONDE DISTRICT, NYAKASHARARA IN KIRUHURA DISTRICT AND BUKIIRO IN MBARARA DISTRICT REF:
MoES/UgIFT/WRKS/00119NAADS/SUPLS/2018-2019/00010.**

APPLICANT: CREAM GENERAL AND TECHNICAL SERVICES LTD

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

2ND RESPONDENT: SPARK TECHNICAL SERVICES LIMITED

3RD RESPONDENT: IBANDA DISTRICT LOCAL GOVERNMENT

(Before: OLIVE ZAALE OTETE- CHAIRPERSON, MOSES JURUA ADRIKO-MEMBER, DAVID KABATERAINE-MEMBER, ABRAHAM NKATA- MEMBER AND ENG. THOMAS ISANGA BROOKES - MEMBER)

MAJORITY DECISION

- 1.1 On 7th June 2019, the Tribunal delivered a summary ruling in this application in which by a majority of 4 to 1 the Tribunal set aside the First Respondents decision with each of the party's to the appeal bearing their own costs. The Minority decision with which this decision is associated reproduced the brief facts in the instant application, the grounds of the appeal to the Tribunal, and submissions made by Counsel for the parties before the Tribunal. It would therefore be unnecessarily repetitive to reproduce those details in this decision.
- 1.2 We will instead address the issues raised in the appeal, in the same order as raised in the minority ruling, starting with the fourth issue which is pivotal to resolution of this appeal. The fourth issue was couched as follows; - ***“The 1st Respondent erred in law and fact when it went ahead to determine the application on its merits and disregarded the fact that it was first lodged in Ibanda District Local Government which was not the main Entity in light of Lot 7 as specified in the advert.”***
- 1.3 To determine this issue we must revisit the procurement process itself, which was a collective bidding process initiated by the Ministry of Education and Sports (MOES), the bidding process was organized for 114 Districts which were clustered in 28 lots. The bid notice advertised in the New Vision Newspaper of 17th December 2018, included four (4) columns which specified the beneficiary districts, the sub counties in which the seed schools would be built and the lead selected local government for the process.
- 1.4 The lead selected local governments, (Gulu, Mbarara Lira, Wakiso, and Mbale) were assigned the following roles in the process; -
 - (a) Receive application fees for bids
 - (b) Supply bid documents to bidders
 - (c) Receive bids from the bidders and open the bids
 - (d) Provide further information required by the bidders
 - (e) Handle pre- bid meeting
 - (f) Evaluate bids.
- 1.5 The Beneficiary Districts were assigned roles as follows;
 - (a) Display and Communication of best evaluated bidder notice.
 - (b) Contract award and signature

- 1.6 The bid notice was silent on the manner in which any administrative challenge to the procurement process or decisions would be made neither did it designate the responsible officer or district to which any complaints would be directed.
- 1.7 In its written statement in support of the appeal and submissions rejecting the application for Administrative review, the third Respondent, stated the Mbarara District Local Government which had been appointed the lead district under the procurement process and which had handled the entire process save for display and communication of the best evaluated bidder notice and contract signature was the District which ought to handle the administrative review process.
- 1.8 On the other hand, as cogently argued in the minority opinion the Act provides that a procuring and disposing entity is responsible for the management of all procurement and disposal activities within its jurisdiction., in accordance with the Act, regulations and guidelines made under the Act.
- 1.9 In the instant application the Procuring and Disposing Entity was Ibanda District Local Government, however the advert inviting bids for construction of seed schools stated that MOES on behalf of selected district Local Governments invited sealed bids for construction of seed secondary schools in selected sub counties in Uganda. The structure of the procurement was not a direct procurement by the 3rd Respondent instead what was envisaged was a managed procurement process by the lead designated district (Mbarara District) on behalf of five (5) other districts comprising Lyantonde, Buhweju, Ibanda, Kiruhura and itself.
- 1.10 In managing the process, the Accounting Officer of Mbarara District was the custodian of the bidding documents, was the designated address for all bids, was the beneficiary and custodian of the bid security which was made payable to the Accounting Officer Mbarara District and was responsible for the evaluation process of all bids received. The only functions that were left with the 3RD Respondent was advertisement of the best evaluated bidder notice after evaluation had commenced and concluded in Mbarara District.
- 1.11 It was apparent during the hearing of this application that the provisions in Regulation 22 of the PPDA(PDE) regulations 2014 which provide for the manner in which an Accounting Officer can contract out a procurement to another procuring and disposing entity were not invoked by the Accounting Officer of the 3rd Respondent.

- 1.12 It is abundantly clear that the instant procurement was not a conventional procurement process, instead the process adopted for procuring the seed schools by MOES was a hybrid process which was implemented to achieve economies of scale and expediency in the procurement of the seed schools.
- 1.13 It would therefore be imprudent to mechanically apply the provisions of the law to the instant process because to do so would be to equate the process with the fairly straight forward procurement process in which a designated PDE superintends and administers a procurement from start to completion including planning, invitation of bids, evaluation post- evaluation and contract award.
- 1.14 In the instant impugned procurement whilst the Act clearly stipulates that the Accounting Officer is responsible for investigating complaints brought by providers (see Section 26 (h) of the Act, it is not clear whether the responsibility for initiating such enquiry fell to the Accounting Officer of the beneficiary PDE (The 3rd Respondent) or the Accounting Officer of the lead district under whose supervision the entire procurement process including crucially evaluation took place. Indeed, if the BEB defaulted under the terms of the contract the only officer with authority to call in the bid security would have been the Accounting Officer of the lead district.
- 1.15 it is therefore our opinion that in these circumstances it would be unduly onerous to place the responsibility of investigating a process on the Accounting officer of the 3rd Respondent who played the role of a by-stander to the procurement, and whose only role was restricted to advertising the BEB notice and signing off a contract after seeking and obtaining the approval of the Solicitor General.
- 1.16 The newspaper advert as already seen omitted allocation of the responsibility for the complaints process under Administrative Review. This omission is surprising in as far as the advert gave an elaborate matrix for allocation of responsibilities and time frame within which such responsibilities were to be carried out Given the nature of the procurement which as seen was of a hybrid nature, it was incumbent for MOES to designate wh
- 1.17 ere the responsibly for conducting an Administrative Review resided. It would be erroneous for the Tribunal to read the law as imposing a duty on the

Accounting Officer of the 3rd Respondent the responsibility to superintend and supervise a process which clearly had been initiated and to a large extent concluded at the level of the lead district. For these reasons we find that the Accounting officer of the 3rd Respondent was not obliged under the parameters of the instant procurement for seed schools to handle the administrative review process because that role had not been assigned to him by MOES. The Applicant ought to have filed its complaint with the Accounting Officer of the lead district who would then have handled the application in accordance with the Act and Regulations. We therefore answer this issue in the affirmative

- 1.18 Before we take leave of this issue it may be advisable for the Authority in addition to any guidelines issued by MOES to harmonize and allocate responsibility for administration of the review process for such hybrid procurement process to avoid uncertainty in similar procurements in the future.
- 2.0 Having found that both the 3rd and 1st Respondent entertained the application for administrative review in error, which substantively disposes of the appeal, We now turn to resolution of issues 1, 3, 5, and 8 which in summation can be framed around the issue of ***“whether the 1st Respondent erred in fact and law when it held that the Applicant had not met the requirement in the bidding document for submission of a valid bid security “***
- 2.1 Part 1 Section 1 Instructions to Bidders clause 18.1 of the bidding document required bidders to furnish as part of the bid a Bid Security or a Bid Securing Declaration if so specified in the Bid Data Sheet. Clause 18.1 required a bid security in form of a bank guarantee from a reputable bank recognized by the Bank of Uganda.
- 2.2 At the hearing before both the Tribunal and the 2nd Respondent the Applicant conceded that their bid included a photocopy of a bid security from Stanbic Bank, that they had the original bid security with them at bid opening which the lead district declined to receive. However, at Evaluation stage the Applicant was requested by the lead district to submit their original bid security from Stanbic Bank after seeking clarification from the bank on the authenticity of the bid security.

2.3 In its decision upholding the application for Administrative Review the 1st Respondent relied on the decision of the Tribunal in Application 1/2017, Sheema United Drivers Co-operative Society Ltd-vs- PPDA , in which the Tribunal held that the Act of submitting a copy of the bid security instead of the original bid security is a material deviation because it would in a substantive way limit the rights of the Entity to cash in the bid security in case the bidder failed to fulfil the conditions of its bid, the Tribunal adheres to this view. In general, a bid accompanied by a copy of the bid security must be rejected. However, in the instant case the lead district sought for and obtained the original bid security at the evaluation stage, it would be academic for the Tribunal to reject the Applicants bid, when the lead district has in its possession a valid and enforceable security. We find on this issue in the affirmative.

3.0 We agree with the findings of the minority decision that the Applicant was accorded a fair hearing before both the 1st and 3rd Respondents.

4.0 Having found on issue 4 that both the first and third respondents had no jurisdiction to entertain the application for administrative review, our opinion on whether the instant application has been overtaken by events would be moot.

5.0 MAJORITY DECISION

1. The complaint first lodged with the Accounting Officer of the 3rd Respondent was incompetent and the decision rendered therefrom was void ab initio.
2. The Tribunal finds that Mbarara District being the lead district that evaluated the bid was the right entity to have received and entertained the complaint for administrative review.
3. The Tribunal finds that the 1st Respondent (Authority) could not hear a complaint on appeal arising out of an incompetent decision and the same is set aside.
4. Each Party shall bear its own costs

SIGNED and Sealed this Day of JULY 2019 by:


1. MOSES J ADRIKO SC


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MEMBER

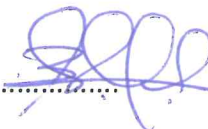
2. ABRAHAM NKATA


.....
MEMBER

3. DAVID KABATERAINE


.....
MEMBER

4. ENG THOMAS ISANGA BROOKES


.....
MEMBER

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MINORITY DECISION

1.0 BRIEF FACTS

1.1 On 17th December 2018, the Ministry of Education and Sports (MoES), on behalf of selected District Local Governments, published a bid notice in the New Vision Newspaper inviting sealed bids for the **Construction of Seed Secondary Schools in Selected Sub Counties in Uganda**. The procurement would be in 28 Lots. In column 2 of the Advert, beneficiary districts were specified, while column 3 of the Advert specified the sub counties in the beneficiary district where the Seed Schools would be built. Column 4 specified the Lead selected Local Government. The Advert further provided details on the different roles that the selected lead local governments would perform and what roles the beneficiary districts would perform.

1.2 Lead selected Local Governments (Gulu, Mbarara, Lira, Wakiso and Mbale) were to perform the following roles in this procurement process:

- (a) Receive application fees for bids (Para 8)
- (b) Supply bid documents to bidders (Para 8)
- (c) Receive bids from the bidders and open the bids (Para. 10)
- (d) Provide further information required by bidders (Para 6)
- (e) Handle pre-bid meeting (Para 11(b))
- (f) Evaluate bids (Para 11(d)).

1.3 The Advert specified roles for the beneficiary districts as:

- (a) Display and communication of best evaluated bidder notice (Para 11(e));
and
- (b) Contract award and signature (Para 11(f)).

1.4 The impugned procurement relates to Lot 7. The beneficiary districts under Lot 7 were Kiruhura, Ibanda, Mbarara, Buhweju and Lyantonde. The Lead selected Local Government for Lot 7 was Mbarara district.

1.5 The bidding document was issued to 16 bidders and on 4th February 2019, seven bidders submitted bids which were opened, and prices read out.

- 1.6 The minutes of the Evaluation Committee dated 26th February 2019 indicated that Cream & Technical Services Ltd, the Applicant, submitted a photocopy of the bid security. The evaluation committee sought confirmation from the Bank whether it had issued a bid security to the Applicant. The committee asked the applicant to submit the original bid security which it did.
- 1.7 On 26th February 2019, the Evaluation Committee recommended award of the contract to the Applicant as the Best Evaluated Bidder for the construction of seed secondary schools in the selected sub-counties in the beneficiary districts. On 15th March 2019, the Contracts Committee approved the award for the construction of seed secondary schools in the selected sub-counties in the beneficiary districts.
- 1.8 On 15th March 2019, the Chief Administrative Officer Ibanda District displayed a Best Evaluated Bidder (BEB) Notice, wherein the Applicant was declared the BEB for the construction of a Seed Secondary School at Rwenshambya in Keihangara Sub county in Ibanda district at a cost of UGX 2,074,859,100. The BEB Notice was displayed from 15th March 2019 with a removal date of 29th March 2019.
- 1.9 On 28th March 2019, Spark Technical Services, the 2nd Respondent, named in the BEB Notice as one of the unsuccessful bidders, applied for administrative review to the Accounting Officer of the 3rd Respondent. On 9th April 2019, the Accounting Officer issued a decision rejecting the application for administrative review.
- 1.10 On 16th April 2019, the 2nd Respondent applied for administrative review to the Authority. On 13th May 2019, the Authority issued a decision upholding the application for administrative review by the 2nd Respondent.
- 1.12 On 22nd May 2019, the Applicant, being dissatisfied with the Authority's decision filed this Application before the Tribunal.

2.0 APPLICATION FOR REVIEW OF THE AUTHORITY'S DECISION.

- 2.1 On 22nd May 2019, the Applicant filed an Application with the Tribunal for review of the Authority's decision.

2.2 The grounds for the Application to the Tribunal were:

- (a) The 1st Respondent erred in law and fact by holding that the Applicant did not meet the requirement in the bidding document on submission of a bid security;
- (b) The 1st Respondent was erroneous in both law and fact when they went on to determine the application without giving a chance to the Applicant to be heard which grossly offended the principles of natural justice;
- (c) The 1st Respondent failed to properly evaluate the evidence on the specifications of the bid document and thereby coming to a wrong conclusion that the submission of a copy of the bid security in the original copy of the bid at the bid opening instead of an original copy of the bid security of a bank guarantee was a material omission that could not be clarified by the Evaluation Committee;
- (d) The 1st Respondent erred in law and fact when it went ahead to determine the application on its merits and disregarded the fact that it was first lodged in Ibanda District Local Government which was not the main Entity in light of Lot 7 as specified in the advert;
- (e) The main entity should have been Mbarara District Local Government. The 1st Respondent erred in law and fact when they failed to put into consideration that the advert specified that the bid security in form of a bank guarantee would be subject to verification in reference to paragraph 9 of the advert;
- (f) Without prejudice, the Application for administrative review by the 2nd Respondent was brought before the 3rd Respondent out of time;
- (g) The Applicant has already signed and started the performance of various contracts under Lot 7 for the majority districts of Mbarara, Buhweju, Kiruhura and Lyantonde therefore the application by the 2nd Respondent to the 1st Respondent was already overtaken by events and the directions given there from are a nugatory;
- (h) The 1st Respondent misdirected itself and unfairly imported a term that was not specified in the bid documents. The alleged copy of the bank guarantee from Stanbic bank was submitted in the original bid document by the Applicant. The copy that was submitted was got from the original copy that Stanbic Bank itself confirmed. A photocopy is allowed in

evidence and the bid did not specify that the bidders must submit an original copy of the bid security.

2.3 The Applicant prayed the Tribunal to quash and set aside the decision and orders of the 1st Respondent; to make a declaration that the process from which the decision of the 1st Respondent arose was irregular; to declare that the application for administrative review by the 2nd Respondent was addressed to a wrong entity and therefore all proceedings before the 3rd and 1st Respondents be declared null and void; order the 3rd Respondent to sign a contract with the Applicant and for costs.

3.0 DISPOSAL OF APPLICATION

3.1 The Tribunal analyzed the Applicant's Application to the Tribunal, Annexes to the Application, the written and oral submissions; the 1st Respondent's response to the Application and Annexes to the response; the 2nd Respondent's response to the Application, Annexes to the response, oral and written submissions; and the 3rd Respondent's response to the Application, Annexes to the response, oral and written submissions.

3.2 The Tribunal conducted a hearing for the Parties on 5th June 2019. The Applicant was represented by Mr. Ampurire Henry, the 1st Respondent was represented Mr. John Kallemera, the 2nd Respondent was represented by Mr. Caleb Amanyama while the 3rd Respondent was represented by Mr. Asimwe Bamanya Phionah.

4.0 SUMMARY RULING

4.1 In accordance with section 91I (7) of the PPDA Act, 2003, the Tribunal delivered a summary ruling on the 7th June 2019. The following is the detailed reasoning for the Minority decision.

5.0 ISSUES

The grounds for the application to the Tribunal contained in the Applicant's application, reproduced at paragraph 2.2 (a) to (h) above were maintained as issues for resolution by the Tribunal.

6.0 SUBMISSIONS BY COUNSEL

- 6.1 Counsel submitted on issues 1, 3, 5 and 8 concurrently. He submitted that the Applicant duly complied with the requirement of a bid security. He submitted that the Applicant secured the bid security from Stanbic Bank and the Bank confirmed that it issued the bank guarantee in favour of the Applicant. He argued that the act of the evaluation committee inquiring from the bank about the bank guarantee was not a clarification as stated by the 1st Respondent but was a verification which the entity was required to do. He submitted that even if an original bank guarantee was submitted, the entity still had an obligation to verify its authenticity. He contended that the bid did not specify that an original bank guarantee be submitted; and that therefore since the submission of an original bid security was not a requirement of the bidding document, lack of an original cannot be a crucial deciding factor in the evaluation of the bid. He argued that the case of *Sheema United Drivers Cooperative Society v. PPDA Application 1 of 2017* relied on by the 1st Respondent is distinguishable from the instant application.
- 6.2 In respect to issue 2 on the right to a fair hearing, Counsel for the Applicant submitted that the 1st Respondent's letter to the Applicant inviting it to attend the hearing did not require that the applicant files any document or by word of mouth explain anything. He submitted that at the hearing, the Applicant was denied a chance to say anything in defence of his interests as the BEB, and that this was a grave irregularity which goes to the root of the entire proceedings.
- 6.3 With respect to issue 4, concerning the mandate of the 3rd Respondent to handle the 2nd Respondent's application for administrative review, Counsel for the Applicant submitted that Mbarara district local government was the main entity for Lot 7. He submitted that Ibanda district, though a beneficiary district under Lot 7 did not have the mandate to entertain an application for administrative review because it did not have the bids. He argued that Ibanda district, the 3rd Respondent would not in itself determine an application for administrative review without the input of the other districts that fall in Lot 7. He argued that the 2nd Respondent's application for administrative review should have been made to Mbarara district, the selected Lead Local Government for the procurement process, which had the bids. He further

argued that even if the 3rd Respondent would have upheld the application for administrative review, the decision would not have had an input of the entire remaining four districts in Lot 7 and would make it a nullity since the 3rd Respondent did not issue the bids. In conclusion, Counsel argued that the application for administrative review by the 2nd Respondent was addressed to a wrong entity and therefore all proceedings before the 3rd and 1st Respondents were null and void.

- 6.4 Concerning issue 6 that in the alternative, the 2nd Respondent submitted to the 3rd Respondent an application for administrative review out of time, it appears the applicant dropped this issue during the hearing.
- 6.5 In respect to issue 7, Counsel for the Applicant submitted that the Applicant has already signed and started the performance of various contracts under Lot 7 therefore the application by the 2nd Respondent was overtaken by events. He submitted that re-evaluating bids at this stage would grossly affect the BEB and would unnecessarily stall the process of the construction.
- 6.7 In response to issues 1, 3, 5 and 8, concerning submission of a copy of a bid security instead of an original, Counsel for the 1st Respondent submitted that by submitting a copy of the bid security instead of an original, the Applicant did not meet the requirement in the bidding document on submission of a bid security. He relied on the decision of the Tribunal in *Sheema United Drivers Cooperative Society Ltd V. PPDA, Application 1 of 2017*, where the Tribunal decided that the act of submitting a copy of a bid security instead of the original bid security is a material deviation because it would in a substantive way limit the rights of the entity to cash in the bid security in case the bidder failed to fulfil the conditions of its bid. Counsel for the 2nd Respondent associated with Counsel for the 1st Respondent's submission on this issue.
- 6.8 In response to issue 2 on the right to a fair hearing, Counsel for the 1st Respondent submitted that the Managing Director of the Applicant attended the administrative review hearing before the 1st Respondent, and that therefore, the Applicant was given a fair hearing.
- 6.9 In response to Counsel for the Applicant's submission on issue 4 that the 3rd Respondent had no mandate to hear an application for administrative review,

Counsel for the 1st Respondent submitted that the 2nd Respondent rightly applied for administrative review to the entity that issued the BEB Notice, which was Ibanda district, the 3rd Respondent. The 2nd Respondent associated with the 1st Respondent's submission on this issue.

- 6.10 In response to issue 7 that the Applicant has already signed and started the performance of various contracts under Lot 7 therefore the application by the 2nd Respondent was overtaken by events, Counsel submitted that the application before the 1st Respondent was not overtaken by events since no contract had been signed in respect to the impugned procurement process for Ibanda. Counsel for the 2nd Respondent agreed with the submissions of Counsel for the 1st Respondent on this issue.

7.0 RESOLUTION OF ISSUES

7.1 Resolution of issue 4 i.e. 3rd Respondent had no mandate to handle an application for administrative review

- 7.2 I will handle issue 4 first because it concerns the jurisdiction of the 3rd Respondent and the 1st Respondent to handle an application for administrative review.

- 7.3 The gist of the submissions of Counsel for the Applicant on this issue was that the application for administrative review by the 2nd Respondent was addressed to a wrong entity (Ibanda District), the 3rd Respondent, and therefore all proceedings before the 3rd and 1st Respondents were null and void. Counsel argued that the district which handed the bids i.e. Mbarara district, should have been the one to handle the application for administrative review, and not Ibanda district since it did not handle any bids.

- 7.4 To determine this issue, I considered provisions of the PPDA Act, 2003 and the relevant Regulations, relating to procuring and disposing entities (PDEs). A PDE is defined in section 3 of the Act to mean a Ministry or department of Government; a district council or a municipal council; a body corporate established under an Act of Parliament other than the Companies Act, among others. By virtue of this definition, the 3rd Respondent is a PDE.

7.5 Section 25 of the Act provides that a PDE shall be responsible for the management of all procurement and disposal activities within its jurisdiction in accordance with this Act, regulations and guidelines made under this Act. Regulation 19(1) of the **PPDA (PDE) Regulations, 2014, S.I 7 of 2014** provides that a Procurement and Disposal Unit shall manage the procurement or disposal process up to the point of contract placement.

7.6 Section 26 of the Act provides as follows:

“26. Accounting Officer.

(1) The Accounting Officer of a procuring and disposing entity shall have overall responsibility for the execution of the procurement and disposal process in the procuring and disposing entity, and, shall be responsible for—

(a);

(c);

(d) advertising bid opportunities;

(e) communicating award decisions;

(f);

(g) signing contracts for procurement or disposal activities on behalf of the procuring and disposing entity;

(h) investigating complaints by providers;

7.7 Following from the above provisions, Ibanda district had the duty and the power as a procuring and disposing entity to conduct and manage the procurement process for the construction of a seed secondary school in one of its sub counties i.e. Rwenshambya sub county, named in the Advert.

7.8 Why then did Mbarara district manage the procurement process on behalf of Ibanda district as seen in the advert? The answer could lie in *regulation 22 of the PPD (PDE) Regulations 2014*. For ease of reference, it is reproduced here-below:

“22. Contracting out of procurement or disposal function to another procuring and disposing entity.

(1) An Accounting Officer may contract out a procurement function or a disposal function of the Contracts Committee, the procurement and disposal

unit or the user department to another procuring and disposing entity or to a third-party procurement and disposal provider.

(2) Where a procurement or a disposal function of the procuring and disposal entity is contracted out to another procuring and disposing entity, the Accounting Officers of the two procuring and disposing entities shall, in writing, agree on—

- (a) the functions to be contracted out;*
- (b) the mechanisms for implementation of the procurement or disposal function;*
- (c) the procedures for reporting and monitoring;*
- (d) the procedure for approving the procurement or disposal function;*
- (e) the limitations or exceptions to the contract, if any; and*
- (f) the costs to be paid, if any.*

(3) Notwithstanding sub regulation (2), the Accounting Officer of the procuring and disposing entity whose function is contracted out to another procuring and disposing entity shall be accountable for the decisions taken by the procuring and disposing entity to which a procurement or disposal function is contracted out.”

7.9 From a close reading of the above legal provisions, it is correct to state that at all times, it is the accounting officer of a PDE who has the overall responsibility for the execution of the procurement and disposal process in a procuring and disposing entity. The law however allows the Accounting officer to contract out this function to another PDE to procure on the PDE’s behalf if the conditions under regulation 22 of S.I 7 of 2014 are met. It is therefore within the law for Mbarara district to manage the procurement process for the construction of a seed school on behalf of Ibanda district. It was not argued before the Tribunal whether the conditions of regulation 22 were fulfilled between the selected lead districts and the beneficiary districts prior to the publishing of the advert. Since this was not in issue before the Tribunal, I shall proceed under the presumption that these conditions were fulfilled.

7.10 Turning to the assertion that Ibanda district could not have handled the administrative review application because it did not handle the bids, my

finding is that this position is not supported by the law. As shown from the legal provisions quoted above, Ibanda as the PDE had the duty and power to handle the procurement process. As we see from the Advert, Ibanda district presumably contracted out the procurement process to Mbarara district. Regulation 22(a) quoted above provides that *where a procurement or a disposal function of the procuring and disposal entity is contracted out to another procuring and disposing entity, the Accounting Officers of the two procuring and disposing entities shall, in writing, agree on the functions to be contracted out.* By virtue of the Schedule in the advert, Ibanda remained with the function of displaying and communicating the BEB Notice and awarding the contract and signing the contract. The Advert did not assign, and rightly in my view, the function of handling administrative review applications to Mbarara district.

- 7.11 Had it been the intention that the accounting officer of Mbarara district, and not the one of the PDE benefiting from the procurement handle the complaints from the procurement process, the advert would have clearly stated so. Since there was no agreement in the Schedule who should handle provider's complaints, section 26(h) of the Act, which provides that ***the Accounting officer is responsible for investigating complaints by providers,*** rules. The Accounting officer of the beneficiary PDE therefore had the mandate under section 26(h) of the Act to handle the 2nd Respondent's complaint. I am also not persuaded by the submission of Counsel for the Applicant that the Accounting officer of Ibanda district could not handle the administrative review without involving the other districts. The Accounting officer is not bound to involve the other districts. He determines who assists him in handling the administrative review. He may do it himself or herself; he may constitute a committee consisting of persons chosen by himself.
- 7.12 In addition, applications for administrative review naturally follow the display of a BEB notice. In the impugned procurement process, it is Ibanda district which was assigned the role of displaying the BEB notice, not Mbarara. How would the 2nd Respondent file an application for administrative review to a district which did not display the BEB notice? Which timelines would the 2nd respondent follow in counting the 10 days allowed for display if it had applied to Mbarara? The BEB Notice, dated 15th March 2019, stated thus:

“The bidder named below has been evaluated as the BEB for the procurement detailed below. It is the intention of the PDE to place a contract with the bidder named after 10 working days from the date for the display given below”

- 7.13 Clearly from the wording of the above, anyone challenging the results of an evaluation process as displayed in the BEB notice would apply to the accounting officer of the entity who has displayed the notice; the accounting officer who would sign a contract with the best evaluated bidder after 10 days of the display of the notice, if there is no application for administrative review. In the impugned procurement, the BEB was to sign a contract with Ibanda, and not Mbarara district.
- 7.14 My finding is that Ibanda district rightly handled the administrative review application, first because it was the district agreed to in the Schedule to display the BEB Notice; second, because it was the district to sign the contract with the BEB following lapse of the notice, and third, because regulation 22 (2) which regulates contracting out provides that *the Accounting Officer of the procuring and disposing entity whose function is contracted out to another procuring and disposing entity shall be accountable for the decisions taken by the procuring and disposing entity to which a procurement or disposal function is contracted out.* (emphasis mine). Ibanda district accounting officer remained accountable for the decision of the evaluation committee of Mbarara district that eliminated the bid of the 2nd Respondent, so the Accounting officer rightfully handled the 2nd Respondent’s application.

Issue 4 is answered in the negative.

- 7.15 **Resolution of issues 1, 3, 5 and 8, concerning submission of a copy of a bid security instead of an original.**
- 7.16 In determining the issue of submitting a copy of a bid security as part of the bid instead of an original, I recall the decision of the Tribunal in *Sheema United Drivers Cooperative Society Ltd V. PPDA, Application 1 of 2017*, where the Tribunal decided that the act of submitting a copy of a bid security instead of the original bid security is a material deviation because it would in a substantive way limit the rights of the entity to cash in the bid security in case

the bidder failed to fulfil the conditions of its bid. I do not find good reasons to depart from this decision. The Applicant failed to show how the instant application is distinguishable from the *Sheema* case. I find the Applicant's attempt to distinguish between 'verification' and 'clarification' as mere semantics.

The above issues are answered in the negative.

7.17 Resolution of issue 2 on the right to a fair hearing

7.18 I am persuaded by the submission of Counsel for the 1st Respondent that the Applicant was given the opportunity to attend the administrative review hearing before the 1st Respondent and its Managing Director indeed attended the hearing. The Applicant did not show evidence that the Managing Director was denied the right to say anything at the administrative review hearing.

This issue is answered in the negative.

7.19 Resolution on issue 7 that the application is overtaken by events since the applicant is already performing contracts in other districts under Lot 7

7.20 On this issue, I am persuaded by the submission of Counsel for the 1st Respondent that the 1st Respondent had the mandate to hear the 2nd Respondent's administrative review application and to issue a decision. I am also persuaded by the submission that the application for administrative review before the 2nd Respondent, and indeed before the Tribunal is not nugatory since there is no contract signed yet between the Applicant and the 3rd Respondent.

This issue is answered in the negative.


8.0 MINORITY DECISION

1. Ibanda District as the beneficiary procuring and disposing entity had the mandate to entertain the administrative review application filed by the 2nd Respondent. The Authority rightly heard a complaint on appeal by the 2nd Respondent.
2. Mbarara district was not assigned by the Advert the duty of handling applications for administrative review. The application for administrative review was properly entertained by the entity which was going to sign the contract with the BEB, the entity which was assigned the role of displaying the BEB notice.

3. The Application is dismissed.
4. The decision of the Authority is affirmed.
5. Each party shall bear its own costs.

SIGNED and Sealed this Day of June 2019 by:

OLIVE ZAALE OTETE


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CHAIRPERSON