

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

APPLICATION NO. 13 OF 2021

BETWEEN

KASOKOSO SERVICES LIMITED=====APPLICANT

AND

**JINJA SCHOOL OF NURSING AND
MIDWIFERY=====RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR
CONSTRUCTION OF A THREE STORIED CLASSROOM BLOCK FOR JINJA
SCHOOL OF NURSING & MIDWIFERY UNDER PROCUREMENT REFERENCE
NUMBER JSNM/WRKS/20-21/00056**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA;
GEOFFREY NUWAGIRA KAKIRA; THOMAS BROOKES ISANGA AND PAUL
KALUMBA, MEMBERS**

DECISION OF THE TRIBUNAL

A. Brief Facts

1. On 29th April 2021, Jinja School of Nursing and Midwifery (the Entity) advertised a procurement in the New Vision newspaper in which they invited bids for the construction of three storied classroom block vide procurement RE:JSNM/WRKS/20-21/00056.
2. The Applicant, along with eight (8) other bidders, expressed interest and each submitted a bid with bid validity of up to 26th September 2021 in accordance with the terms of the procurement. The bid opening exercise was conducted on 26th May 2021 and all the bidders were informed to wait for notification of the best evaluated bidder.
3. The evaluation process commenced on 1st June 2021 and concluded on 11th June 2021. On 16th June 2021, the Contracts Committee approved the evaluation report and awarded the contract for construction of a three storied classroom block to Bulmak Associates Limited under Minute No. CC05/16/06/2021 at a contract price of UGX. 1,048,989,993 (Uganda Shillings One Billion Forty-Eight Million Nine Hundred Eighty Nine Thousand Nine Hundred Ninety-Three) tax inclusive on 16th June 2021.
4. A best evaluated bidder notice was issued on 16th June 2021 with a display date of 16th June 2021 and removal date of 30th June 2021.
5. A construction agreement was executed between the Respondent and Bulmak Associates Limited on 23rd July 2021 and the ground breaking ceremony held on 3rd August 2021.
6. The Applicant avers that it learnt about the result of the procurement process and ground breaking ceremony through a radio news bulletin on 3rd August 2021.
7. The Applicant being dissatisfied the procurement process, lodged a complaint with the Accounting Officer of the Respondent on 9th August 2021 through *Isabirye & Co. Advocates*. The complaint was entitled *Demand Notice Cum Notice of Intention to Sue* was premised on grounds that the Applicant was never notified of the best evaluated bidder, and that the best evaluated bidder did not have the required general experience of five years in construction as indicated in the bidding document.

8. The Accounting Officer did not respond to the complaint.
9. The Applicant being aggrieved filed the instant Application on 30th August 2021 before the Tribunal to challenge the outcome of the entire procurement process.

B. Application to the Tribunal

1. The Applicant avers that the procurement and Disposal Unit did not publish a copy of the Notice of the Best Evaluated Bidder as stated under ITB 37-1 of the standard bidding document that was issued. That it only learnt of the progress of the process on a local radio station in Busoga called Baba FM that the Entity had launched stone breaking for the project of three storied classroom block.
2. That the purported Best Evaluated Bidder, Bulmak Associates Ltd did not have the required experience as stated in the standard bidding document. That Section 3 Evaluation methodology and criteria under (c) detailed evaluation criteria item (f) the document required a general experience of at least 5 years in construction projects and specific experience as a prime contractor in the execution of the same contracts.
3. That Bulmak Associates Ltd was incorporated on 28th July 2016, and that therefore by the time of the submission of bids on 26th May 2021, the company had not attained the 5-year experience that was required.
4. The Applicant prayed for - (i) cancellation of the contract award to the BEB, (ii) Applicant be substituted as the BEB, and (iii) awarded costs and any available remedies.
5. The application named Jinja School of Nursing & Midwifery as the Respondent to the Application.

C. Reply to the Application



6. The Respondent argues that the Best Evaluated Bidder notice was displayed on the school notice board on 16th June 2021 up till 30th June 2021.
7. That a soft copy of the Best Evaluated Bidder notice was shared with all bidders via their email addresses which were indicated on their company letterhead in the bidding document and the same was received.
8. That Bulmak Associates Ltd was the Best Evaluated Bidder with a total contract price of UGX. 1,048,989,993 (Uganda Shillings One Billion Forty-Eight Million Nine Hundred Eighty Nine Thousand Nine Hundred Ninety-Three).
9. That the Applicant was ranked second with a bid price of UGX. 1,105,816,173 (One Billion One Hundred Five Million Eight Hundred Sixteen Thousand One Hundred Seventy-Three).
10. That by the time the Best Evaluated Bidder notice expired on 30th June 2021, no application for administrative review had been received.
11. That the contract award was communicated on 1st July 2021 and acceptance received. Thereafter, the Entity proceeded to submit to the Solicitor General for clearance on 2nd July 2021. On 14th July 2021, the Office of the Solicitor General cleared the contract and the Entity proceeded to sign the Agreement with Bulmak Associates Ltd.
12. That although Bulmak Associates Ltd was registered on 28th July 2016, it was first registered as Bulmak General Enterprises Limited in 2010 with the same Directors. That in 2019, the directors swore an affidavit which among other things states that:
 - Bulmak Associates Ltd started operations on 26th June 2010 but operating under the name and style of Bulmak General Enterprises Limited.

- That the operations of Bulmak Associates Ltd are spanning 9 years now in construction and property developing work.
13. That the Applicant has not made any application to the Entity seeking administrative review and so was not entitled to receiving a copy of the evaluation report.
 14. That the Application is baseless and prayed that the Tribunal dismiss it with costs.
 15. The Tribunal also notified the best evaluated bidder Bulmak Associates Limited of these proceedings and invited them to make a response as an interested party. In an email sent by Nuludin Bukenya on 1st September 2021, Bulmak Associates Limited stated that they received the notification of best evaluated bidder and assume that all bidders were notified. That Bulmak Associates Ltd operated as Bulmak General Enterprise Limited which was registered way back in 2010 as per the affidavit submitted in the bid document. That the two companies are the same.

D The oral hearing

The Tribunal held an oral hearing on 13th September 2021 via zoom software. The appearances were as follows:

1. Mr Omoloi Ivan represented the Applicant as legal counsel together with Mr. Mpyangu Zaid, a Director of the Applicant.
2. State Attorney Mr. Twinomugisha Mugisha and Mr. Ezra Mugabi appeared together as Counsel for the Respondent. The Respondent was represented by the Principal, Mrs. Mulabiza Mebra, the Project Manager, Mr. Nyende Ramadhan, and the Acting Head of Procurement, Mr, Mubaale Yahaya.
3. The Best Evaluated Bidder was represented by Mr. Mukuve Mugaga.

E. SUBMISSIONS

The Applicant and Respondent highlighted their written submissions and also provided clarifications to the Tribunal.

Applicant

1. Counsel for the Applicant submitted that the Applicant raised a valid complaint with the Respondent which is envisaged by law under section 89(1)a of the PPDA Act within the prescribed time running from the date it first became aware of the decision of the Respondent via radio new bulletin.
2. That the notice of the display of BEB was never communicated, that since it was during the countrywide lockdown, the best mode was via email communication and that this was not done.
3. That it only learnt of the progress of the process through a news bullet on a local radio station called Baba FM that the Entity had launched stone breaking for the project of three storied classroom block.
4. That the purported Best Evaluated Bidder, Bulmak Associates Ltd did not have the required experience as stated in the standard bidding document.
5. That statutory declarations do not clarify questions of incorporation of companies. That companies as dictated by law are separate and distinct from each other and from their individual shareholders and directors.
6. That the preliminary objection raised by the Respondent be dismissed. The bid security deadline as advertised in the bid advert was up till 30th July 2021 unlike the Respondent's assertions that it was meant to last up till 26th September 2021.
7. The Applicant prayed that the Tribunal sets aside the award to the Respondent and be replaced by the Applicant and award the costs to the Applicant.

Respondent

1. The Respondent raised a preliminary objection that the Applicant has no locus before the Tribunal since its bid security validity had since expired and therefore has no valid



bid.

2. Counsel for the Respondent averred that due to the countrywide lockdown, notices could not be issued individually to the respective bidders. This necessitated that the notices be served electronically and that the Respondent duly informed all bidders including the Applicant via email.
3. Counsel further argued that the Best Evaluated Bidder had been trading as Bulmak General Enterprises Ltd. That notwithstanding the submission of different certificates of incorporation, the directors were the same and therefore the entities were the same.
4. Counsel argued that the project had already commenced and colossal sums would be lost if the Respondent's decision were reversed.
5. That although Bulmak Associates Ltd was registered on 28th July 2016, it was first registered as Bulmak General Enterprises Limited in 2010 with the same directors and that they were one and the same person.
6. That in 2019, the directors swore an affidavit which among other things states that:
 - Bulmak Associates Ltd started operations on 26th June 2010 but operating under the name and style of Bulmak General Enterprises Limited.
 - That the operations of Bulmak Associated Ltd are spanning 9 years now in construction and property developing work.
7. That the Applicant has not made any application to the Entity seeking administrative review and so was not entitled to receiving a copy of the evaluation report.
8. The Respondent prayed that the Application be found lacking in merit and be struck out with costs.

Best Evaluated Bidder



1. The Best Evaluated Bidder associated itself with the submissions of the Respondent regarding the Applicant's lack of locus to appear before the Tribunal. That the Applicant had no valid bid that would have granted him the right to be present in these proceedings.
2. That a valid bid must be accompanied by the required bid security which had to be valid up to 26th September 2021. The Applicant's bid security was valid only up to 30th July 2021. That the Applicant did not fulfil this requirement. The Applicant provided for an extra period of 28 days which then lapsed subsequently.
3. That the Respondent issued out electronic notices to all the bidders.
4. That it has the necessary experience and expertise attested by the evidence of its previous works done. That it meets the requirements of the bidding documents.
5. That cancellation of the contract would amount to a colossal loss more so in the present circumstances which do not warrant such a draconian approach.
6. That the Application lacks merit and be dismissed with costs.

F. RESOLUTION BY THE TRIBUNAL

Preliminary Objection

1. The Tribunal has considered the submissions of all parties with respect to the preliminary objection raised by the Respondent. The Tribunal will deal first with the preliminary point of law raised.
2. The Respondent raised a preliminary objection that the Applicant has no locus before the Tribunal since its bid validity had since expired and therefore has no valid bid. That a valid bid must be accompanied by the required bid security which had to be valid up to 26th September 2021 as per **ITB 17.1** and **ITB 18.3** of the bidding document. The Applicant's bid security was valid only up to 30th July 2021. That upon the expiry of the Applicant's Bid Security on July 30, 2021, the Applicant would have no obligation towards the Respondent and would not be bound by the terms of its bid if any, to the detriment of the Respondent. That there was no valid bid upon which an Application to the Tribunal could be based.
3. The Respondent relied on the decision of the Tribunal in *Sheema United Drivers Cooperative Society Ltd Vs PPDA, Application No 1 of 2017*, to buttress its submission that bid validity and bid security are synonymous and go hand in hand. Failure to comply with either the bid validity or bid security renders a bid incompetent for the rights of a procuring and disposal entity would be affected in a substantial way. The Respondent therefore invited the Tribunal to dismiss the Application with costs.
4. In response to the preliminary objection, the Applicant's Counsel submitted that the Applicant's bid is valid until September 26, 2021 as per the Applicant's bid submission sheet and that in any case, the Applicant followed the specific instructions of the Respondent indicated in the advertised bid notice which required bid securities to be valid until 30th July 2021. The Applicant submitted that the objection is misconceived and prayed that it is dismissed.
5. The Tribunal has noted that the Applicant's bid validity expires on 26th September

2021. The Applicant's bid security however expired on 30th July 2021. The Tribunal has considered arguments made by both parties regarding the point of law and thus resolves the point of law as follows:

6. The position of the law is that points of law can be raised at any stage of the proceedings whether or not they were pleaded in the pleadings. See *Yaya vs Obur & Ors (Civil Appeal-2018/81) [2020] UGHC 165*. A preliminary point of law is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696*.
7. The term *locus standi* literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard in a specified proceeding. To say that a person has no *locus standi* means the person cannot be heard, even on whether or not he has a case worth listening to. See *Njau & Others vs. City Council of Nairobi [1976–1985] 1 EA 397 at 407*.
8. Under **Regulation 53(3) of the PPDA (Rules and Methods of Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014**, the purpose of bid security is to ensure that bidders fulfil the conditions of their bid and to deter irresponsible and unserious bidders from bidding.
9. **Regulation 53(5) of the PPDA (Rules and Methods of Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014** provides that a bid security shall be valid for at least 28 days after the expiry of the bid.
10. It is the Tribunal's understanding that bid validity period and bid security are two different aspects of procurement with different purposes and their expiry leads to two different conclusions. The purpose of the bid validity period is for bidders to commit to keeping their bid legally binding for a specific number of days in order to assure the Entity that there will be no modification of their bid during the specified period. The

expiry of the bid validity period prior to date stipulated in the bidding document or before the conclusion of the procurement process leads to the conclusion that the bid submitted is no longer valid and thus non-existent. A bidder whose bid validity has since expired is not therefore a bidder in actual sense and thus has no locus to apply for administrative review.

11. Expiry of a bid validity is a matter of law and the Tribunal has consistently held that *“Once the bid validity expires, the procurement process comes to an end. By the time this application for review was made, the bid had expired thereby putting an end to the procurement process in question”*. Any Application based on an expired bid is incompetent. See Tribunal Decisions in ***Acacia Place Ltd vs. PPDA & Electoral Commission Application No. 10 of 2021; Kazini Fredric vs. PPDA Application No. 16 of 2015; And Twed Property Development Limited vs. PPDA Application No. 9 of 2015.***

12. On the other hand, the bid security is an amount of money that may be calculated as a percentage of the budget estimate of a procurement requirement or a percentage of a bidder’s bid price. It is used by the Entity as protection against bidders withdrawing their bids prior to the end of their bid validity period, or for refusing to sign the contract. The expiry of the bid security prior to the date stipulated in the bidding document or as guided by **Regulation 53(5) of the PPDA (Rules and Methods of Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014** however does not lead to the conclusion that the bid is non-existent. The conclusion in such an instance is that such a bid is not responsive to the requirements stipulated in the bidding document. A bidder with a valid bid but whose bid security has since expired is therefore still a bidder properly so called and has locus to apply for administrative review.

13. Regulation 53 (1) of the ***PPDA (Rules and Methods of Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014*** provides that a bidding document shall state any requirement for a bid security or bid securing declaration. ITB 18.1 of the bidding document required a bid security but did not specify the amount or expiry date. The Bid Data Sheet in the Biding Document specified the amount but did not indicate bid security expiry date. However, the Bid Notice for the impugned procurement that was advertised in the New Vision Newspaper of Thursday,

April 19, 2021 by the Respondent at item 6 stated that “Bids must be delivered to the address below at 7(c) at or before 10:00am on 26th May 202. Bids for construction must be accompanied by a bid security of Uganda Shillings eleven million six hundred ninety-six thousand two hundred sixty-eight (11,996,268) only. **Bid securities must be valid until 30th July 2021**”.

14. The Respondent failed to state the proper bid security requirements in the bidding document as required under **Reg 53** of the **PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014**. In the premises, the Applicant cannot be faulted for submitting a bid security which was valid up to 30th July 2021. The Respondent should not be permitted to rely on its own errors and omissions to challenge the validity of the Applicant’s bid.
15. The Applicant’ bid remains valid until the close of business on the last day of the validity period that is to say September 26, 2021 as per **ITB 17.1** of the Bidding Document and **Regulation 52(2) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014**.
16. Any bidder has locus to file an application before this Tribunal. The Applicant’s bid is still valid until 26th September 2021. In view of the Respondent’s own errors discussed above, substantive justice dictates that expiry of the bid security is a technicality which may be cured by requiring the Applicant to furnish a fresh security.
17. The Tribunal therefore finds that the Applicant has locus to bring this Application within the definition of an aggrieved bidder contemplated under **Section 91I (1) (a) of the PPDA Act as amended by Act No. 15 of 2021**.
18. The preliminary objection raised by the Respondent is therefore misconceived and is accordingly dismissed.

Issues

We now revert to the substantive issues arising in this application:



- i. *Whether there was a valid application for administrative review upon which the Accounting Officer was mandated to act?*
- ii. *Whether the Respondent erred in law and fact by not responding to the Applicant's complaint within the stipulated timeframe?*
- iii. *Whether the Respondent erred in law and fact by not displaying the Best Evaluated Bidder Notice as guided by the PPDA Regulations?*
- iv. *Whether the Best Evaluated Bidder, Bulmak Associates Ltd met the eligibility requirements stipulated in the bidding document?*
- v. *What remedies are available to the Parties?*

Resolution of the Issues

Issue 1

Whether there was a valid complaint upon which the Accounting Officer was mandated to act?

1. The Applicant contends that it wrote a complaint letter to the Respondent dated 6th August 2021 referenced *Demand Notice Cum Notice of Intention to Sue*. **Section 89 (1) of the PPDA Act** states that a bidder may seek administrative review for any omission or breach by a procuring and disposing entity of this Act, or any regulations or guidelines made under this Act or of the provisions of bidding documents, including best practices.
2. The Respondent contends that the Applicant has not made any application for administrative review to it and that it only received a letter of intention to sue from the Applicant dated 6th August 2021. From this averment, the Tribunal denotes that the Respondent does not view the letter dated 6th August 2021 from the Applicant as a valid application for administrative review.



3. The law does not prescribe a standard format for a complaint except that it must comply with the requirements of **Section 89(3) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** namely that:
- i. *The complaint must be in writing,*
 - ii. *The complaint should be submitted to the Accounting Officer of the procuring and disposing entity,*
 - iii. *The complaint should be accompanied by payment of the fees prescribed and;*
 - iv. *The complaint should have been made within ten working days after the date the bidder first became aware or ought to have become aware of the circumstances giving rise to the Complaint.*
4. The letter of the Applicant through its lawyers *Isabirye & Co. Advocates* referenced as ICA/SK/067/2021, dated 6th August 2021 and received by the Respondent on 9th August 2021 was made within 6 calendar days from 3rd August 2021 when the Applicant became aware of the circumstances giving rise to the Complaint. The letter sets out the grounds of the complaint and the remedies sought. On the basis of these facts, it was a valid complaint despite having been titled as a *“Demand Notice cum notice of intention to sue”*.
5. 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 our decision in ***APPLICATION NO.4 OF 2021- SAMANGA ELCOMPLUS JV versus PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY (PPDA) RESPONDENTS UGANDA ELECTRICITY DISTRIBUTION COMPANY LIMITED.***
6. The Tribunal noted however, that the complaint was not accompanied by proof of payment of the fees prescribed. The late payment of filing fees is not necessarily fatal, and 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. More so, the Accounting Officer is mandated to guide an Applicant on how and where to pay the administrative review fees upon receiving the application for administrative review. See the

Tribunal Decisions in *Obon Infrastructure Development JV vs. PPDA & Mbarara City, Application No. 5 of 2021*; *Samanga Elcomplus JV vs. PPDA & Uganda Electricity Distribution Company Limited, Application No. 4 of 2021*.

7. Where the Applicant was not guided on how and where to pay the administrative review fees as required by law, the Applicant cannot be faulted for the non-payment of prescribed fees upon lodging a complaint with the Accounting Officer. Regarding the requirement to lodge a complaint within ten (10) working days after the date the bidder first becomes aware or ought to have become aware of the circumstances giving rise to the complaint, the Applicant averred that about the result of the procurement process and ground breaking ceremony through a radio news bulletin on 3rd August 2021. This averment was not denied by the Respondent. It is clear that the Applicant was not aware of the display of the notice of the best evaluated bidder and only got to know that a best evaluated bidder had been decided on through a radio news bulletin on 3rd August 2021. Consequently, the administrative review period begun to run on 3rd August 2021 when the Applicant first became aware of the circumstances giving rise to the complaint. The complaint lodged with the Respondent on 9th August 2021 was therefore within time.
8. The Tribunal therefore finds that there was a valid complaint before the Respondent's Accounting Officer for purposes of administrative review.
9. **The Tribunal answers this issue in the affirmative.**

Issue 2

Whether the Respondent erred in law and fact by not responding to the Applicant's Complaint within the stipulated timeframe?

1. The Tribunal has held in its two recent decisions of *Abasamia Hwolerane Association Ltd vs. Jinja City Council (JCC), Application No. 12 of 2021* and *Globe World Engineering (U) Limited vs. Jinja City Council, Application No. 11 of 2021* that under **Section 89 (7) of the Public Procurement and Disposal of Public Assets Act** as amended, the Accounting Officer must make a decision within ten (10) days of receipt of a complaint and then communicate to the complainant the decision, reasons for the decision and corrective measure if any.

2. In the instant case, the Applicant made a Complaint to the Accounting Officer and no decision was made by the Accounting Officer. A further request for information was made to the Respondent by the Applicant on 26th August 2021 to which a response was purportedly made on 31st August 2021. This however, was no response to the earlier letter dated 6th August 2021.
3. The Accounting Officer never considered the Applicant's letter a compliant within the meaning of the law and thus opted not to respond. The same consideration formed the basis of denying the Applicant's request of information on 31st August 2021.
4. The Tribunal also noted that the response to the request for information was an afterthought. This is because the said response was dated 30th August 2021 but stamped and signed on 31st August 2021 when the Applicant had already lodged this Application with the Tribunal. The Respondent in paragraph (xix) on page 3 of its response for the application indicates that it responded to the Applicant's request by email to isabiryejon@yahoo.com on **30th August 2021**. It is astonishing that a letter dated **30th August 2021** and purportedly emailed on the same day could be stamped and signed on **31st August 2021**.
5. Whereas legally, the request for information based on the former section 89(2) and (3) of the of the Public Procurement and Disposal of Public Assets Act 2003, was repealed by Section 33 of the *Public Procurement and Disposal of Public Assets (Amendment) Act 2021* and is no longer mandatory or necessary, it is clear that no decision was made by the Accounting Officer upon receipt of the complaint.
6. In the absence of a decision by the Accounting Officer, the Tribunal still has jurisdiction to entertain the Application under **Section 89 (8) of the Public Procurement and Disposal of Public Assets Act** as amended by Act 15 of 2021.
7. Under section 91I (2) (b) of the **Public Procurement and Disposal of Public Assets Act** as amended by **Act 15 of 2021**, where an Accounting Officer fails to

make a decision, an application to the Tribunal must be made within ten days from the date of expiry of the period for making the decision. In the instant case, the Applicant made a complaint to the Accounting officer on 9th August 2021. Under section 89(7) of the Act the Accounting Officer had 10 days to make a decision. The 10 days expired on 19th August 2021. The Applicant had 10 days from 19th August 2021 within which to make an application to the Tribunal.

8. The period of 10 days from 19th August 2021 expired on 29th August 2021 which was a Sunday. The next working day was 30th August 2021. The application filed on 30th August 2021 was therefore within time.
9. The Tribunal therefore finds the Respondent's averment that it did not receive a Complaint from the Applicant erroneous since the wording of the Applicant's letter dated 6th August 2021 clearly shows that the Applicant was aggrieved and dissatisfied by the procurement process. The Tribunal finds that the Accounting Officer erred in law and fact when she did not make a decision upon receiving a Complaint from the Applicant. The Tribunal therefore invokes its jurisdiction under **Section 89 (8) of the Public Procurement and Disposal of Public Assets Act as amended by Act No. 15 of 2021.**
10. **The Tribunal answers this issue in the affirmative.**

Issue 3

Whether the Respondent erred in law and fact by not displaying the Best Evaluated Bidder Notice as guided by the PPDA Regulations?

11. The Applicant contended that the Respondent did not display the Notice of Best Evaluated Bidder. However, the Respondent avers that the Notice was displayed on its notice board from 11th June 2021 until 30th June 2021 and similarly, a soft copy of the notice was shared with all the bidders via their email addresses indicated on their company letterhead.
12. **Regulation 4(1) of the PPDA (Contracts) Regulations, 2014** provides guidance on the Notice of best evaluated bidder as follows:
A procuring and disposing entity shall, within five working days after the decision



of the contracts committee to award a contract –

- (a) Deliver a copy of the notice of best evaluated bidder to all bidders who participated in the bidding process;*
- (b) Display a notice of best evaluated bidder on the notice board of the procuring and disposing entity; and*
- (c) Send a copy of the notice of best evaluated bidder to the Authority for publication on the website of the Authority*

13. **Regulation 4(4) of the PPDA (Contracts) Regulations, 2014** further requires the procuring and disposing entity to obtain proof of delivery of the notice of best evaluated bidder to all bidders. **ITB 37.2** of the Bidding Document states that “*No contract shall be signed within a period of ten (10) working days after the date of display of the best evaluated bidder notice*”. **ITB 39.1** further states that “*on expiry of the ten (10) working day period after display of the best evaluated bidder and upon approval by the Attorney General, the Employer shall sign a contract with the successful Bidder*”.

14. The Respondent indicates that the notice of best evaluated bidder was displayed on its notice board on 16th June 2021 up to 30th June 2021 and that a soft copy of the NOBEB was sent by email to all the bidders. The Respondent attached an email print out indicating that communication on the Best Evaluated Bidder was sent from info@jinjanursingschool.org to kasoskososervicesltd@gmail.com on **21st June, 2021 at 01:58 hours**. The Respondent’s response at point (vi) expressly stated that:

“A soft copy of the best evaluated bidder notice was shared with all bidders via their email addresses which were indicated on their company letterhead in the bidding document and the same was received as our system indicates”

15. **ITB 13.2** of the bidding document required all correspondence and documents relating to the bid exchanged by the bidder and the employer, to be in writing. At common law, “writing” means any method of transcribing or reproducing the written word and may be ink, pencil or otherwise.

16. Under **section 2(1)** read together with **section 5(4) (a) and (b) of the Electronic Transactions Act, 2011 (Act 8 of 2011)**, electronic messages are deemed to be “writing”. Therefore, the email purportedly sent by the Respondent on 21st June 2021 fell within the ambit of ITB 13.2.
17. The law on instantaneous communications between the parties is to the effect that a communication will only be accepted when it is received by the intended recipient as per the Court of Appeal of England and Wales in *Entores Ltd vs. Miles Far East Corporation* [1955] 2 ALL ER 493.
18. In *Brinkibon Ltd vs. Stahag Stahl G.M.B.H.* [1983] 2 AC 34, Lord Wilberforce while dealing with email communications remarked that:
“... *No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.*”
19. In *Bernuth Lines Limited V High Seas Shipping Ltd* [2006] 1 Lloyds Rep 537, it was held that the notice of arbitration was validly served by email notwithstanding that it may not have reached the relevant managerial or legal staff in the recipient company. Christopher Clarke J said at p. 541-2:
“*That is not to say that clicking on the "send" icon automatically amounts to good service. The e-mail must, of course, be despatched to what is, in fact, the e-mail address of the intended recipient. It must not be rejected by the system. If the sender does not require confirmation of receipt he may not be able to show that receipt has occurred. There may be circumstances where, for instance, there are several e-mail addresses for a number of different divisions of the same company, possibly in different countries, where despatch to a particular e-mail address is not effective service.*”
20. An examination of the bid file submitted by the Applicant to the Respondent on its letter head consistently indicates the email of the Applicant at the bottom left side of the letter head to be kasokososervicesltd@gmail.com. It is thus clear that the purported email address of the Applicant used by the Respondent was erroneous. The letter “s” was introduced within the words “kasokoso” and the letter “m” was



missed from the word “com” as the domain was being entered. Clearly, this was not the known email address of the Applicant.

21. Where the wrong email address is clearly used, then questions or discussions on receipt or propriety of the receipt of an email cannot arise because in reality there was no email sent to the intended recipient and none could be received. The email purportedly sent to the Applicant was dispatched to the wrong email address and not that of the Applicant.
22. We accordingly find that a copy of the notice of best evaluated bidder was not delivered to the Applicant and the Respondent failed to sufficiently show proof of delivery of the notice of best evaluated bidder to all bidders (inclusive of the Applicant), contrary to *Regulation 4(1)(a), (b) and (4) of the Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014* and ITB 37.1 of the Bidding Document on Award Procedure.
23. In *Abasamia Hwolerane Association Ltd vs. Jinja City Council, Application No. 12 of 2021*, the Tribunal dealt with a similar issue regarding display of notice of best evaluated bidder and its delivery to bidders and held that where there is no evidence that the notice of best evaluated bidder was displayed, then there is no compliance as required under the law.
24. The Respondent has not availed any evidence to the Tribunal to show proof of delivery of the notice of best evaluated bidder to the Applicant in question. The Tribunal therefore finds that the Respondent did not follow the rightful procedure prescribed in the PPDA Act and the *PPDA (Contracts) Regulations, 2014* and therefore erred in law and fact to that effect.
25. **The Tribunal answers this question in the affirmative.**

Issue 4

Whether the Best Evaluated Bidder met the eligibility requirements stipulated in

the bidding document?

26. **Part 2: Section 3 Evaluation Methodology and Criteria, C, 5. Commercial and Technical Criteria. Item (f) and 9.1 (h)** of the Criteria required the bidder to have “*a general experience of at least **five years** in construction projects and specific experience as prime contractor in the execution of the same contracts/ projects*”.
27. The Applicant’s averment on this issue is that the purported Best Evaluated Bidder, Bulmak Associates Ltd did not meet the eligibility requirements of the bid which required all bidders to have general experience of at least five (5) years.
28. In its response, the Respondent averred that although Bulmak Associates Ltd was registered on 28th July 2016, it was first registered as Bulmak General Enterprises Limited in 2010 with the same directors. That in 2019, the directors swore an affidavit which among other things states that Bulmak Associates Ltd started operations on 26th June 2010 but operating under the name and style of Bulmak General Enterprises Limited; and that the operations of Bulmak Associates Ltd are spanning 9 years now in construction and property developing work.
29. The Tribunal has previously held on a somewhat similar issue in ***My Maka Group Limited v UNBS Application 9 of 2021*** that a company becomes legally existent from its date of incorporation and can only legally commence business in its own name after its date of incorporation. Indeed, separate legal personality is the basic tenet on which company law is premised. On this legal basis, the lifespan of Bulmak Associates Ltd commenced on 28th July 2016.
30. Therefore, by the date of bid submission and opening on 26th May 2021, Bulmak Associates Limited was only 4 years, 9 months and 28 days old. The Respondent’s imputation of the existence of Bulmak Associates Ltd years before the date of incorporation indicated on its certificate of incorporation was wrong in law. The Tribunal finds that Bulmak Associates Ltd did not meet the eligibility requirement that needed all bidders to have had a general experience of at least five years as

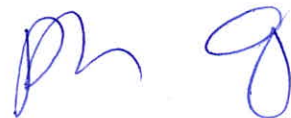
required in the bidding document. Therefore, its bid was non-responsive at the Commercial and Technical Evaluation stage.

31. In as far as experience is concerned, pages 510 to 573 of the bid submitted by Bulmak Associates Ltd indicate that it submitted the following as proof of its experience.
- i. *Contract with UNHCR dated January 2021(pages 510-519)*
 - ii. *Completion Certificate issued by China National Aero Technology International Engineering Corporation finishing works in Iganga dated 15th January 2015 (Pages 527)*
 - iii. *Completion Certificate issued by China National Aero Technology International Engineering Corporation finishing works at Entebbe Grade B Hospital dated 21st February 2014 (Page 528)*
 - iv. *Contract with Wakiso Distrit LG for construction of adminstration block dated April, 2020 (pages 529-531)*
 - v. *Completion Certificate from Karoli Lwanga Hospital-Nyakibali dated February 14, 2020 (Page 520)*
 - vi. *Completion Certificate from St Theresa Lisieux Riwbaale Health Centre IV dated February 14, 2020 –Sister’s convent (Page 521)*
 - vii. *Completion Certificate from St Theresa Lisieux Riwbaale Health Centre IV dated February 21, 2020 – Dr’s Staff House (Page 522, repeated on page 523), BOQs for said staff house dated June 2017(pages 532-533)*
 - viii. *Completion Certificate from St Theresa Lisieux Riwbaale Health Centre IV dated February 21, 2020 –theatre block (Page 524), BOQs for said theatre block dated February, 2018 (pages 534-535)*
 - ix. *Contract with Save the Children dated September 2020 (Page 536-538)*
 - x. *Contract with Ministry of Health dated November 2020 (Page 539-541)*
 - xi. *Contract for the construction of a Physiotherapy block at Rubaga Hospital of June 2020 (Page 549- 550)*

- xii. *Contract for the construction with Registered Trustees of Kabale Diocese dated 18th September 2018 (pages 546-547)*
- xiii. *Construction Contract with Banyatereza Sisters dated February 28, 2020 (pages 543-545)*
- xiv. *Contract with Vision Group dated 18th January 2018*
- xv. *Construction Contract, Recommendation Letter from HRAPF dated May 24, 2021 indicates that the Company is known to them since March 2020 when it constructed the organisation's offices in Ntinda. This appear together with an interim certificates issued by SBN Consulting Ltd (Page 525,526 551- 571)*
- xvi. *A recommendation letter from Daughters of St Therese of the child Jesus (Banyatereza Sisters) dated May 2021 indicates that they have known the company since 2016 when it constructed Sisters Convent at Rwibale Health Centre IV and a drainable Pit Latrine (Page 572).*
- xvii. *A recommendation letter from Karoli Lwanga Hospital dated May 24 2021 indicates that they have known the company since 2018 when it constructed specialist staff Houses (Page 573)*
32. The Tribunal has examined the bid submitted by Bulmak Associates Limited and noted that there is no contract attached to show that the Best Evaluated Bidder had experience beyond 2016 when they constructed the sister's convent at Daughters of St Therese of the Child Jesus (Banyatereza Sisters).
33. The Technical Director of Bulmak Associates Limited, Engineer Nuludin Bukenya in an email to the Tribunal on Wednesday, 1st September 2021 refuted the claim that the company did not have the required general experience of at least **five years** in construction projects and further stated that Bulmak Associates Limited operated as *Bulmak General Enterprises Limited* and that the two companies are the same.
34. We have examined the said Statutory Declaration (page 66 of the BEB's bid), sworn by Bukenya Nuludin and Teddy Latette where in paragraph 3-5, they state as follows:



2. *THAT we are directors and shareholders of Bulmak Associates Limited*
 3. *THAT Bulmak Associates Limited started operations on June 26th 2010 but operating under the name and style of Bulmak General Enterprises Limited.*
 4. *THAT for all intents and purposes, Bulmak Associates Limited and Bulmak General Enterprises Limited refer to the same entity*
 5. *THAT the operations of Bulmak Associates Limited are spanning 9 years now in construction and property developing work*
35. In procurement practice, a bidder can rely on experience of another person under two circumstances; namely;
- i. *where there is a duly registered change of name by the bidder so that its bid is under its newly adopted name regulated by compliance with **Regulation 17 of the Companies (General) Regulations, 2016, S.I No. 7** which is concluded by issuance of a certificate of change of name in Form 9 by Uganda Registration Services Bureau (URSB) or;*
 - ii. *where a bidder is a result of a joint venture, consortium or association, which must formally comply with the requirements of ITB 4.2 and 6 of Standard Bidding Document for procurement of Works issued by PPDA in the 2009, 2014 and 2019 versions.*
36. In the absence of proof of a *certificate of change of name in Form 9* duly issued by the Registrar of Companies or Uganda Registration Services Bureau (URSB) to show that *Bulmak General Enterprises Limited* duly changed its name to Bulmak Associates Limited, or in absence of a joint venture, consortium or association agreement executed between *Bulmak General Enterprises Limited* and Bulmak Associates Limited, a statutory declaration by shareholders of both companies will not suffice for it is alien to the law.
37. We have examined the constituting documents of *Bulmak General Enterprise Limited* and *Bulmak Associates Limited* that were submitted to the Tribunal through email on Monday, 6th September 2021 at 10:59 a.m. and noted that both companies have similar directors and shareholders being *Bukenya Naludin* holding 30 shares, *Latete Teddy* holding 30 shares, *Matovu Edward* holding 10 shares and *Karamagi Matovu Florence* holding 30 shares respectively.



38. We reiterate our decision in *My Maka Group Limited vs. Uganda National Bureau of Standards, Application No. 9 of 2021* wherein the Tribunal held that a certificate of incorporation is conclusive as to the date on which a company was incorporated and that a bidding company could not exist before its registration as a company by the Registrar of Companies. In that decision, while relying on *Salomon v A Salomon and Co Ltd [1897] AC 22*, the Tribunal further held that a bidding company is at law a different person altogether from the subscribers of the memorandum and in a bidding process, it thus could not rely on experience of its subscribers prior to its incorporation.
39. It therefore follows that the decision to declare Bulmak Associates Limited as the Best Evaluated Bidder was erroneous since the said bidder was **3 months and 2 days from attaining 5 years in existence so as to be responsive to the requirement of at least 5 years' general experience in construction projects as required by the Bidding Document.**
40. The Respondent therefore erred in law and fact when it evaluated Bulmak Associates Limited as the best evaluated bidder and consequently awarded Bulmak Associates Limited the contract under the impugned procurement yet its bid was not substantially responsive to the minimum requirements of the detailed evaluation and ought to have been rejected at the detailed evaluation stage in accordance with *Regulation 19 (4) of the Public Procurement and Disposal of public Assets (Evaluation) Regulations 2014.*
41. **The Tribunal therefore answers this issue in the affirmative.**

Issue 5

What remedies are available to the Parties?

42. In light of the Tribunal's findings on the first four issues and the fact that the contract has already been executed, the pertinent question now is whether the

Applicant can obtain redress at this stage of the procurement process.

43. In ***Old Kampala Students Association vs. Old Kampala Senior Secondary School & PPDA Application 7 of 2017***, the Tribunal found that the Applicant therein was not eligible to be issued a contract having failed the eligibility test required by the bidding document. In that case, the Tribunal found that the contract that had been entered into by the Entity and the purported best evaluated bidder who had not met the eligibility requirements was void.
44. Similarly in the present case at hand, the declared best evaluated bidder had not achieved the required experience of at least five years by the date of bid submission and thus failed to meet that eligibility requirement. Therefore, the contract executed on the basis that the bidder was compliant with the requirements of the bid whereas not was irregular.
45. Even when the contract was irregularly awarded to Bulmak Associates Limited on 1st July 2021, the best evaluated bidder was not subjected to a post qualification evaluation. The Evaluation Report at page 6 of 16 indicates that post qualification was not conducted while the manual evaluation sheet ends at page 7 with the recommendation that “*I recommend Bulmak Associates Ltd for award of contract for the construction of a three storied classroom block at Jinja School of Nursing and Midwifery*”.
46. We find the omission to conduct a post qualification exercise to be contrary to **Part 2: Section 3 Evaluation Methodology and Criteria, Evaluation Methodology, 2. Summary of Methodology, 2.2(d) and E. Post Qualification Criteria, 9. Qualification Criteria** of the bidding document and **Regulation 34(1) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014**. A whole stage of the evaluation process was erroneously skipped or avoided by the Respondent rendering the award of contract to Bulmak Associates Limited irregular.
47. We are fortified in our resolution by relying on the decision of the Supreme Court in ***Galleria In Africa Ltd vs. Uganda Electricity Distribution Company Ltd (Civil Appeal-2017) [2018] UGSC 19***, where it held that:



“.....there’s no way the Act can regulate practices in respect of public procurement and disposal of public assets unless if the provisions are adhered to strictly to the letter. The provisions cannot be directory merely. They are for all purposes and intents mandatory and noncompliance with them makes the proceedings fatal. Procurement and Disposal activities are processes; one cannot move to another stage of the processes without fulfilling the first one”.

48. Further, Lady Justice Lydia Mugambe in *Roko Construction Limited vs. Public Procurement and Disposal of Public Assets Authority & Others* [2018] UGHCCD 137, held that the decision to award a contract to a bidder whose bid was not substantially responsive to the minimum requirement of the detailed evaluation contravened **Regulation 19 (4) of the Public Procurement and Disposal of public Assets (Evaluation) Regulations 2014**, and that such a decision was a nullity.
49. In *Makula International Ltd vs His Eminence Emmanuel Cardinal Nsubuga & Rev. Fr. Dr. Kyeyune*, CACA No. 4 of 1981, [1982] HCB 11, it was held that a court of law cannot sanction what is illegal and that an illegality once brought to the attention of court overrides all questions of pleading, including any admission thereof.
50. The submission and acceptance of a statutory declaration to purport that *Bulmak General Enterprise Limited* and *Bulmak Associates Limited* refer to the same entity was also a violation of the core principles of transparency, accountability and fairness as enshrined in section 45 of the **Public Procurement and Disposal of Public Assets Act**.
56. In the application lodged before this Tribunal on 30th August 2021, the Applicant sought annulment of the contract awarded to the BEB; for re-tender of the contract; costs; and any other remedies deemed fit. However, in their written submissions filed on 7th September 2021, the Applicant also prayed that the Tribunal orders that the Applicant is awarded as best evaluated bidder.
57. The Tribunal finds merit in this application. *Bulmak Associates Limited* did not meet the evaluation criteria of a general experience of at least five years in construction projects and specific experience as prime contractor in the execution of the same contracts. The decision of the Respondent to award the contract to

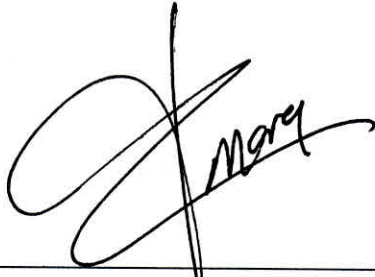
Bulmak Associates Limited will therefore be annulled.

58. Since it is not the function of this Tribunal to evaluate bids, it will suffice to remit this procurement back to the Entity for re-evaluation of the bids in a manner not inconsistent with this decision.

G. DISPOSITION

1. The Application is allowed.
2. The contract dated 23rd July 2021 entered into between the Entity and Bulmak Associates Limited is cancelled and set aside.
3. The Respondent's Accounting Officer is directed to assess and communicate the administrative review fees payable by the Applicant within two working days from the delivery of this decision.
4. The Applicant is ordered to pay the assessed administrative review fees within two working days of the communication thereof.
5. The procurement process is returned to the Entity for re-evaluation of the bids in a manner consistent with the decision of the Tribunal, the PPDA Act, as amended and the Regulations thereunder.
6. The Tribunal's suspension order dated 30th August 2021 is vacated.
7. Each party shall bear its own costs.

Dated at Kampala this 16th day of September 2021.



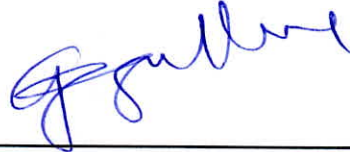
FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER