

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

**APPLICATION NO. 13 OF 2022**

**BETWEEN**

**MULAGO HILL DIAGNOSTICS LIMITED =====APPLICANT**

**AND**

**NATIONAL WATER AND SEWERAGE CORPORATION ===RESPONDENT**

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR  
SUPPLY OF HACH CHEMICALS AND REAGENTS UNDER  
PROCUREMENT REFERENCE NUMBER NWSC-HQ/SUPLS/21-  
22/172693**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA;  
GEOFFREY NUWAGIRA KAKIRA; PATRICIA ASIIMWE AND CHARITY  
KYARISIIMA; MEMBERS**

## **DECISION OF THE TRIBUNAL**

### **A. BRIEF FACTS**

1. In December 2021, the National Water and Sewerage Corporation (the Respondent Entity) caused the publication of a bid notice for procurement of HACH chemicals and reagents under Procurement Reference Number NWSC-HQ/SUPLS/21-22/172693 and thereafter issued the tender documents under open domestic bidding on 10<sup>th</sup> December 2021.
2. On 25<sup>th</sup> March 2022, the Respondent displayed and communicated the Notice of Best Evaluated Bidder with a removal date of 8<sup>th</sup> April 2022. M/s Palin Corporation Limited was named the Best Evaluated Bidder while the Applicant's bid was stated to be unsuccessful on the ground that it offered a price higher than that offered by the Best Evaluated Bidder.
3. On 31<sup>st</sup> March 2022, the Applicant made an administrative review complaint to the Respondent's Accounting Officer on grounds among others that the Evaluation Committee breached provisions of ITB 5.5 of the Bid Data Sheet (BDS) in the bidding document when it equated a purported "Manufacturer's Authorisation" in the Best Evaluated Bidder's bid to the mandatory required documents from the manufacturer of supplies, that the Best Evaluated Bidder had been authorised to supply, in Uganda, the supplies indicated in its bid, whereas not. That the Evaluation Committee breached Regulations 7(2) and 18(3) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014 when it made an amendment to ITB 5.5 of the Bid Data Sheet and accepted a purported manufacturer's authorisation from a non-manufacturer of the supplies. That the evaluation committee perpetuated fraudulent practice of misrepresentation of facts by the bidder.



4. In a letter dated 7<sup>th</sup> April 2022, the Managing Director of the Respondent Entity informed the Applicant that an administrative review team had been set up to address the Applicant's complaint upon its recommendation the procurement had been cancelled and the Applicant's administrative review fees were to be refunded.

**B. APPLICATION TO THE TRIBUNAL**

1. On 13<sup>th</sup> April 2022, being dissatisfied with the decision of the Accounting Officer, the Applicant lodged this application for further administrative review by the Tribunal.
2. The Applicant contended that it sought and obtained information from the HACH regional distributor through their local partner in Uganda wherein it established that the manufacturer had issued manufacturer's authorization letters to only two companies. That the administrative review team did not address its mind to the provisions of ITB 32.3.
3. The Applicant framed the following issues:
  - 1) Whether the evaluation committee conducted the evaluation process in compliance with Regulations 6, 7 and 18 of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014; Regulation 37 of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non- Consultancy Services) Regulations, 2014; and the Evaluation Methodology and Criteria stated the Bidding Document.
  - 2) Whether the bid of the best evaluated bidder was complete without comprising of the Manufacturer Authorization required under ITB Clause 11(i) read together with ITB Clause 5.5 to the Bid Data Sheet in the Bidding Document.

- 3) Whether cancellation of the procurement without citing any approval by the Contracts Committee after a contract is awarded to the best evaluated bidder and approved by the Contracts Committee is lawful.
  - 4) Whether the acts of the employees of the procuring and disposing entity when they omitted to investigate and make a finding on the fraudulent practice committed by the named best evaluated bidder breached provisions of part 1 (d) (i) of the Code of Ethical Conduct in Business to the Fifth Schedule of the Act.
  - 5) Whether omission by the administrative review team to inquire into completeness of the bid of the best evaluated bidder and the substantive and factual grounds in the complaint promoted the basic public procurement and disposal principles set out in section 45 and 49 of the PPDA Act.
  - 6) Whether the provisions of ITB Clause 3.1(c) are not applicable to the best evaluated bidder knowingly engaged in a fraudulent practice when it included in its bid false documentation to avoid an obligation.
  - 7) Whether the procuring and disposing entity should not proceed under ITB Clause 38.3 to award the contract to next best evaluated bidder; in this case the Applicant.
4. The Applicant prayed that the Tribunal find merit in the application, direct the Respondent to abide with ITB Clause 38.3 of the bidding document to proceed to award the contract to the next Best Evaluated Bidder; and prohibit the entity from the unilateral decision to cancel the procurement process.

**C. REPLY TO THE APPLICATION**

*The Respondent*

1. The Respondent raised a preliminary objection that the Tribunal has no jurisdiction to entertain this application by virtue of section 91I(3)(a) of the Public Procurement and Disposal of Public Assets Act as amended which stipulates that *a decision by a procuring and*



*disposing entity to reject or cancel any or all bids prior to award of a contract under section 75 shall not be subject to review by the Tribunal.*

2. The Respondent averred that there was no error of law or fact on the part of the Evaluation Committee which it states conducted the process in compliance with the procurement laws and regulations taking into consideration all the technical aspects of the bidding document.
3. The Respondent contended that the documents submitted by the Best Evaluated Bidder as evidence of eligibility were substantially compliant and responsive to the minimum requirements of the eligibility criteria in **ITB Clause 5.5** and **section 3.2 (m) Evaluation Criteria and Methodology**. The Respondent averred that the Manufacturer's Authorisation furnished by the Applicant itself is also for all intents a Distributor's Authorisation in substance.
4. Regarding the Applicant's contention that the Respondent's employees were engaged in acts of fraudulent practice in breach of the Code of Ethical Conduct in Business, the Respondent denied the allegations and averred that there were no particulars of fraud adduced by the Applicant and put the Applicant to strict proof.
5. The Respondent further contended that the Applicant relied on speculative and misleading information to support its complaint intended to impose a particular decision on the Administrative Review Committee.
6. The Respondent prayed that the Tribunal invokes its originating powers under section 91K of the Public Procurement and Disposal of Public Assets Act and find that the Respondent judiciously conducted the evaluation in accordance with the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014 and that there was no breach thereof; that Palin Corporation was properly determined as the Best Evaluated Bidder; that the Respondent did

not breach any ethical standards or code in the evaluation process; that the Accounting Officer properly discharged his responsibility in arriving at and making a decision in accordance with section 89(7) of the Public Procurement and Disposal of Public Assets Act; that the Respondent proceed and conclude the procurement process; and that in the alternative, that the Tribunal substitutes the Accounting Officer's decision of cancellation with its own decision of cancellation to achieve value for money.

#### **D THE ORAL HEARING**

1. The Tribunal held an oral hearing on 27<sup>th</sup> April 2022 via zoom software. The appearances were as follows:
2. Applicant: Henry Kyalimpa, Counsel for the Applicant. Present were Mr. Magezi Godfrey-Contracts Manager for the procurement, and Mr. Ikamere Deogratiuous-Managing Director.
3. Best Evaluated Bidder-Samuel Ejoku Oonyu the company secretary; Smith Edoni the Chief Operations Officer; and Patricia Nakinaaba the Legal Officer.
4. The Respondent: Aloysious Kaijuka-Manager Legal Services and Craven Barigye, Principal Legal Officer. Present were Eng Alex Gisagara-Senior Director Engineering Services; Martin Busulwa-Manager Procurement; Muheirwe Robinah-Principal Analyst Chemistry and Chairperson Evaluation Committee.

#### **E. SUBMISSIONS**

1. During the oral hearing, the Applicant and Respondent highlighted their written submissions and also provided clarifications to the Tribunal.

##### Applicant

2. The Applicant contended that the Evaluation Committee breached provisions of ITB 5.5. of the Bid Data Sheet (BDS) in the bidding



document when it equated a purported “Manufacturer’s Authorisation” in the Best Evaluated Bidder’s bid to the mandatory required documents from the manufacturer of supplies that the Best Evaluated Bidder had been authorised to supply the supplies indicated in its bid in Uganda.

3. The Applicant averred that the Evaluation Committee breached Regulations 7(2) and 18(3) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014 when it made an amendment to ITB 5.5 of the Bid Data Sheet to evidence eligibility and administrative compliance specified under 3.2 (m) to the evaluation methodology used for the evaluation of the bids received.
4. The Applicant argued that the Best Evaluated Bidder’s bid was not compliant with the documentation required under ITB Clause 11(i) specified in ITB Clause 5.5 of the Bid Data Sheet and in the Evaluation Methodology and Criteria.
5. The Applicant averred that after the Contracts Committee has awarded the contract to the Best Evaluated Bidder, the stage at which the Accounting Officer can exercise the powers to reject all bids ceases. That the purported cancellation of bids in a letter dated 7<sup>th</sup> April 2022 did not cite any approval by the Contracts Committee as required under section 75 of the Public Procurement and Disposal of Public Assets Act.
6. The Applicant further averred that the Entity’s employees breached provisions of the Code of Ethical Conduct in Business when they failed to inquire into any of the substantial grounds stated in the Applicant’s complaint to the Accounting Officer.
7. The Applicant prayed that the Tribunal find merit in the application, direct the Respondent to abide with ITB Clause 38.3 of the bidding document to proceed to award the contract to the next Best Evaluated Bidder; and prohibit the entity from the unilateral decision to cancel the procurement process.

Respondent

8. The Respondent raised a preliminary objection that the Tribunal has no jurisdiction to entertain this application by virtue of section 91I(3)(a) of the Public Procurement and Disposal of Public Assets Act as amended which stipulates that *a decision by a procuring and disposing entity to reject or cancel any or all bids prior to award of a contract under section 75 shall not be subject to review by the Tribunal.*
9. The Respondent averred that there was no error of law or fact on the part of the Evaluation Committee which it states conducted the process in compliance with the procurement laws and regulations taking into consideration all the technical aspects of the bidding document.
10. The Respondent contended that the documents submitted by the Best Evaluated Bidder as evidence of eligibility were substantially compliant and responsive to the minimum requirements of the eligibility criteria in **ITB Clause 5.5** and **section 3.2 (m) Evaluation Criteria and Methodology**. The Respondent averred that the Manufacturer's Authorisation furnished by the Applicant itself is also for all intents a Distributor's Authorisation in substance.
11. Regarding the Applicant's contention that the Respondent's employees were engaged in acts of fraudulent practice in breach of the Code of Ethical Conduct in Business, the Respondent denied the allegations and averred that there were no particulars of fraud adduced by the Applicant and put the Applicant to strict proof.



12. The Respondent further contended that the Applicant relied on speculative and misleading information to support its complaint intended to impose a particular decision on the Administrative Review Committee.
13. The Respondent prayed that the Tribunal invokes its originating powers under section 91K of the Public Procurement and Disposal of Public Assets Act and find that the Respondent judiciously conducted the evaluation in accordance with the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014 and that there was no breach thereof; that Palin Corporation was properly determined as the Best Evaluated Bidder; that the Respondent did not breach any ethical standards or code in the evaluation process; that the Accounting Officer properly discharged his responsibility in arriving at and making a decision in accordance with section 89(7) of the Public Procurement and Disposal of Public Assets Act; that the Respondent proceed and conclude the procurement process; and that in the alternative, that the Tribunal substitutes the Accounting Officer's decision of cancellation with its own decision of cancellation to achieve value for money.

**F. RESOLUTION BY THE TRIBUNAL**  
**Preliminary Objection**

1. Before we delve into the issues for determination, we must first resolve the preliminary objection raised by the Respondent because it touches on the jurisdiction of the Tribunal.
2. The Respondent raised a preliminary objection that the Tribunal has no jurisdiction to entertain this application by virtue of section 91I(3)(a) of the *Public Procurement and Disposal of Public Assets Act* as amended which stipulates that a decision by a procuring and disposing entity to reject or cancel any or all bids prior to award of a contract under section 75 shall not be subject to review by the Tribunal.

3. Section 75(1) of the *Public Procurement and Disposal of Public Assets Act* as amended provides that a procuring and disposing entity may, on the approval of the Contracts Committee, cancel a procurement process or a disposal process at any time, before a contract is awarded to the Best Evaluated Bidder, as may be prescribed.
4. Although the Tribunal cannot inquire into the reasons for cancellation, it has the authority to inquire into the existence or non-existence of a valid cancellation. See ***DOTT Services Ltd versus Uganda National Roads Authority Application No.3 of 2017; Preg-Tech Communications Ltd versus Uganda Police Force Application No.32 of 2021.***
5. The Tribunal can therefore inquire into whether a cancellation was done prior to contract award; and whether it was approved by the contracts committee.
6. Since the validity of the cancellation is in issue, the tribunal has jurisdiction to inquire into it.
7. **The preliminary objection is overruled.**  
**Issues**
8. We now revert to the substantive issues which we recast as follows:
  - i. *Whether the procurement process was lawfully cancelled by the Respondent?*
  - ii. *Whether the evaluation committee conducted the evaluation process in compliance with the law and the bidding document?*
  - iii. *Whether the bid of Palin Corporation Ltd ( the best evaluated bidder) was complete without a Manufacturer's Authorisation as required in the Bidding Document?*



- iv. *Whether the Procuring and Disposing Entity erred in law when it omitted to investigate and make a decision on the allegation of fraudulent practice by the Best Evaluated Bidder?*
- v. *Whether the Procuring and Disposing Entity erred in law when it omitted to investigate the substantive and factual grounds raised in the Complaint?*
- vi. *Whether the provisions of ITB 3.1(c) of the bidding document do not apply to the Best Evaluated Bidder?*
- vii. *Whether the PDE should proceed under ITB Clause 38.3 to award the Contract to the next best evaluated bidder?*
- viii. *What remedies are available to the parties?*

### **Resolution of issues**

#### **Issue No. 1: Whether the procurement process was lawfully cancelled by the Respondent?**

- 9. According to section 91I(3)(a) of the *Public Procurement and Disposal of Public Assets Act* as amended, a Procuring and Disposing Entity is at liberty to cancel any or all bids prior to award of a contract. The decision of the Entity to cancel any or all bids is not subject to review by the Tribunal.
- 10. Section 75(1) of the *Public Procurement and Disposal of Public Assets Act* provides that a procuring and disposing entity may, on the approval of the Contracts Committee, cancel a procurement process or a disposal process at any time, before a contract is awarded to the Best Evaluated Bidder, as may be prescribed.
- 11. For a cancellation to be valid, it must be made prior to the award of a contract and be approved by the contracts committee.
- 12. Section 3 of the *Public Procurement and Disposal of Public Assets Act* defines an award decision to mean a decision made by the

Contracts Committee in accordance with section 28(1) (a) of the Act. Section 28 of the Act provides for the functions of the Contracts Committee which include approving recommendations of the other units in a procurement process like the Procurement Disposal Unit and the Evaluation Committee and making decisions to award contracts.

13. Under regulation 3 of *The Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014*, after evaluation and any negotiation process, a procurement and disposal unit submits to the contracts committee, a recommendation to award a contract. The contracts committee considers the recommendation and makes a decision to award the contract.
14. The Tribunal has found that in this instant matter, the award of contract was made under Minute 874/22/E/5 of the Contracts Committee sitting of 3<sup>rd</sup> March 2022 and effectuated with the display of the Notice of Best Evaluated Bidder on 25<sup>th</sup> March 2022.
15. Later, in a letter dated 7<sup>th</sup> April 2022, the cancellation of all the bids was communicated to the Applicant by the Accounting Officer. The Tribunal notes that this purported cancellation was made after the Contracts committee had made the award of contract to Palin Corporation Ltd and without obtaining the approval of cancellation of the Contracts Committee.
16. There was a belated attempt to seek the approval of the contracts committee but, under Minute 877/22/13/C/4 of 22<sup>nd</sup> April 2022 the committee declined due to the Tribunal's suspension order of any further action in this procurement.
17. The Tribunal, therefore, holds that the purported cancellation on 7<sup>th</sup> April 2021 was a nullity and made contrary to section 75(1) and 91I (3) (a) of the *Public Procurement and Disposal of Public Assets*



Act as amended.

**The Tribunal answers issue no. 1 in the negative.**

**Issue No.2: Whether the Evaluation Committee conducted the evaluation process in compliance with the law and the bidding document?**

18. The main essence of the Applicant's contention in this matter is that the Best Evaluated Bidder did not submit a Manufacturer's Authorisation Certificate as required by the bidding document and instead submitted a Distributorship Certificate; and that the Evaluation Committee unlawfully waived the said requirement in contravention of the law and the bidding document.
19. The Respondent contended that the documents submitted by the Best Evaluated Bidder as evidence of eligibility were substantially compliant and responsive to the minimum requirements of the eligibility criteria in **ITB Clause 5.5** and **section 3.2 (m) Evaluation Criteria and Methodology**.
20. For the Tribunal to arrive at a proper determination of this issue, there is need to first consider what the bidding document required the bidders to submit. The Evaluation Criteria in **ITB Clause 5.5** and **Part 1: Section 3, Evaluation Methodology Criteria, Preliminary Examination Criteria**, eligibility and administrative 3.2 (m) required a *Manufacturer's Authorisation certificate addressed to NWSC and signed off by the authorised signatory of the entity confirming the issuance.*
21. The Best Evaluated Bidder attached a document titled "*Distributor's Authorisation*" from *DelAgua* addressed to NSWC and it states as follows:  
*"WHEREAS DelAgua **who are channel partners** of Hach. DelAgua Headquarters....do hereby authorise Palin Corporation Ltd.....to*

*submit a bid, the purposes of which is to provide the following goods.....”*

22. The Tribunal considers that there is a difference between a Distributor’s Authorisation and a Manufacturer’s Authorisation since the Manufacturer (HACH) in this instance is a different entity from the Distributor (DelAgua). From a basic dictionary definition, a Manufacturer is a company or individual that makes/produces goods while a Distributor is a person or company that buys products from a manufacturer and sells them for a profit to other businesses, stores, or customers, often by transporting the goods to different places. Manufacturers work to assemble components and materials into a finished product. Distributors place bulk orders with the manufacturer and then sell far smaller quantities to either retail stores or end-users. They are different entities with different functions and roles in the supply chain.
23. The Tribunal thus notes that the authorisation from the Distributor submitted by the Best Evaluated Bidder was inconsistent with the bidding document which specifically required the bidders to submit a Manufacturer’s Authorisation signed off by the authorised signatory. A Distributor, be it a recognised Channel Partner is not an authorised signatory of a Manufacturer with authority to bind a Manufacturer where a Manufacturer’s authorisation is sought.
24. Section 71(3) of the *Public Procurement and Disposal of Public Assets Act* and Regulation 7(2) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations SI No. 9 of 2014*, all provide that an evaluation committee shall not, during an evaluation, make an amendment or addition to the evaluation criteria stated in the bidding document, and shall not use any other criteria other than the criteria stated in the bidding document.



25. In the case of **Public Procurement and Disposal of Public Assets Authority v Pawor Park Operators and Market vendors SACCO (Civil Appeal-2016/3) [2017] UGHCCD 12 (23 February 2017)**, Justice Mubiru made reference to the comment made by The Australian Law Reform Commission, in its report *“Managing Justice: A Review of the Federal Civil Justice System”*, published in 2000, which is instructive in this case. The Commission stated:
- “The values underpinning administrative review are said to encompass the desire for a review system which promotes lawfulness, fairness, openness, participation and rationality.”*
26. The Tribunal finds that upholding the decision of the Administrative Review Committee of the Respondent which was arrived at outside the criteria stipulated in the bidding document in reliance on the Evaluation Committee’s report while neglecting the clearly stipulated requirements in the bidding document would be unlawful and unfair to other bidders who had complied with the bidding document.
27. In In **Elite Chemicals versus UCDA Application 8 of 2021**, the Tribunal held that the Evaluation Committee ought not to make any amendment or addition to the evaluation criteria other than that stipulated in the bidding document.
28. It therefore follows that the decision to declare Palin Corporaton Limited as the Best Evaluated Bidder conforming fully to the evaluation criteria was erroneous. The Best Evaluated Bidder should have been disqualified at the Preliminary examination stage. We are fortified in our submission by relying on the decision of Lady Justice Lydia Mugambe in **Roko Construction Limited v Public Procurement and Disposal of Public Assets Authority & Others [2018] UGHCCD 137**, where it was 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 to be awarded a contract, contravened Regulation 19 (4) of the Public Procurement and Disposal of public



Assets (Evaluation) Regulations 2014, that such a decision was a nullity.

29. The Respondent averred that it requested for clarification and carried out due diligence obtaining confirmation from HACH, the Manufacturer that indeed DelAgua was an authorised channel partner. Regulation 10(2) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations* requires an Evaluation Committee to request for clarification of information or submission of documentation only in circumstances where:
- a. *there is a nonconformity or an omission in the bid, which is not a material deviation as specified in regulation 11 (4); or*
  - b. *there is an arithmetic error which has to be corrected.*
30. An entity can only request for further information from a bidder provided that its bid is substantially compliant and responsive. In other words, the Entity cannot request for further information from a bidder whose bid had a material deviation. Therefore, in this given instance where the Tribunal finds that the Best Evaluated Bidder ought to have been disqualified at the preliminary examination stage, its bid was not substantially compliant and responsive.
31. In ***China Aero-Tech International Engineering Corporation (CATIC) Vs. PPDA, Application No. 1 of 2016***, the Tribunal held that in determining whether an omission is a material deviation, the entity must first determine whether a bid was substantially compliant and responsive.
32. In ***Roko Construction Ltd & Roko Construction (Rwanda) Ltd JV versus PPDA Application No. 6 of 2019***, the Tribunal reiterated its holding in a similar ***Application No. 1 of 2016*** as follows:
- “the test to determine whether a deviation is material or not is an*



*objective, not a subjective test. In determining whether an omission is a material deviation, the entity must first determine whether a bid was substantially compliant and responsive.”*

33. Regulation 11 (4) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014* broadly defines what amounts to a material deviation as follows:

*For the purposes of this regulation a “material deviation” is a deviation that—*

- (a) affects in a substantial way, the scope or quality of the supplies or services or the performance of the works to be procured;*
- (b) is inconsistent with the bidding document and which may in a substantial way, limit the rights of the procuring and disposing entity or the obligations of the bidder under the contract;*
- (c) if corrected would unfairly affect the competitive position of the other bidders whose bids are administratively compliant and responsive; or*
- (d) impacts the key factors of a procurement including cost, risk, time and quality and causes—*
  - (i) unacceptable time schedules, where it is stated in the bidding document that time is of the essence;*
  - (ii) unacceptable alternative technical details, such as design, materials, workmanship, specifications, standards or methodologies; or*
  - (iii) unacceptable counter-bids with respect to key contract terms and conditions, such as payment terms, price adjustment, liquidated damages, sub-contracting or warranty.*

34. From the Tribunal’s careful interpretation of the bidding document and the law, it finds that the failure or omission by the Best Evaluated Bidder to attach or submit a Manufacturer’s Authorisation as required by the bidding document was a material deviation as specified in Regulation 11(4) (c) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations*



for if corrected, would unfairly affect the competitive position of other bidders whose bids are administratively compliant and responsive.

35. The Tribunal dealt with a similar circumstance in ***Transtrac Limited v PPDA & Ministry of Works and Transport PAT Application No.10 of 2017*** wherein it held that the absence of the Power of Attorney could not be clarified by the Evaluation Committee after closing of bid submission as it would contravene Regulations 11 (4) (b) and (c) of S.I No. 9 of 2014.
36. The Tribunal equally reached a similar decision in ***My Maka Group v UNBS Application 9 of 2021*** when it found that the Applicant's omission to submit audited accounts for three years as clearly stipulated in the bidding document was a material deviation from the commercial criteria of the bid.
37. In the same vein, the Tribunal holds that the failure to attach the required Manufacturer's Authorisation was a material deviation from the bidding document requirements and had the propensity in a substantial way, to limit the rights of the procuring and disposing entity and affect the scope or quality of the supplies being procured.
38. The omission was not a matter upon which clarification could be sought and was definitely not a ground upon which the Evaluation Committee could exercise its discretion to waive for doing so would affect the competitive position of other bidders like the Applicant who was administratively complaint and responsive. It was also clear at that stage of evaluation that the Manufacturer's Authorisation formed a crucial or deciding factor in the evaluation of the BEB's bid. See *Regulations 10(2)(a), 10(3)(c) and 11(4)(c) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014; GAT Consult Ltd vs National Water and Sewerage Corporation, Application No.30 of 2021, My Maka Group Ltd vs UNBS, Application No.9 of 2021 and Smileplast Ltd vs PPDA & NAADS, Application No.13 of 2020*



39. **Issue is no. 2 answered in the negative. The Evaluation Committee did not comply with the law and the bidding document during the evaluation process.**

**Issue No.3: Whether the bid of Palin Corporation Ltd was complete without a Manufacturer's Authorisation as required in the Bidding Document**

40. ITB 11 of the bidding document specifies the documents which must comprise the bid. *Palin Corporation Ltd* submitted a document titled "*Distributor's Authorisation*" from *DelAgua* who purported to be "channel partners" of Hach.
41. Having answered issue is no. 2 in the negative, it follows that the bid of *Palin Corporation Ltd* was incomplete and should have failed at the preliminary examination.
42. The Tribunal finds that for purposes of passing the preliminary examination, the bid of *Palin Corporation Ltd* was incomplete.
43. **Issue no. 3 is answered in the negative.**

**Issue No.4: Whether the Procuring and Disposing Entity erred in law when it omitted to investigate and make a decision on the allegation of fraudulent practice by the Best Evaluated Bidder**

44. The Applicant did not adduce proof of the alleged fraudulent practice by the Best Evaluated bidder in its complaint to enable the Accounting Officer to inquire into the said allegation. The Applicant has not also proved the said fraudulent practice before the Tribunal.
45. **Issue no. 4 answered in the negative.**

**Issue No.5: Whether the Procuring and Disposing Entity erred in law when it omitted to investigate the substantive and factual grounds raised in the Complaint**

46. The sole duty and responsibility of the Accounting Officer upon receipt of a complaint is to make and communicate a decision including reasons for the decision taken and the corrective measure to be taken if any, within the specified statutory timelines to the bidder. Investigation into the complaint is a discretion of the Accounting Officer. See *Section 89 (7) of the Public Procurement and Disposal of Public Assets Act* as amended.
47. The administrative review committee in its report of 6<sup>th</sup> April 2022 to the Accounting Officer, addressed all the substantive and factual grounds raised in the Complaint. See *para 4.1-4.2 on pages 5-7 of the Administrative Review Committee's Report*.
48. **Issue no. 5 is answered in the negative. The Procuring and Disposing Entity did not err in this regard.**

**Issue No.6: Whether the provisions of ITB 3.1(c) of the bidding document do not apply to the Best Evaluated Bidder.**

49. ITB 3.1(c) of the bidding document as relied upon by the Applicant is futuristic in nature and only applies when the Government of Uganda has found that a provider has engaged in corrupt or fraudulent practice in a procurement process. There is no proof that the Respondent has conducted investigations and is satisfied that the Best Evaluated Bidder engaged in a fraudulent practice or that a special audit or court has found that the Best Evaluated Bidder is engaged in a fraudulent practice. See *sections 94(d), 95(1)(d), 95(1c), 95(1f) and 95(1g) of the Public Procurement and Disposal of Public Assets Act*.
50. **Issue no. 6 is answered in favour of the Respondent.**



**Issue No.7: Whether the Respondent should proceed under ITB Clause 38.3 to award the Contract to the next best evaluated bidder.**

51. Having found that Palin Corporation Ltd (the best evaluated bidder)'s bid should have been disqualified at the Preliminary examination stage for the fatal omission to attach the required manufacturer's Authorisation certificate, the only remaining bid being that of the Applicant, if substantially compliant with the bidding document, should have progressed to the detailed evaluation, financial comparison and post qualification stages of the evaluation criteria as indicated in the bidding document.
51. However, the Respondent has clearly indicated and communicated to the Applicant that it is no longer interested in the procurement process, subsequently purported to cancel the said procurement and even refunded the administrative review fees (a fact not contested by the Applicant).
52. The doctrine of mootness is part of a general policy that a court shall decline to decide a case which raises merely a hypothetical or abstract question. An application is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. See Mubiru J in ***Dramadri v Elwoku & 7 Ors (Miscellaneous Civil Application No. 0014 of 2016 and Miscellaneous Civil Application No. 0003 of 2016) [2017] UGHCCD 86.***
53. Nevertheless, having found that the purported cancellation was a nullity and cannot stand, the Tribunal cannot compel the Respondent to continue with a procurement process that it is no longer interested in. Such an order would be legally moot and academic.

54. Such a consequential order would be an exercise in futility and would cause unnecessary hardship to the Respondent and would set an onerous and illogical precedent in procurement processes undertaken in this Country and contrary to the intention of the legislature in amending section 75 of the principal procurement statute. *See section 26 of the Public Procurement and Disposal of Public Assets Amendment) Act 2021.*
55. It is therefore prudent that the Tribunal substitutes the *ill-fated* April 7, 2022 cancellation with its own cancellation. See ***Preg Tech Communications vs Uganda Police Force Application No.32 of 2021***

**G. DISPOSITION**

1. The Application succeeds in part.
2. The decision of the Accounting Officer dated April 7, 2022 is set aside.
3. The procurement process under Procurement Ref No: NWSC-HQ/SUPLS/21-22/172693 **is cancelled.**
4. The Tribunal's suspension order dated April 13, 2022 is vacated.
5. The Respondent may re-tender the procurement if it so wishes.
6. Each party shall bear its costs of this Application.



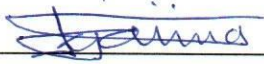
Dated at Kampala this 4<sup>th</sup> day of May 2022.



**FRANCIS GIMARA S.C**  
**CHAIRPERSON**



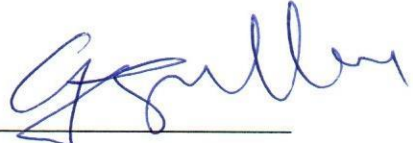
**PATRICIA K. ASIIMWE**  
**MEMBER**



**CHARITY KYARISIIMA**  
**MEMBER**



**NELSON NERIMA**  
**MEMBER**



**GEOFFREY NUWAGIRA KAKIRA**  
**MEMBER**