

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

APPLICATION NO. 15 OF 2023

BETWEEN

**QUALITY INSPECTION SERVICES INC. JAPAN::::::::::::: APPLICANT
AND**

UGANDA NATIONAL BUREAU OF STANDARDS:::::::::::::RESPONDENT

APPLICATION NO. 17 OF 2023

BETWEEN

**EAA COMPANY LIMITED:::::::::::::APPLICANT
AND**

**1. NANGALAMA DANIEL RICHARD MAKAYI
2. UGANDA NATIONAL BUREAU OF STANDARDS
3. QUALITY INSPECTION SERVICES INC. JAPAN:::::::::::::RESPONDENTS**

APPLICATION NO. 18 OF 2023

BETWEEN

AUTO TERMINAL JAPAN :::::::::::::::APPLICANT

AND

UGANDA NATIONAL BUREAU OF STANDARDS:::::::::::::RESPONDENT

**APPLICATION FOR REVIEW OF THE DECISIONS OF UGANDA
NATIONAL BUREAU OF STANDARDS IN RESPECT OF THE
PROCUREMENT FOR PROVISION OF PRE-EXPORT
VERIFICATION OF CONFORMITY TO STANDARDS SERVICE
PROVIDERS FOR USED MOTOR VEHICLES UNDER
PROCUREMENT REFERENCE NO. UNBS/NCONS/2022-2023
USING OPEN INTERNATIONAL BIDDING METHOD**

**BEFORE: NELSON NERIMA; THOMAS BROOKES ISANGA;
GEOFFREY NUWAGIRA KAKIRA; PAUL KALUMBA; AND CHARITY
KYARISIIMA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. *Uganda National Bureau of Standards (UNBS)* initiated a procurement for Provision of Pre-Export Verification of Conformity to Standards Service Providers for Used Motor Vehicles under Procurement Reference No. UNBS/NCONS/2022-2023 using Open International Bidding method.
2. Upon conclusion of the evaluation and adjudication process, *UNBS* issued a Best Evaluated Bidder Notice on the Electronic Government Procurement (EGP) Platform on June 27, 2023, with a removal date of July 7, 2023.
3. The Notice indicated that *Quality Inspection Services Inc. Japan (QISJ)* was the best evaluated bidder, and the unsuccessful bidders were *EAA Company Limited; (EAA) Auto Terminal Japan (ATJ); TIC Quality Control LLC (TIC);* and *Intertek International Limited (IIL)*. The reasons for their disqualification were also stated in the notice.
4. On June 27, 2023, by a letter referenced BO/PPDA/135, the Chairperson of the *UNBS* Contracts Committee wrote to the *Public Procurement and Disposal of Public Assets Authority (PPDA)*, requesting for independent advice due to disagreements with the evaluation committee and within the Contracts Committee.
5. The *PPDA*, in a letter dated July 3, 2023, reference PPDA/UNBS/154, received by *UNBS* on July 4, 2023, advised the Chairperson of the Contracts committee that since both *QISJ* and *EAA* met the requirements in the bidding documents, the entity should consider them both for contract award as service providers in a bid not to have monopoly in provision of these services.

6. On July 5, 2023, *EAA*, being dissatisfied with the procurement process, filed an administrative review compliant before the Accounting Officer of *UNBS*.
7. In a letter dated July 14, 2023, reference BO/PPDA-APP/135, the Accounting Officer of *UNBS* made an administrative review decision that based on guidance from the *PPDA*, *EAA* had now been reconsidered as one of best evaluated bidders for the provision of PVOC service providers for used motor vehicles.
8. On July 14, 2023, the Accounting Officer of *UNBS* issued a new Best Evaluated Bidder Notice with a removal date of August 1, 2023, in which both *QISJ* and *EAA* were indicated as best evaluated bidders.
9. *QISJ* filed Application No. 15 of 2023 directly with the Tribunal on July 18, 2023, seeking to review the decision of the *UNBS* Accounting Officer. *QISJ* stated that it believed that the matters of the impugned procurement could not be impartially handled by *UNBS*.
10. Upon receipt of the Application No. 15 of 2023, the Tribunal on July 18, 2023, invited *EAA* as one of the best evaluated bidders to make submissions to the Tribunal in response to the Application, as an interested party. The Response was filed by *EAA* through *Nsubuga and Co. Advocates & Legal Consultants* on July 20, 2023.
11. *UNBS* filed a response to Application No. 15 of 2023 on July 24, 2023, signed by Nangalama Daniel Richard Makayi as Executive Director/Accounting Officer. The response conceded that the issuance of the best evaluated bidder notice on July 14, 2023 which declared both *QISJ* and *EAA* as best evaluated bidders was in error. *UNBS* asked the Tribunal to vacating the administrative review decision made on July 14, 2023, and to allow the procurement to proceed to its logical conclusion.

12. *EAA* further filed a response to the Respondent's response on July 28, 2023, challenging the said response by *UNBS* to Application No. 15 of 2023 dated July 24, 2023. A further submission was made by *EAA*, raising objections on the competence of Application No. 15 of 2023 which was filed in the Tribunal without prior statutory notice to the Accounting Officer of *UNBS*, and without first making an application for administrative review to the *UNBS* Accounting Officer.
13. On July 31, 2023, *EAA* acting through another law firm *Ahamya Associates and Advocates*, filed Application No. 17 of 2023, direct with the Tribunal, challenging the contents of the response made by *UNBS* in Application No. 15 of 2023. Nangalama Daniel Richard Makayi the Executive Director of *UNBS* was named as 1st Respondent, *UNBS* was named as 2nd Respondent and *QISJ* was named as 3rd Respondent in the said Application No. 17 of 2023.
14. On July 25, 2023, *Auto Terminal Japan (ATJ)* being one of the bidders, being dissatisfied with the outcome of the procurement following the display of the Best Evaluated Bidder Notice on July 14, 2023, also filed a complaint before the Accounting Officer of *UNBS*.
15. The Accounting Officer of *UNBS* in a letter dated July 26, 2023, made an administrative review decision, and dismissed the complaint filed by *ATJ*.
16. *ATJ*, being aggrieved by the decision of the Accounting Officer, then filed Application No. 18 of 2023 on July 31, 2023, seeking to review the administrative review decision of the *UNBS* Accounting Officer.
17. Upon receipt of the Application No. 18 of 2023, the Tribunal on July 18, 2023, invited *EAA* and *QISJ* as the best evaluated bidders to make submissions to the Tribunal, in response to the Application. *EAA* and *QISJ* filed responses to Application No. 18 of 2023 on August 2, 2023.

18. On August 4, 2023, Application No. 15 of 2023; Application No. 17 of 2023; and Application No. 18 of 2023 were consolidated by the Tribunal with the consent of all counsel. The consolidation was premised on the fact that all the applications arose from the same procurement, there were common questions of law and fact, and there was need to avoid contradictory decisions.

B. SUBMISSIONS

QISJ

1. QISJ filed written submissions through *Apricus Advocates*.
2. Counsel prayed for judgement on admission based on the response of *UNBS* which conceded to Application No. 15 of 2023.

EAA

3. *EAA*, through *Nsubuga & Co. advocates*, raised 2 preliminary objections to application No. 15 of 2023, i.e. that QISJ did not first apply to the Accounting Officer for administrative review, and to give notice to the Accounting Officer before applying to the Tribunal.
4. On the merits, counsel made elaborate submissions to support the decision of the Accounting Officer to withdraw the notice of best evaluated bidder dated June 27, 2023 and replace it with the one of July 14, 2023.
5. In respect of Application No. 17 of 2023, *EAA*, filed submissions through *Ahamya Associates & Advocates*.
6. That the July 14, 2023, decision of the Accounting Officer of *UNBS* was a statutory action and corrective measure taken by the Accounting Officer pursuant to section 89(7) of the *Public Procurement and Disposal of Public Assets Act*. There was nothing illegal and or irregular with the decision.

7. The Notice of Best Evaluated Bidder issued on July 14, 2023, was a corrective measure and a lawful action envisaged under regulation 5(2) of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations 2014*.
8. The time and action stated under the cited regulation was halted by the suspension of the procurement under section 89(6) of the *Public Procurement and Disposal of Public Assets Act* when the Applicant filled a compliant with the Accounting Officer on July 5, 2023.
9. The cited timeline is still on halt following the suspension order that was issued by the Tribunal under section 89(11)(a) of the *Public Procurement and Disposal of Public Assets Act* on July 18, 2023. The UNBS and the Accounting Officer are therefore estopped from taking any action such as vacating the July 14, 2023, actions before the conclusive determination of Application No. 15 of 2023.
10. The disputed communication of July 24, 2023 is in utter contempt of the Suspension Order and a criminal offence under section 95(i) of the *Public Procurement and Disposal of Public Assets Act*. The disputed communication is an illegality to which the Tribunal should not close its eyes should be set aside and struck off the procurement action file.
11. The bidding document required a maximum number of 3 bidders or best evaluated bidders for the entire procurement. Sections 45, 46 and 48 enjoin the 1st and 2nd Respondents to conduct this procurement in a manner which promotes transparency, accountability, and fairness, maximizes competition, economy, efficiency, and value for money.

12. The disputed communication of July 24, 2023, by UNBS and the Accounting Officer is an attempt to minimise competition by creating an instant monopoly for the benefit of QISJ, defeat the economy, increase bottlenecks in PVOC assessments for used motor vehicles being imported to Uganda creating a dreaded inefficiency with no value for money at all.
13. With at least 3 providers, UNBS would attain efficiency and value for money by collecting 1% VAT on all assessments from 3 providers. Any attempt to stick to one provider imputes bias, corruption, uneconomic and retrogressive against value for money, a vice that the Tribunal must nip in the bud.

ATJ

14. *ATJ* filed written submissions through *Origo Advocates*.
15. Counsel submitted that;
 - 1) *UNBS* does not have an Accounting Officer.
 - 2) The Notice of best evaluated Bidder dated July 14, 2023 was not compliant with the law because it did not state the scores awarded during the evaluation process.
 - 3) The best evaluated bidders had a conflict of interest because they submitted the same equipment.
 - 4) *UNBS* illegally sought advice from *PPDA* after issuing the notice of best evaluated bidder and omitted to communicate the said actions to the bidders.
 - 5) *UNBS* departed from the evaluation methodology and criteria.

UNBS

16. *UNBS*, through its Legal Department, submitted that the Accounting Officer was duly appointed by the Secretary to the Treasury.

17. That the Best Evaluated Bidder notice dated July 14, 2023 was based on the administrative review decision which was erroneous.
18. There was no conflict of interest as alleged by *ATJ*.
19. The evaluation team never departed from the evaluation methodology and only duly followed the methodology as laid down in the bid document.

C. ORAL HEARING

1. The Tribunal held an oral hearing on August 4, 2023. The appearances were as follows:
 - 1) Ezra Mugabi and Elijah Kamukama represented *Quality Inspection Services Inc. Japan (QISJ)*.
 - 2) Richard Nsubuga and Ahamya Sam represented *EAA Co. Ltd (EAA)*.
 - 3) Mark Kizza represented *Auto Terminal Japan (ATJ)*.
 - 4) Hassan Walusimbi and Doreen Nanvule were in-house legal counsel for *UNBS*.
2. In attendance were;
 - 1) Brian Kuria the Liaison Officer for *Quality Inspection Services Inc. Japan (QISJ)*.
 - 2) Lee Sayer a Director of *EAA Co. Ltd (EAA)*.
 - 3) Kalua Green a Director, Kabira Osteiren and Harrission Ochieng as a representative from *Auto Terminal Japan (ATJ)*.

- 4) Nangalama Daniel the acting Executive Director, Babalanda Godfrey the Head Procurement and Disposal Unit, Eng. John Paul Musimami the Deputy Executive Director and Chairperson of the Contracts Committee, Komubigo Caroline a Procurement Assistant, Patrick Kizito a Metrologist, Grace Nabagereka a Procurement Officer, Caroline Agozibwe a Principal Legal Officer attended on behalf of *UNBS*.
3. The parties and their counsel provided clarifications to the Tribunal and highlighted their respective cases.

D. RESOLUTION

1. In light of the pleadings and submissions of the parties, the following issues stand for determination by the Tribunal;
 - 1) Whether Application No. 15 of 2023 is competently before the Tribunal?
 - 2) Whether Application No. 17 of 2023 is competently before the Tribunal?
 - 3) Whether a judgement on admission should be entered against UNBS in Application No. 15 of 2023?
 - 4) Whether Mr. Nangalama Daniel Richard Makayi had authority to make the decision in the administrative review complaint filed by *ATJ*?
 - 5) Whether the Accounting Officer of *UNBS* erred in law and fact when he withdrew the Notice of Best Evaluated Bidder that was published on the EGP platform on June 27, 2023 and issued a new Notice of Best Evaluated Bidder on July 14, 2023?
 - 6) Whether *QISJ* and *EAA* had a conflict of interest in the impugned procurement?

- 7) Whether *UNBS* departed from the Evaluation Methodology and Criteria prescribed in the bidding document while evaluating bids in the impugned procurement?
- 8) Whether the bid of *EAA* was responsive to the requirements of the bidding document?
- 9) Whether the bid of *ATJ* was responsive to the requirements of the bidding document?
- 10) What remedies are available to the parties?

Issue No. 1:

Whether Application No. 15 of 2023 is competently before the Tribunal?

2. Counsel for *EAA* submitted that *QISJ* failed to issue 5 working days' notice to the Accounting Officer prior to lodging the application before the Tribunal as required under section 89 (10) of the *Public Procurement and Disposal of Public Assets Act*, and that failure to file the notice rendered the application incurably defective. Counsel relied on the High Court decision in ***Mbarara City and MBJ Technologies v Obon Infrastructure Development JV, Civil Appeal No. 45 of 2021*** and the Supreme Court decision in ***Galleria in Africa Ltd v Uganda Electricity Distribution Company Ltd, Civil Appeal No. of 2017***.
3. This is our considered view that the circumstances in ***Mbarara City and MBJ Technologies v Obon Infrastructure Development JV, Civil Appeal No. 45 of 2021*** differ from the facts of the instant application. In the High Court case, the Respondent had originally applied for administrative review as a bidder and then changed its position to that of a person whose rights are adversely affected by a decision made by the Accounting Officer to benefit of the direct route of application to the Tribunal under section 91I(1)(b) of the *Public Procurement and Disposal of Public Assets Act*.

4. In the instant case, *QISJ* is still a bidder and has not sought to alter its position as Applicant while making a direct application to the Tribunal. *QISJ* has pursued the direct route to the Tribunal under section 91I (1) of the *Public Procurement and Disposal of Public Assets Act*.
5. The Tribunal has previously relied on the Supreme Court decision in ***Kampala Capital City Authority v Kabandize and 20 others, Supreme Court Civil Appeal No. 13 of 2014***, to hold that failure to serve statutory notice does not vitiate the proceedings. Perhaps failure to serve notice may be a relevant factor to consider when deciding whether to award costs or not but nonservice of notice cannot vitiate the jurisdiction of the Tribunal. See ***Application No. 2 of 2022, APA Insurance Uganda Ltd v Uganda National Roads Authority*** and ***Application No. 7 of 2021, Elite Chemicals Ltd vs Uganda Coffee Development Authority***.
6. We also observed that in filing Application No. 17 of 2023, EAA did not also serve the statutory notice with the Accounting Officer, prior to filing a direct application to the Tribunal.
7. The Tribunal therefore finds that the failure or omission to serve statutory notice to the Accounting Officer does not vitiate the proceedings or the jurisdiction of the Tribunal.
8. Counsel for EAA also submitted that *QISJ* did not particularise its reasons for belief that the Accounting Officer of UNBS had a conflict of interest or that matters of the impugned procurement could not be impartially handled by him, replete with specific actions or omissions reasonably relatable to the allegation. Counsel relied on the decision of the Tribunal in ***Application No. 18 of 2021, Abasamia Hwolerane Association Ltd v Jinja City Council***.

9. The Tribunal has extensively dealt with the issue of belief that an accounting officer is biased or that the procuring and disposing entity cannot handle a compliant impartially in ***Application No. 18 of 2021, Abasamia Hwolerane Association Ltd v Jinja City Council*** and more recently in ***Application No. 7 of 2022, SMS Construction Limited and Another v Ministry of Justice and Constitutional Affairs***.
10. We have perused through the Application and observed that at page 2 of the Application, *QISJ* particularised the basis for its belief that *UNBS* and its Accounting could not impartially handle the complaint relating to the impugned procurement. In the cited paragraphs, *QISJ* avers *inter alia* that the Accounting Officer did not independently investigate the complaint by *EAA* but relied an advisory opinion of PPDA; and that *UNBS* has already formed an opinion and taken a firm stand on the issue of non-responsiveness of the bid of *EAA*.
11. In the circumstances, we are persuaded that *QISJ* has a reasonable belief that the Accounting Officer and *UNBS* cannot impartially handle their complaint relating to the impugned procurement.
12. *QISJ* was therefore entitled and within its statutory rights to directly make the instant Application to the Tribunal for determination of the compliant under sections 89(9) and 91I(C) of the *Public Procurement and Disposal of Public Assets Act*.
13. We also observed that *EAA* also purported to make a direct Application No. 17 of 2023 to the Tribunal premised on section 91I(2)(c) and 89(9) of the *Public Procurement and Disposal of Public Assets Act*, challenging the contents of the response made by *UNBS* in Application No. 15 of 2023.

14. Having found that the failure to serve a statutory notice was not fatal and that *QISJ* pleaded facts to show that *UNBS* and its Accounting Officer could not impartially handle the complaint, the Tribunal concludes that the Application No. 15 of 2023 is competent and the Applicant has *locus standi*.
15. **Issue no. 1 is answered in the affirmative.**
Issue no. 2:
Whether Application No. 17 of 2023 is competently before the Tribunal?
16. On July 5, 2023, *EAA*, being dissatisfied with the procurement process, filed an administrative review compliant before the Accounting Officer of *UNBS*. In a letter dated July 14, 2023, the Accounting Officer of *UNBS* made an administrative review decision that, based on guidance from the *PPDA*, *EAA* had now been reconsidered as one of best evaluated bidders for the provision of PVOC service providers for used motor vehicles.
17. On July 14, 2023, the Accounting Officer of *UNBS* issued a new Best Evaluated Bidder Notice, in which both *QISJ* and *EAA* were indicated as best evaluated bidders.
18. *QISJ* filed Application No. 15 of 2023 directly with the Tribunal on July 18, 2023, seeking to review the decision of the *UNBS* Accounting Officer.
19. *UNBS* filed a response to Application No. 15 of 2023 on July 24, 2023, signed by Nangalama Daniel Richard Makayi as Executive Director/Accounting Officer. The response conceded that the issuance of the best evaluated bidder notice on July 14, 2023 which declared both *QISJ* and *EAA* as best evaluated bidders was in error. *UNBS* asked the Tribunal to vacating the administrative review decision made on July 14, 2023, and to allow the procurement to proceed to its logical conclusion.

20. On July 31, 2023, *EAA* filed Application No. 17 of 2023, with the Tribunal, challenging the contents of the response made by *UNBS* in Application No. 15 of 2023.
21. Under section 89(1) and 89(2) of the *Public Procurement and Disposal of Public Assets Act*, a bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity. A bidder may also seek administrative review for any omission or breach by a procuring and disposing entity, of the Act, regulations or guidelines made under the Act or any provision of the bidding documents.
22. The instances under which a person may invoke the jurisdiction of the Tribunal are provided for under sections 89(8), 89(9), and 91I(1)(a)-c) of the *Public Procurement and Disposal of Public Assets Act*, namely:
- (i) by a bidder, where an Accounting Officer does not make a decision or communicate an administrative review decision within ten days; or
 - (ii) by a bidder who is not satisfied with the administrative review decision made by the Accounting Officer under section 89(8), or
 - (iii) by a bidder, direct to the Tribunal, if the bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach that would be made; or
 - (iv) by bidder, direct to the Tribunal, if the bidder believes that the matter cannot be handled impartially by the procuring and disposing entity; or
 - (v) by any person whose rights are adversely affected by a decision made by the Accounting Officer.
23. It is clear from the above provisions that a bidder (like *EAA*) can only make a complaint to the Accounting Officer, or an application to the Tribunal, in respect of a decision, omission or breach of a procuring and disposing entity. The impugned decision must relate to a procurement or disposal matter.

24. In Application No. 17 of 2023, *EAA* purported to apply to the Tribunal to challenge the response of *UNBS* in Application No. 15 of 2023, basically because that response concedes that issuance of the best evaluated bidder notice on July 14, 2023 which declared both *QISJ* and *EAA* as best evaluated bidders, was in error. *UNBS* merely stated its position in relation to application No. 15 of 2023 and invited the Tribunal to vacate the best evaluated bidder notice of July 14, 2023 which declared both *QISJ* and *EAA* as best evaluated bidders, on the ground that it was in error. *UNBS* as a Respondent was within its rights to concede. However, it is up to the Tribunal to determine whether best evaluated bidder notice of July 14, 2023 was erroneous or not and whether or not to vacate it.
25. The response of *UNBS* is a pleading for purposes of Application No. 15 of 2023. *EAA*, as an interested party, was duly invited by the Tribunal to file submissions, and it did file elaborate submissions. There was no basis or need for *EAA* to file Application No. 17 of 2023 purportedly to challenge the response of *UNBS*. The said response of *UNBS* is not a decision, omission or breach of a procuring and disposing entity within the meaning of the above cited statutory provisions.
26. Application No. 17 is misconceived, incompetent, and will be struck out.
27. **Issue no. 2 is answered in the negative.**

Issue no. 3:

Whether a judgement on admission should be entered against UNBS in Application No. 15 of 2023?

28. *QISJ*, the Applicant in Application No. 15 of 2023, filed submissions in which it prayed for a judgement on admission, in favour of the Applicant, in view of the response by *UNBS* that the issuance of the Best Evaluated Bidder Notice on July 14,

2023 which declared both *QISJ* and *EAA* as best evaluated bidders was in error, and that the first best evaluated bidder notice of June 27, 2023 in favour of *QISJ* was in accordance with the bid document, the Act and the regulations.

29. Regulation 36(1) of the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations* cited by counsel for *QISJ* enables the Tribunal to apply the rules of practice of procure of the High Court, in any matter relating to proceedings of the Tribunal where the regulations are silent. By virtue of this regulation alone, the *Civil Procedure Act* cap 71 and the *Civil Procedure Regulations* apply to the Tribunal where necessary.
30. O.13 r.6 of the *Civil Procedure Rules* as cited by counsel for *QISJ*, allows a party to a suit, at any stage of a suit, to apply to the court for such judgment or order as upon the admission without waiting for the determination of any other question between the parties where an admission of facts has been made and the court may upon the application make such order, or give such judgment as the court may think just.
31. UNBS, in its response to Application No. 15 of 2023, expressly stated that they are desirous of vacating the administrative review decision hitherto made on July 14, 2023, and to allow the procurement to proceed to a logical conclusion.
32. UNBS states that the Best Evaluated Bidder Notice dated June 27, 2023, was validly issued, while the Best Evaluated Bidder Notice dated July 14, 2023, was issued in error and should be vacated. The response also acknowledges that the letter of June 27, 2023, by the Chairperson of the Contracts Committee was authored out of time and that the subsequent guidance by the Authority on July 3, 2023 was overtaken by events.
33. The Applicant has rightly cited authorities on circumstances under which court can be moved to enter judgment on admission.

34. However, the Tribunal does not apply the *Civil Procedure Rules* wholesale. Regulation 36(2) of the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations* empowers the Tribunal to direct the modification of the use of any rule of practice or procedure of the High Court.
35. In addition, judgement on admission applies to admission of fact, not law. In the instant case, the response of UNBS claims that the Best Evaluated Bidder Notice of July 14, 2023 was issued in error, and that that the first Best Evaluated Bidder Notice of June 27, 2023 was in accordance with the bid document, the Act and the regulations.
36. The alleged admissions are of intertwined fact and law. A dispute before this Tribunal concerns public affairs and the application of public law. Parties cannot agree or admit about the law or the effect of the law. It is up to the court or Tribunal to pronounce itself on the same. Matters before the Tribunal are akin to other public law disputes like election petitions. Parties cannot change the result of an election by consent or admission. The court must investigate the facts and make a decision according to law.
37. Moreover, since 3 Applications have been consolidated, it is prudent that the Tribunal delves into the merits of the impugned procurement so that it can answer all the legal and factual questions posed in the consolidated Applications. Entering a judgement on admission in favour of QISJ would not serve the interests of justice and the law.
38. **Issue no. 3 is resolved in the negative.**

Issue no. 4:

Whether Mr. Nangalama Daniel Richard Makayi had authority to make the decision in the administrative review complaint filed by ATJ?

39. On July 25, 2023, *ATJ* being one of the bidders, applied for administrative review to the Accounting Officer of *UNBS* to challenge the new Best Evaluated Bidder Notice of July 14, 2023, which in which both *QISJ* and *EAA* were indicated as best evaluated bidders. The Accounting Officer of *UNBS* in a letter dated July 26, 2023, dismissed the complaint filed by *ATJ*.
40. *ATJ* now contends that *UNBS* does not have an Accounting Officer within the meaning of the *Public Finance Management Act* and the *Public Procurement and Disposal of Public Assets Act*. That Mr. Nangalama Daniel Richard Makayi took over as Acting executive Director of *UNBS* but was never appointed by the Secretary to the Treasury as the Accounting Officer. That he therefore had no power to make an administrative review decision.
41. The Tribunal has noted the letter dated July 24, 2023, by which Mr. Nangalama Daniel Richard Makayi was appointed as Acting Executive Director of *UNBS*. The Tribunal has also noted the letter dated by which the Secretary to the Treasury appointed Mr. Nangalama Daniel Richard Makayi as Accounting Officer of Vote 154-*UNBS* under the *Public Finance Management Act*, subject to formal acceptance and a signed performance contract.
42. Mr. Nangalama Daniel Richard Makayi informed the Tribunal at the hearing that he accepted the appointment on July 27, 2023.
43. We take it that as of July 25, 2023 when *ATJ* made an administrative review application to the Accounting Officer of *UNBS* and also on July 26, 2023 when the application was dismissed, the appointment of Mr. Nangalama Daniel Richard Makayi as Accounting Officer of *UNBS*, for purposes of the *Public Finance Management Act*, had not become effective.

44. However, section 3 of the *Public Procurement and Disposal of Public Assets Act* defines “Accounting Officer to mean:
- (a) *an Accounting Officer appointed as such by the Secretary to the Treasury;*
 - (b) *a person appointed under an Act of Parliament or under an instrument of appointment made under an Act of Parliament, including the Companies Act, to perform the functions of Accounting Officer of a procuring and disposing entity; or*
 - (c) *a person appointed to perform the functions of Accounting Officer of an entity not being of Government, to which section 2(1)(d) applies;*
45. For purposes of the *Public Procurement and Disposal of Public Assets Act*, an Accounting Officer may be appointed by the Secretary to the Treasury. A person may also exercise the functions of Accounting Officer if he or she is *appointed under an Act of Parliament or under an instrument of appointment made under an Act of Parliament, including the Companies Act, to perform the functions of Accounting Officer of a procuring and disposing entity.*
46. The Executive Director of UNBS is appointed by the Minister of Trade under section 11 of the *Uganda National Bureau of Standards Act, cap. 327* as amended by Act 11 of 2013.
47. On July 24, 2023, Mr. Nangalama Daniel Richard Makayi was appointed as Acting Executive Director of UNBS. Section 4 of the *Interpretation Act* provides that a reference to the holder of an office by the term designating his or her office shall be construed as meaning the person for the time being lawfully holding, acting in or performing the functions of that office.
48. The said Mr. Nangalama Daniel Richard Makayi signed off the administrative review decision to ATJ as Acting Executive Director/Accounting Officer. The Accounting Officer of UNBS is

appointed as Chief Executive Officer of the institution under section 11 of the *Uganda National Bureau of Standards Act* cap. 327 as amended by Act 11 of 2013.

49. The **presumption of regularity** at common law is that where it has been proved that an "official act" has been done, it will be presumed, until the contrary is proved, that the said act complied with any necessary formalities, and that the person who did it was "duly appointed". The presumption is expressed in the Latin maxim *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*; in short form stated as *omnia praesumuntur rite et solemniter esse acta* or *omnia praesumuntur rite esse acta*. The principle has been applied in Uganda, for instance in ***Court of Appeal Civil Appeal No. 088 of 2011- Jacob Mutabazi v The Seventh Day Adventist Church.***
50. We take it that Mr. Nangalama Daniel Richard Makayi was appointed to exercise the functions of Executive Director in acting capacity, and that those functions include the role of Accounting Officer for purposes of the *Public Procurement and Disposal of Public Assets Act*. ATJ has not produced evidence that the Executive Director of UNBS is not authorised to perform the functions of Accounting Officer for purposes of administrative review under the *Public Procurement and Disposal of Public Assets Act*.
51. We find the argument that UNBS had no Accounting Officer to be ingenious. We note that ATJ itself applied for administrative review on July 25, 2023, during the period in which they now claim there was no Accounting Officer. ATJ cannot approbate and reprobate at the same time.
52. Mr. Nangalama Daniel Richard Makayi therefore lawfully exercised the functions of Accounting Officer under the *Public Procurement and Disposal of Public Assets Act*.
53. **Issue no. 4 is resolved in the affirmative.**

Issue no. 5:

Whether the Accounting Officer of UNBS erred in law and fact when he withdrew the Notice of Best Evaluated Bidder that was published on the EGP platform on June 27, 2023 and issued a new Notice of Best Evaluated Bidder on July 14, 2023?

54. The Accounting Officer is statutorily bound to investigate complaints by providers, submitting a copy of any complaints and reports of the findings to the Authority. See sections 26(1) h),(i), and 89 (7) of the *Public Procurement and Disposal of Public Assets Act*, and regulation 5 of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014*.
55. The Accounting Officer in responding to a complaint by EAA wholly relied on the advice from the Authority. However, the consideration of such information or guidance from the Authority does not absolve the Accounting Officer of his statutory responsibility for the execution of the procurement and disposal process in the procuring and disposing entity, in accordance with the law, and to independently investigate the complaint. The Accounting Officer failed in his duty to independently investigate the complaint by EAA and instead chose to rubber stamp the guidance from the Authority.
56. We have observed that when the Chairperson of the Contracts Committee purported to seek independent guidance from the Authority on June 27, 2023, the Notice of Best Evaluated Bidder was already published on June 27, 2023, on the Electronic Government Procurement (EGP) Platform.
57. The Contracts Committee had already exercised its duty to adjudicate the recommendations from the Procurement and Disposal Unit and made an award decision pursuant to section 28(1)(a) of the *Public Procurement and Disposal of Public Assets Act*, upon which, it became *functus officio*. There were no more

disagreements between the Contracts Committee and the Procurement and Disposal Unit to form a basis for exercising powers under section 33 of the *Public Procurement and Disposal of Public Assets Act*.

58. We further observed that impugned letter of the Contracts Committee Chairperson, did not state that the Contracts Committee disagreed with any recommendations of the Procurement and Disposal Unit. It merely stated that there were disagreements within the two independent bodies namely within the Contracts Committee and the Evaluation Committee. The letter did not state in writing the reasons for disagreement contrary to section 33(1) (b) and 33(3) of the *Public Procurement and Disposal of Public Assets Act*.
59. Intra disagreements within the Contracts Committee and the Evaluation Committee respectively do not form a valid basis for the exercise of the power under section 33 of the *Public Procurement and Disposal of Public Assets Act*. This is because decisions of the Contracts Committee are unanimous but, where unanimity cannot be achieved, the decision is by a simple majority of the members present. See regulation 3(5) of the *Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014*.
60. Even for the Evaluation Committee, the decision of the majority shall be the decision of the evaluation committee and shall be stated as such in the evaluation report. See Regulation 5(10) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations*.
61. The Chairperson of the Contracts Committee therefore acted on a frolic of his own, irregularly, and illegally when he opted to singlehandedly seek guidance of the Authority. That guidance had been procured illegally by the Chairperson of the Contracts Committee.

62. In any case, the guidance of the Authority arrived belatedly after the publication of the Notice of Best Evaluated Bidder on June 27, 2023. It could not be acted upon since an award decision had already been made. The guidance also purported to rely on a minority opinion of the evaluation report in total disregard of Regulation 5(9) and 5(10) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations* which requires all evaluation committee reports to be unanimous and based on the decision of the majority.
63. The Authority also relied on extraneous and historical material and information that was not available to the Evaluation Committee or the Contracts Committee. The said information is a departure from the evaluation criteria contrary to section 71(3) of the *Public Procurement and Disposal of Public Assets Act*. Reliance on such extraneous information defeats the main purpose of bidding or inviting competent firms to bid. Procuring and disposing entities would just rely on the information from the Authority to award tenders.
64. The impugned guidance, however contained a disclaimer to the effect that the Accounting Officer and Contracts Committee remain responsible for ensuring and conducting procurements in accordance with the provisions of the Act.
65. The Administrative Review Committee appointed by the Accounting Officer was unable to offer any useful advice. The Administrative Review Committee report recommended that that the matter of selecting the suitable service providers “*be referred to the PPDA Tribunal for proper interpretation and decision*”. The recommendation that the matter be referred to the Tribunal has no legal basis because the law does not envisage a reference or application to the Tribunal by a procuring and disposing entity.
66. The Accounting Officer was not bound by the recommendations of the Administrative Review Committee and in any case, the Tribunal has held that the findings of the Administrative Review Committee are advisory by nature. The

final decision must be made by the Accounting Officer. See in ***Rhema Engineering Company Limited Ltd v Arua City, Application No.13 of 2023*** and ***Abasamia Hwolerane Association Ltd v Jinja City Council Application No. 11 of 2021***.

67. Even if the Accounting Officer disregarded the advice or recommendations of Administrative Review Committee, he still erred when he did not investigate the compliant of *EAA* and relied on the impugned guidance of the Authority as the basis of his administrative review decision.
68. In any case, even where the Accounting Officer found merit in a complaint about evaluation of bids, he has no power to make an award or issue a notice of best evaluated bidder, like he did. Only the Contracts Committee can make awards decisions under section 29 (1) (b) of the *Public Procurement and Disposal of Public Assets Act*. The corrective measures by an accounting Officer which are envisaged under section 89(7) of the *Public Procurement and Disposal of Public Assets Act* cannot include usurping the powers of the Contracts Committee or other bodies in the procurement and disposal cycle.
69. If he found merit in the complaint, he should have ordered a re-evaluation. After re-evaluation, the procurement and Disposal Unit would then have made the submission to the Contracts Committee for adjudication.
70. UNBS has rightly conceded that administrative review decision made on July 14, 2023, and the corresponding Notice of Best Evaluated Bidder that was displayed on July 14, 2023 were erroneous and illegal.
71. The upshot of our finding is that the Accounting Officer therefore erred when set aside the Notice of Best Evaluated Bidder of June 27, 2023, and replaced it with the Notice of Best Evaluated Bidder that was displayed on July 14, 2023.

72. Since the purported Notice of Best Evaluated Bidder of July 14, 2023 was illegal and a nullity, there is no need to delve into the complaint by *ATJ* that the said notice was fundamentally defective to the extent that it failed to state the scores awarded and the total score of the Best Evaluated Bidder.
73. **Issue no. 5 is answered in the affirmative.**

Issue no. 6:

Whether QISJ and EAA had a conflict of interest in the impugned procurement?

74. *ATJ* claims that the bids of *QISJ* and *EAA* contained the same equipment with the same serial numbers and facilities that were to be used in the execution of the contract. *ATJ* cites clause ITB 4.4 to contend that there was a conflict of interest between the two bidders and they should have been disqualified.
75. *ATJ* has not shown how it came to know the contents of the bids of *QISJ* and *EAA*. If *ATJ* accessed the bids of *QISJ* and *EAA*, that amounted to a serious breach of the principle of confidentiality enshrined in section 47 of the *Public Procurement and Disposal of Public Assets Act*.
76. What was gathered from the due diligence report is that some equipment is declared as owned by *EAA* and also declared by *QISJ* as leased from *ECL Agency Company Limited*. The due diligence report also indicates that the calibration certificates presented by both *QISJ* and *EAA* are for the same facility and in the names of *Hakata Koun Company Ltd* and *ECL Agency Company Limited*. The due diligence team concluded that the infrastructure and technology submitted by *EAA* is likely not owned by them.

77. The Applicant has not adduced evidence to show how a 2 bidders' competing claims of ownership of equipment put the said bidders in a position to influence the bid of the other or the bidding process.

78. **Issue no. 6 is resolved in the negative.**

Issue no. 7:

Whether UNBS departed from the Evaluation Methodology and Criteria prescribed in the bidding document while evaluating bids in the impugned procurement?

79. ATJ complains that UNBS departed from the technical compliance selection method stated in the bidding document and instead used the quality and cost method during evaluation of bids.

80. The relevant provision at page 22 of the Bidding Document under Section 3, *Evaluation Methodology and Criteria*, Part A: *Evaluation Methodology*, Item 1, *Methodology Used* states that ***The evaluation methodology to be used for the evaluation of bids received shall be the Technical Compliance Selection (TCS) methodology.***

81. Another relevant provision of the Bidding Document at page 24 is reproduced below:

TECHNICAL EVALUATION CRITERIA

Only Bids which have satisfied the Mandatory Requirements will proceed to the Technical Evaluation stage.

Technical responsiveness shall be evaluated in accordance with ITB Clause 31.

Technical Bids shall be evaluated on the basis of the Bidder's responsiveness to the Terms of Reference by applying the Evaluation Criteria and Point System specified below. Each responsive bid will be given a Technical Score (TS).

A Bid shall be rejected if it does not achieve a minimum Technical Score of 80 points based on the criteria shown in the table below OR if it shows material deviation from tender requirements/ specifications. Only the first three highest ranking bidders that have scored 80points and above shall be awarded the Contract.

Maximum number of points to be given under each technical evaluation criterion are as follows:

| <i>#</i> | <i>Evaluation Criteria</i> | <i>No. of points</i> |
|----------|-----------------------------|----------------------|
| <i>1</i> | <i>Specific Experience</i> | <i>35</i> |
| <i>2</i> | <i>Methodology Proposed</i> | <i>20</i> |
| <i>3</i> | <i>Key Personnel</i> | <i>25</i> |
| <i>4</i> | <i>Infrastructure</i> | <i>20</i> |
| | <i>Total:</i> | <i>100</i> |

The introduction of a technical score each responsive bid will be given a Technical Score (TS).

82. At the hearing Mr. the Head of the Procurement and Disposal Unit of UNBS stated that the evaluation methodology used was the quality and cost based method. He claimed that the reference to the *Technical Compliance Selection (TCS)* methodology stated in the bidding document was an “error”.
83. Section 71 (3) of the *Public Procurement and Disposal of Public Assets Act* states that no evaluation criteria other than stated in the bidding documents shall be taken into account. Regulation 7(1) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* provides that the evaluation of a bid shall be conducted in accordance with the evaluation criteria stated in the *Public Procurement and*

Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations, 2014 and in the Bidding Document. Regulation 7 (2) provides 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.

84. The evaluation method in the bidding document was never amended as provided for in ITB 8.
85. Therefore, the purported use of the quality and cost based method instead of the *Technical Compliance Selection (TCS)* methodology stated in the bidding document was illegal and also contrary to the bidding document.
86. The *Public Procurement and Disposal of Public Assets Appeals Tribunal* is a merits review body and has wide powers to set aside the original decision and substitute it with a new decision of its own. Implicit within such a power is the authority to consider both the lawfulness of the procurement decision it is reviewing and the facts going to the exercise of discretion, whether raised by the Applicant or not, provided all interested parties are provided with an opportunity to present their case (the right to be heard), are notified in advance that a decision is to be made on the basis of that material and are given an opportunity to respond (procedural fairness), determine the matter in an unbiased manner (an absence of bias) and give reasons for the decision. See: *Arua Municipal Council v Arua United Transporters' SACCO, High Court at Arua C.A 25 of 2017*.
87. As a merits review body, we have also scrutinised the bidding document and noted that the procurement was for **Non-Consultancy Services** i.e. Provision of Pre Export Verification of Conformity to Standards - Service Providers for used Motor Vehicles.

88. Regulation 6(1) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014* provides that bids for the procurement of supplies, works and non-consultancy services shall be evaluated using the *technical compliance evaluation* method, except that bids for text books, information technology and for design and build contracts may be evaluated using quality and cost based evaluation method under regulation 6(2). The merit point system is applicable to procurement of consultancy services under regulation 47 of the *Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Consultancy Services) Regulations, 2014*.
89. In the circumstances, the evaluation of technical bids by applying a *point system* in the bidding document, was illegal.
90. At the hearing, Mr. Godfrey Babalanda the Head of the Procurement and Disposal Unit of UNBS claimed, to our dismay, that the nature of the procurement was both consultancy and non-consultancy services. We do not agree. The bidding document is very clear that the subject of procurement was for non-consultancy services. It was therefore illegal to use a methodology which belongs to procurement of consultancy services. for non- consultancy services without any clearance from the Authority to deviate from the standard bidding document.
91. The use of an evaluation methodology which had not been specified in the bidding document and provided for under the law was also contrary to the principles of transparency, accountability and fairness enshrined in section 47 of the *Public Procurement and Disposal of Public Assets Act*.
92. We find merit in the complaint of ATJ that there was departure from the evaluation methodology.
93. **Issue no. 7 is answered in the negative.**

Issue no. 8:

Whether the bid of EAA was responsive to the requirements of the bidding document?

94. ITB 28.1 of the bidding document stipulated that the determination of a bid's compliance and responsiveness was to be based on the contents of the bid itself.
95. The Evaluation Methodology and Criteria in Section 3, Item 3.3 (4) at page 23, and Section 3, Item 6.2 at page 27 of the Bidding Document which stipulated that a bidder was to prove possession of Infrastructure and Technology at Inspection Centre(s) in Japan and United Arab Emirates (UAE). Presence in other countries of United Kingdom (UK), Singapore and South Africa was to be an added advantage. Possession of Infrastructure and Technology at Inspection Centre(s) in Japan and United Arab Emirates (UAE) was to be evidenced by Local Business License /Official Government Registry / Lease Agreement or other relevant document to demonstrate proof of ownership/existence).
96. We perused the record due diligence found that EAA failed to provide proof of legal existence in UAE and proof of legal ownership of infrastructure in Japan.
97. The due diligence report by UNBS states at page 7 that the team confirmed availability of inspection equipment at Yokohama Sun Phoenix Inspection Centre and Nittsu Kawasaki Inspection Centre. The report lists equipment found on site with calibration certificates in the name of EAA. The team however expressed doubt about the ownership by EAA of certain other facilities and equipment. That notwithstanding, there was no doubt expressed about the rest of the facilities and equipment submitted.

98. We are satisfied that *EAA* provided sufficient proof of possession of relevant facilities in Japan.
99. For evidence of physical presence in UAE, the Bidder attached a professional licence No. 548797 issued on 12 December 2012 with an expiry date of December 10, 2023 issued to *East Africa Auto Maint*.
100. They also attached an Agreement between *Badr Mahmud Jafar, Abdulla Hiados, Thurayya Mahmud Jafar and Abudulla Haidos* as Lessors and *East Africa Auto Maint* of Licence No 548797 as Lessee for lease of property in Plot 1969/A Al Nahda Street, Karaj/ Garage. This is contained in a translation made by Al Hamd Legal Translation LLC.
101. *EAA* also submitted a contract of purchase of 50 % shares in *East Africa Auto Maint* by Lee Sayer. Lee Sayer is described in the company profile of *EAA* as Vice President/Director.
102. It is our finding that the bid of *EAA* did not contain any proof of ownership of assets of *East Africa Auto Maint*.
103. There is no proof or document contemplated in ITB 4.2 of the Bidding document to show that *EAA* and *East Africa Auto Maint* are bidding as a joint venture or consortium or association.

104. The bid in this impugned procurement was solely submitted by *EAA*. The bidder could therefore not rely on the documents of another separate and distinct entity such as *East Africa Auto Maint*, as its own documentation, even if the shareholders of both companies are related. The purchase of 50% shares in *East Africa Auto Maint* by the Vice President/Director of *EAA* does not of itself make *EAA* the owner of *East Africa Auto Maint* assets. We therefore do not agree with the submission of counsel for *EAA* that *EAA* “indirectly” own *East Africa Auto Maint*. See similar decision of the Tribunal in ***My Maka Group v Uganda National Bureau of Standards, Application No. 9 of 2021*** and ***Kasokoso Services Limited v Jinja School of Nursing. And Midwifery, Application No. 13 of 2021***.
105. *EAA* also submitted an invoice dated February 27, 2021, from *Jabal Kilimanjaro Auto Elec. Mech*, addressed *EAA*, in respect of “Purchase of Inspection Equipment, Business License and Associated Assets”. The description of the assets is “Assets as agreed in List attached”. The list was not attached. No purchase agreement was attached.
106. The memorandum of understanding for the purchase of inspection of equipment dated February 24, 2021, referred to paragraph 1.3.1 of the July 5, 2023 compliant of *EAA* was not submitted as part of the bid on the EGP Platform. It thus could not be relied upon by the Evaluation Committee.
107. The *EAA* bid did not have proof of evidence of physical presence and location in UAE contrary to Evaluation Methodology and Criteria contained in Section 3, C, Detailed Evaluation Criteria, at page 29 of the Bidding Document. The bid was thus not substantially compliant and responsive to the bidding document and was rightfully disqualified pursuant to ITB 28.3 of the bidding document.
108. **Issue no. 8 is answered in the negative**

Issue no. 9:

Whether the bid of ATJ was responsive to the requirements of the bidding document?

109. We have perused the bid of *ATJ* and observed that the Applicant did not have proof of evidence of physical presence and location in UAE. The bid was not responsive to the Evaluation Methodology and Criteria in Section 3 of the bidding Document which requires proof of possession of Infrastructure and Technology at Inspection Centre(s) in Japan and United Arab Emirates (UAE).
110. *ATJ* only submitted the following documents;
- i) A professional license No. 870349 issued to *ATJ Auto Services Ltd* valid on December 23, 2023
 - ii) A lease agreement between *PAL Auto Garage* and *ATJ Auto Services UAE* dated February 22, 2023
 - iii) A sale agreement dated December 15, 2019 between *PAL Auto Garage* and *Auto Terminal Japan Ltd.*
 - iv) A service agreement dated April 9, 2018 between *PAL Auto Garage* and *ATJ Ltd* for purpose of utilising the services of *PAL Auto Garage* for purpose of providing pre-shipment inspection of used motor vehicles to Jamaica
111. The afore listed documents do not satisfy the evaluation criteria in terms of demonstrating ownership by local business licence or lease agreement.
112. The fact or assertion that *ATJ Auto Services Ltd* is a subsidiary of *ATJ* does not make *ATJ Auto Services Ltd* a bidder in the impugned procurement. Had *ATJ* intended to rightfully use the services or documents of *ATJ Auto Services Ltd* in this bidding process, it had to comply with the requirements of ITB 4.2 of the Bidding document by forming a joint venture, consortium, or association.

113. The bid of *ATJ* was thus not substantially compliant and responsive to the bidding document and was rightfully disqualified pursuant to ITB 28.3 of the bidding document.

114. **Issue no. 9 is answered in the negative.**

Issue no. 10:

What remedies are available to the parties?

115. Following the Preliminary and Technical evaluation, three companies met the preliminary and technical requirements. In order to authenticate the given information and recommend for award of contract, due diligence was consequently undertaken on the following companies that met the requirements;

- a) EAA Company Ltd.
- b) Quality Inspection Services Ltd.
- c) Auto Terminal Japan Ltd.

116. The purpose of the due diligence was to undertake physical verification of documents, key personnel, infrastructure and equipment as well as authenticate information presented in the proposals submitted by the bidders on eGP.

117. The due diligence team comprised members of the Evaluation Committee ie. Babalanda Godfrey, Patrick Kizito, Yasin Lemeriga, Innocent Namara and Caroline Agonzibwa.

118. The final recommendation of the due diligence report is split. Babalanda Godfrey, Caroline Agonzibwa, and Patrick Kizito recommended for award of contract to *M/s. Quality Inspection Services Inc. Japan*.

119. However, Mr. Yasin Lemeriga and Ms. Innocent Namara recommend for award of contract to *M/s. Quality Inspection Services Inc. Japan* and *M/s. EAA Company Ltd.*

120. The said due diligence report as well as the technical evaluation report were then submitted to the Contracts Committee.
121. The relevant procedures for decision making by the Evaluation Committee are prescribed under section 37 of the *Public Procurement and Disposal of Public Assets Act* and Regulation 5(7) to 5(15) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*.
- (9) *A decision of an evaluation committee shall be unanimous except where the evaluation methodology requires individual scores or marks.*
- (10) *Notwithstanding sub-regulation (9), where the evaluation committee is unable to reach a decision unanimously, the decision of the majority shall be the decision of the evaluation committee and shall be stated as such in the evaluation report.*
- (11) *The minutes of a meeting of the evaluation committee shall be signed by all members of the evaluation committee and shall form part of the records of the procurement for which the evaluation is conducted.*
- (12) *The minutes of a meeting of the evaluation committee shall be an annex to the evaluation report. (13) The evaluation report shall state the disagreements of the members, if any, including the reasons for the disagreement, the discussions held on the issue in disagreement and the views of the members of the evaluation committee on the matter.*
- (14) *The evaluation report shall be signed by all the members of the evaluation committee.*
- (15) *Where a member of the evaluation committee does not or is not able to sign the report, the member shall in writing give reasons why he or she did not or was not able to sign the report.*
122. An evaluation report must be prepared as prescribed under regulation 35 of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*.

123. In the instant case, we have noted 3 irregularities in the procedure for documenting the results of the evaluation.
124. First, there was a due diligence report but no final evaluation report following completion of the due diligence. The technical evaluation report and the findings of the due diligence should have resulted in a final evaluation report for submission to the Contracts Committee. This was not done. Instead, the raw technical evaluation report and due diligence report were submitted to the Contracts Committee as separate documents.
125. Secondly, it appears that the four members of the Evaluation Committee were unable to reach a unanimous decision as required by regulation 5 (9) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014*. Babalanda Godfrey, Caroline Agonzibwa and Patrick Kizito recommended an award of contract to *M/s. Quality Inspection Services Inc. Japan*. Mr. Yasin Lemeriga and Ms. Innocent Namara recommended an award of contract to *M/s. Quality Inspection Services Inc. Japan* and *M/s. EAA Company Ltd*. In such a scenario, the decision of the majority should be the decision of the Evaluation Committee. The disagreement should have been duly noted in the final evaluation report for submission to the Contracts Committee. This was not done.
126. Thirdly, there are no minutes of the meeting of the Evaluation Committee which made the impugned recommendations. The absence of minutes contravenes regulations 5 (11) and 5 (12) of the *Public Procurement and Disposal of Public Assets (Evaluation) Regulations 2014*.
127. We have also noted irregularities in the procedure for submitting the results of the evaluation to the Contracts Committee and the adjudication thereof. We have carefully studied the proceedings on the Electronic Government Procurement (EGP) Platform and noted the following:

128. On June 13 2023 at 11:53:58, Babalanda Godfrey, Head PDU, submitted to the Contracts Committee that *based on the due diligence report attached, and the majority score from the evaluation members, QISJ is recommended for your approval.*
129. Eng. John Paul Musimami, chairperson of the contracts Committee clicked “Approved” on the eGP system the recommendation for award to *M/s Quality Inspection Services Inc. Japan (QISJ)*. However, he made comments that monopoly is not good for the country when it comes to service delivery and it is the very reason why three service providers were sought for and that it is also emphatic in the bid document that a bidder with 80 points and above shall be awarded a contract. He therefore made a comment “recommended contract award to: 1. *M/s Quality Inspection Services Inc. Japan* and 2. *M/s. EAA Company Ltd.*”
130. Mufumbiro Hakim, member of the Contracts Committee, “Approved” on the eGP system the recommendation for award to *M/s Quality Inspection Services Inc. Japan (QISJ)*, but added comments to make his own recommendation for award to: 1. *M/s Quality Inspection Services Inc. Japan* and 2. *M/s. EAA Company Ltd.*
131. Kasule Lydia, member of the Contracts Committee, “Approved” on the eGP system the recommendation for award to *M/s Quality Inspection Services Inc. Japan (QISJ)*, and added comments to support her recommendation for award to *M/s Quality Inspection Services Inc. Japan (QISJ)*.
132. Olwa Joseph, member of the Contracts Committee, “Approved” on the eGP system the recommendation for award to *M/s Quality Inspection Services Inc. Japan (QISJ)*, and added some comments.
133. Tushemereirwe Margret, member of the Contracts Committee, did not vote.

134. Ssubi Johnson, member of the Contracts Committee, did not vote.
135. A decision of the Contracts Committee must be unanimous under regulation 13 (5) of the *Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations 2014*. In the instant case there was no unanimity. Where unanimity cannot be achieved, the decision is by a simple majority of the members present.
136. It would appear to us that Mufumbiro Hakim and Kasule Lydia clicked their approval on the system for award to *M/s Quality Inspection Services Inc. Japan (QISJ)*, but in fact intended to recommend award to 1. *M/s Quality Inspection Services Inc. Japan* and 2. *M/s. EAA Company Ltd.* Their approval on the system was equivocal, but technically once one clicks *Approved*, he or she is taken to have approved the submission from the PDU as it is. The problem arose from a misunderstanding of the Electronic Government Procurement (EGP) Platform. Indeed, in a meeting of the Contracts Committee held on July 4, 2023 to discuss the guidance from the PPDA, it was agreed that system challenges affected two members who voted *Approved* when they meant reject on the system yet their decision was for two bidders to be awarded the contract.
137. Despite the equivocal *Approval* by the Contracts Committee, the head of the PDU did not seek any clarification.
138. On June 27, 2023 at 11:42:42, Eng. John Paul Musimami, chairperson Contracts Committee stated on the system that the Contracts Committee is not able to conclude this procurement given the disagreements within the Evaluation Committee and within the Contracts Committee.
139. Still, despite the above communication from the Chairperson of the Contracts Committee, on June 27 2023 at 12:42:14, the Head PDU issued a best evaluated bidder notice in favour of

M/s Quality Inspection Services Inc. Japan (QISJ), citing purported approval by the Contracts Committee. On June 27, 2023 at 15:23:15, *M/s Quality Inspection Services Inc. Japan (QISJ)*, issued an acceptance letter for the Notice of Best Evaluated Bidder.


140. There is also ambiguity about the number of service providers required by UNBS. Section 3, Part C Item 6.6 (Technical Criteria) at page 23 of the Bidding Document provides that only the first three highest ranking bidders that have scored 80 points and above shall be awarded the Contract. This implies that the Entity envisaged a minimum of three service providers. This interpretation is corroborated by paragraph 8.1.1 of the administrative review report which states that the terms of reference of the procurement in the bid document required a minimum of three (3) service providers.
141. However, Section 3, Part D, Item 8 at page 29 of the Bidding Document provides that the best 03 (Three) bidders ranked from the top that score equal or more than 80 % in Technical Stage shall proceed to Post Qualification and Due diligence. At the hearing, we were informed by the Head of the Procurement and Disposal Unit that three was the maximum number of service providers required but if any did not pass post qualification and due diligence then the minimum was one, subject to passing post qualification and due diligence. In his view, paragraph 8.1.1 of the administrative review report was erroneous.
142. In view of the illegal evaluation methodology in the bidding document; the irregularities in the procedure for documenting the results of the evaluation; in the procedure for submitting the results of the evaluation to the Contracts Committee and the adjudication thereof; and the ambiguities regarding the number of service providers required by UNBS, we are not persuaded that this procurement was conducted in accordance with the law.

143. The errors and omissions are so fundamental that the impugned procurement must be cancelled.


E. DISPOSITION

1. Application No. 17 of 2023 is struck out as incompetent.
2. Application No. 15 is allowed in part.
3. Application No. 18 is allowed in part.
4. The administrative review decision of the Accounting Officer of *UNBS* dated July 14, 2023, is set aside.
5. The procurement by *UNBS* for Provision of Pre-Export Verification of Conformity to Standards Service Providers for Used Motor Vehicles under Procurement Reference No. *UNBS/NCONS/2022-2023* is cancelled.
6. The Entity may re-tender the procurement if it so wishes.
7. The Tribunal's suspension orders dated July 18, 2023 and July 31, 2023 are vacated.
8. Each party to bear its own costs.


Dated at Kampala this 8th day of August 2023.



NELSON NERIMA
MEMBER



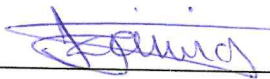
THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER



CHARITY KYARISIIMA
MEMBER