

**THE REPUBLIC OF UGANDA**

**IN THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC  
ASSETS**

**APPEALS TRIBUNAL AT KAMPALA  
APPLICATION NO. 20 OF 2021**

**OBON INFRASTRUCTURE DEVELOPMENT JV===== APPLICANT**

**VERSUS**

**1.MBARARA CITY**

**2.MBJ TECHNOLOGIES LIMITED::::::::::::::::::::::::::RESPONDENTS**

**APPLICATION IN RESPECT OF THE PROCUREMENT FOR  
PROVISION OF CONSULTANCY SERVICES FOR SUPERVISION OF  
ROADWORKS BY MBARARA CITY REF: MCC  
852/USMID/SRVCS/20-21/00001/Cluster 6**

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

## **DECISION OF THE TRIBUNAL**

### **A. Brief Facts**

1. On 24<sup>th</sup> September 2020, Mbarara City advertised a tender under Procurement Ref No: MCC 825/USMID/SRVCS/20-21/00001 for consultancy services for supervision of roadworks under Cluster 6 in Mbarara City (Major Victor Bwana Road (0.95km), Galt Road (0.63km), Stanley Road (0.78km), Ntungamo Municipal Council (Kajinya Road (1.37km) and Kabale Municipal Council (Bwankosya Road (0.76km), Bushekwire Road (0.34km), Rushoroza Road (2.49km).
2. Three bidders passed the technical evaluation and their financial bids were recommended for evaluation. These were the Applicant (*OBON and Infrastructure Development Ltd Joint Venture*); *MBJ Technologies Ltd in association with Hersun Consults Ltd*; and *UB Consulting Engineers in association with SEGAMU 14 Consults Ltd*.
3. On 5<sup>th</sup> March, 2021, the Applicant being a bidder for Cluster 6, submitted an application for an administrative review to the Accounting Officer of the 1<sup>st</sup> Respondent (the Entity). The Applicant complained about the short notice of the invitation for financial bid opening and lack of prior formal notification of the outcome of the technical evaluation stage.
4. The application for administrative review was accompanied with a post-dated cheque dated 31<sup>st</sup> March, 2021 of UGX 5,000,000 as fees for the administrative review.
5. On 12<sup>th</sup> March 2021, the Accounting Officer of the 1<sup>st</sup> Respondent dismissed the compliant on the ground that issuance of a post-dated cheque was not sufficient payment of administrative review fees.

- technical proposal had expired on December 24, 2020. That the payment of administrative review fees through post-dated cheque of 31<sup>st</sup> March 2021 was not among the payment methods put in place by the Authority through which administrative review fees are paid. Lastly, that the compliant was received on the same day of opening of the financial proposals but when the exercise had already taken place.
5. It was our finding that the accounting officer or his staff erred when they received the application and a post-dated cheque but failed to advise the Applicant on the facilities and proper mode of payment.
  6. The Tribunal also held that the phone call invitation to the financial bid opening was a contravention of section 57 of the Act as well as ITB 10.1 and 10.2.
  7. The Tribunal noted that the weighted technical scores and the weighted financial scores were then added up to determine the best evaluated bidder. [the statement is incomplete]
  8. The Tribunal found that the financial bids had not been opened at the time the application for administrative review was lodged with the Accounting Officer. Nevertheless, the evaluation committee proceeded to evaluate the financial bids and declared *MBJ Technologies Ltd in association with Hersun Consults Ltd* as the Best evaluated Bidder at the cost of UGX. 5,166,400,000. The Tribunal noted that no Best Evaluated Bidder notice was issued.
  9. The application was therefore allowed on 17<sup>th</sup> May 2021. The decision of the Accounting Officer of the Entity dated 12<sup>th</sup> March 2021 and the decision of the Authority dated 26<sup>th</sup> April 2021, were set aside. The procurement for Cluster 6 under Procurement Ref No: MCC 825/USMID/SRVCS/20-21/00001 was cancelled. The Entity was advised to re-tender the procurement if it so wished. Each party was ordered to bear its own costs.



**C. Application for judicial review**

1. *MBJ Technologies Ltd* filed Miscellaneous Cause No. 171 of 2021 in the Civil Division of the High Court seeking judicial review of the decision of the Tribunal. The application was premised on alleged violation of the right to be heard when the Tribunal made its decision. In a decision dated 29<sup>th</sup> July 2021 the High Court (Philip Odoki, J) allowed the application. He declared the Tribunal's decision void, quashed it and issued an injunction restraining the Entity from implementing the decision.

**D. Resumption of the procurement**

1. On 30<sup>th</sup> July 2021, the Senior Procurement Officer/Head Procurement and Disposal Unit of the Entity made a submission to the Contracts Committee seeking retrospective approval of the proposal validity period for six months and also approval of the financial evaluation report and its recommendations.
2. On the same day 30<sup>th</sup> July 2021, the Contracts Committee awarded the tender to *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* at a total contract price of UGX. 1,754,680,000.
3. By a letter dated 3<sup>rd</sup> August 2021 the Entity sought clearance of the contract by the Solicitor General. The Solicitor General cleared the contract on 20<sup>th</sup> August 2021.
4. By a letter dated 23<sup>rd</sup> August 2021, the Accounting Officer of the Entity notified *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* of the contract award. *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* accepted the award by letter dated 24<sup>th</sup> August 2021.
5. The agreement between *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* and Mbarara City was signed on 25<sup>th</sup> August 2021.

**E. 2<sup>nd</sup> application to the Tribunal**

1. The Applicant lodged the instant application on 27<sup>th</sup> September 2021.
2. The Applicant alleged that on the 17<sup>th</sup> September 2021, it learnt through an online platform, **Redpepper digital** that carried a headline “ **Mbarara RCC vows to arrest roads contractor**” that the 1<sup>st</sup> Respondent had awarded and in fact signed a contract with the 2<sup>nd</sup> Respondent and that the works relating to the impugned procurement had been flagged off. That when the Applicant’s Managing Director, Ronald Menya cross checked with the Town Clerk’s office, he confirmed these facts.
3. The Applicant contends that it was never notified of the best evaluated bidder as required by law and that the procurement process and specifically the manner in which the financial bids were opened was illegal.
4. That the 1<sup>st</sup> Respondent has concealed all information relating to the impugned procurement even after the Applicant sought to be updated about the procurement processes. That the Applicant therefore believes this application cannot be impartially handled by the 1<sup>st</sup> Respondent and that the Applicant’s rights have been affected by the 1<sup>st</sup> Respondent’s decision to award a contract that followed an illegal process.
5. The Applicant also avers that the 1<sup>st</sup> Respondent’s actions were carried out with the knowledge and benefit of the 2<sup>nd</sup> Respondent.
6. The application raised the following issues:
  - (1) *Whether the 1<sup>st</sup> Respondent’s failure to deliver and display the Best Evaluated bidder notice violated the procurement laws.*
  - (2) *Whether the 1<sup>st</sup> Respondent erred in conducting a procurement process that had been cancelled.*



7. The application seeks the following remedies:
- (i) *That the contract entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in respect to the procurement for Cluster 6 under procurement Ref No. MCC/825/USMID/SRVCS/20-21/00001 be cancelled.*
  - (ii) *The entity re-tenders the said procurement with strict adherence to law, practice and procurement processes.*
  - (iii) *The Respondents be ordered to pay costs of this Application.*

**F. Response to the application**

1. The Entity (1<sup>st</sup> Respondent) opposed the application on four grounds.
  - (1) That the application is improper before this Tribunal, premature and the Tribunal lacks jurisdiction to handle the same
  - (2) That the facts and the matters in issue before this Tribunal are res judicata having been decided in application No. 5 of 221.
  - (3) That the best evaluated bidder notice was displayed and delivered in accordance with the law.
  - (4) That the procurement process was conducted in accordance with the law.
2. The 2<sup>nd</sup> Respondent did not file any response to the application.

**G. Written submissions**

**Applicant**

1. On issue no. 1, counsel submitted that section 91I(1)(b) of the Public Procurement and Disposal of Public Assets Act as amended provides for redress to a person whose rights are adversely affected by a decision made by the Accounting Officer. The Applicant who participated in the bidding process of this procurement considers itself as being aggrieved by the decisions and actions of the Respondents hence this Application. That the

- 1<sup>st</sup> Respondent did not deliver and display the Best Evaluated bidder notice and this violated procurement laws and the bidding document.
2. That the Applicant by letter dated 10<sup>th</sup> August 2021 warned the 1<sup>st</sup> Respondent about the illegalities and required of it to communicate all decisions relating to this procurement. The 1<sup>st</sup> Respondent defiantly never responded to that letter and instead chose to conduct the procurement with the 2<sup>nd</sup> Respondent.
  3. Counsel submitted that there cannot be a valid contract between the Respondents that deviates from the law and bidding document. He cited *Roko Construction Ltd Vs PPDA, National Drug Authority and Seyani Brothers Ltd, Civil Appeal 59 of 2017*; *Makula International V Cardinal Nsubuga, Civil Appeal No. 4 of 1981*; and *Galleria in Africa v UEDCL SCCA 08/2017*.
  4. On issue no. 2, counsel submitted that in Tribunal Application No. 05 of 2021; *Obon Infrastructure Development JV Vs PPDA & Mbarara City* the Tribunal cancelled this procurement.
  5. The 2<sup>nd</sup> Respondent that wasn't party to those proceedings filed an application for judicial review and Tribunal's decision was set aside. That by the very nature of judicial review proceedings, the court did not concern itself with the merits of the Tribunal's decision but rather the procedure taken by the Tribunal.
  6. He cited *PPDA Vs Peace Gloria, Civil Appeal 06 of 2016* on the difference between judicial review and administrative merits review.
  7. On issue no. 2, counsel prayed for cancellation of the contract executed between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He also prayed that the Tribunal orders the Respondents to pay costs of this application.

### **1<sup>st</sup> Respondent**

8. The 1<sup>st</sup> Respondent raised 2 preliminary objections to the Applicant's application.



9. The first objection is that the application is improper before this Tribunal, premature and the Tribunal lacks jurisdiction to handle the same. That an aggrieved person in a bidding process must first seek redress from the Accounting Officer and then the Authority. That the application to this Tribunal as a first resort is premature and this Tribunal lacks jurisdiction to handle this matter.
10. The second objection is that the facts and matters in issue before this Tribunal are res-judicata having been decided in application no. 5 of 2021 (before this Tribunal) and Miscellaneous Cause no. 171 of 2021 before the High Court and were settled.
11. That it was up to the Applicant as a prudent litigant to have raised this issue in the High Court and have it resolved. Having failed to do so, the Applicant is estopped from raising this same issue before this Tribunal. In the alternative, if the Applicant did raise the said issue before the High Court and feels it was not resolved to its satisfaction, then it has the remedy to appeal the decision of the High Court but not to institute new proceedings before this Tribunal and grant it appellate jurisdiction over the High Court.
12. On the first issue, counsel submitted that the best evaluated bidder notice was displayed in accordance with the law on the 30<sup>th</sup> day of July 2021 and served on all the “best evaluated bidders” [SIC].
13. On the second issue, counsel submitted that the Applicant’s submissions on this issue are barred by the law of *Res Judicata*. That since the Applicant has admitted in his application and submissions that the High court set aside this Tribunal’s decision in Miscellaneous Cause No. 171 of 2021, then any grievances the Applicant has with the said High Court decision should have been addressed accordingly through an appeal.



14. Counsel finally submitted that the High Court's decision quashed the decision of this Tribunal, and further ordered the Respondents then (1<sup>st</sup> Respondent and Applicant now) not to implement the decision of this Tribunal dated 17<sup>th</sup> May 2021. That the procurement was not cancelled and hence the 1<sup>st</sup> Respondent's actions were not in error but were in furtherance of a court order.
15. He prayed that the application be dismissed with costs.

**Applicant's rejoinder**

16. On jurisdiction, counsel for the Applicant submitted that section 91I(1)(b) of the Public Procurement and Disposal of Public Assets Act as amended provides for redress to a person whose rights are adversely affected by a decision made by the entity. The Applicant who participated in the bidding process of this procurement considers itself as being aggrieved by the decisions and actions of the Respondents. That administrative review can be undertaken by the Tribunal upon a decision of a procuring and disposing entity by a person whose rights have been adversely affected and that person need not seek a review from the Accounting Officer as a forum of first instance.
17. That the breaches complained of by the Applicant constitute illegalities which this Tribunal cannot overlook.
18. On *res judicata*, counsel submitted that neither the Tribunal nor the court ever considered issues to do with display and service of best evaluated notices because at the time the said proceedings, the procurement had been halted and the stage of display and service of best evaluated notices had not been reached. The Judicial review application in the High Court that quashed the Tribunal decision was only considering the procedure taken by the Tribunal and not the merits thereof.
19. That the 1<sup>st</sup> Respondent has not provided any evidence of service of the best evaluated bidder notice.

**H. The oral hearing**

1. The Tribunal conducted an oral hearing on 13<sup>th</sup> October 2021 via zoom software.
2. Appearances and attendances were as follows:
  - i. Solomon Kisambira-Baleese, of ABBA Advocates, Counsel representing the Applicant. In attendance, Menya Ronald, a Director for Obon & and Infrastructure Development JV.
  - ii. Timothy Arinaitwe, of Paul Byaruhanga Advocates, Counsel representing the Respondent. In attendance, John M. Bahengane, the City Town Clerk of Mbarara City.
3. The 2<sup>nd</sup> Respondent did not file any documents or appear at the hearing although they were duly served with the Application, summons and related documents.

**I. Resolution by the Tribunal**

1. In determining this application, the Tribunal has considered the following documents:
2. The Application to the Tribunal and related Annexure dated September 27, 2021 marked at the hearing by the Tribunal as D1.
3. The 1<sup>st</sup> Respondent's Reply to the Application filed on September 30, 2021 marked at the hearing by the Tribunal as D2.
4. The Applicant's Letter correcting annexures to Application filed on October 4, 2021 marked at the hearing by the Tribunal as D3.
5. The Applicant's submission filed on October 6, 2021 marked at the hearing by the Tribunal as D4.
6. The 1<sup>st</sup> Respondent's Submissions filed on October 11, 2021 marked at the hearing by the Tribunal as D5.
7. Applicant's submission in rejoinder to preliminary Objections filed on October 13, 2021 marked at the hearing by the Tribunal as D6.



8. The Entire procurement action file together with all the bids in the said procurement filed on September 30, 2021 marked at the hearing by the Tribunal as D7.
9. Affidavits of Service deponed by Tribunal Process Server Ms. Namataka Catherine, effecting service of Application, summons and related documents on 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 27<sup>th</sup> September 2021 and 13<sup>th</sup> October 2021 marked at the hearing by the Tribunal as D8.

## **J. Preliminary objections**

### ***Preliminary objection no. 1- Whether the Tribunal has jurisdiction to hear this application.***

1. There are only five instances under which the Tribunal can exercise its jurisdiction. These instances are provided for under sections 89(8), 89(9) and 91I(1)(a)-c) of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021 namely:
  - a) *Where an Accounting Officer does not make a decision or communicate a decision within ten working days as required under section 89(7), or*
  - b) *where a bidder is not satisfied with the decision made by the Accounting Officer under section 89(8), or*
  - c) *under section 91I(1)(b), where a person's rights are adversely affected by a decision made by the Accounting Officer, or*
  - d) *under sections 89(9) and 91I(1)(c), where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach; or*
  - e) *under sections 89(9) and 91I(1)(c), where a bidder believes that the matter cannot be handled impartially by the procuring and disposing entity.*
2. Section 91I(1)(b) of the *Public Procurement and Disposal of Public Assets Act* created a wide and unique path for persons who are not necessarily bidders but are aggrieved by a decision made by an Accounting Officer to apply to the Tribunal for a review of the decision of a procuring and disposing entity.



3. Section 91I(1)(b) of the *Public Procurement and Disposal of Public Assets Act* and the regulations made under the Act have not prescribed any time limit for lodging an application with the Tribunal.
4. It is important to note that this unique avenue is not novel in Uganda's procurement legislation. A similar clause existed in the repealed section 91I (3) of the *Public Procurement and Disposal of Public Assets Act 2003* which stated as follows;
 

*In addition to subsections (1) and (2), the Tribunal has power to review a decision of the Authority where an application is properly made to the Tribunal by a procuring and disposing entity or by any person whose rights are adversely affected by a decision made by the Authority.*
5. It is therefore clear that applications for administrative reviews are not only restricted to bidders but also open to any persons whose rights are adversely affected by a decision of the Accounting Officer.
6. The Tribunal considered the question of who is a person whose rights are adversely affected by the decision of the Authority under the then section 91I (3) of the *Public Procurement and Disposal of Public Assets Act 2003* in *Old Kampala Students Association Vs. Old Kampala Senior Secondary School & PPDA, Application No. 7 of 2017* where it held as follows;
 

*".....in determining whether a person is adversely affected by a decision of the Authority so as to fall within the ambit of Section 91I (3), the Tribunal has to consider facts of each particular application"*
20. In that application, the Tribunal found that the Applicant was represented on the board of directors of the school. The Applicant was in possession of a certificate of recognition by the entity and as such, the Applicant was a recognised stakeholder of the entity capable of being adversely affected by the decision of the Authority
21. In the instant application, the Applicant chose to premise its Application on sections 91I(1)(b), 89(9) and 91I(1)(c) of the *Public Procurement and Disposal of Public Assets Act*. Section 91I(1)(b)

gives the Tribunal jurisdiction to handle the application of any person whose rights are adversely affected by a decision made by the Accounting Officer.

22. At the hearing of the Application, counsel for the Applicant abandoned reliance on sections 89(9) and 91I(1) (c).
23. The Applicant alleges various breaches of the law and the bidding document. The Applicant also claims that the procurement was cancelled. We are persuaded that the application pleads averments which *prima facie* show an aggrieved person within the meaning of section 91I(1)(b). Whether or not the averments are correct is a matter to be visited when inquiring into the merits of the application. In any case, jurisdiction is not conferred by an Applicant. Jurisdiction is established by determining whether the applicable legal provisions are applicable to the pleaded parties, subject matter and dispute.
24. We did not find merit in the 1<sup>st</sup> Respondent's argument that the Applicant should have applied to the Authority before proceeding to the Tribunal. This is because administrative review by the Authority under Section 91 of the *Public Procurement and Disposal of Public Assets Act 2003* was repealed by section 34 of the *Public Procurement and Disposal of Public Assets (Amendment) Act 2021*.
25. **Preliminary objection no.1 is overruled.**

***Preliminary objection no. 2- whether this application is barred by res judicata***

3. The doctrine of *res judicata* prevents adjudication of a matter which is already judged. The rationale is to prevent multiplicity of suits and bring finality to litigation. See the Court of Appeal decision in ***General Industries (U) Ltd v Non Performing Assets Recovery Trust & Ors (Civil Appeal-2007/51) [2019] UGCA 1.***



4. In Uganda, it is codified in Section 7 of the Civil Procedure Act which states as follows;

*"7. Res judicata*

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court."*

5. In *Boutique Shazim Ltd v Norattam Bhatia & Anor (Civil Appeal-2007/36) [2009] UGCA 45*, the Court of Appeal held that;

*"Essentially the test to be applied by court to determine the question of res judicata is this; **“is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new cause of action which he or she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon?** If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belongs to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the same time”*

8. The impugned notice of best evaluated bidder and the impugned contract were not in existence at the time of filing and adjudication of Application no. 5 of 2021 before this Tribunal and Miscellaneous Cause no. 171 of 2021 before the High Court. The complaints in the instant application cannot be said to be matters which were raised or ought to have been raised in the previous litigation. In any case, as pointed out by the judge in the ruling of Miscellaneous Cause no. 171 of 2021, in judicial review, the court is not concerned with the decision arrived at, but rather the decision-making process. Even if the Tribunal had adjudicated those complaints, which is not the case, res judicata would still



not apply because the High Court declared the Tribunal decision to be void ie it does not exist. Obviously a nullified decision cannot give rise to res judicata.

9. **The second preliminary objection is overruled.**

**K. Merits of the Application.**

10. We shall now revert to the merits of the Application.

**Issue no.1:**

**Whether the 1<sup>st</sup> Respondent's failure to deliver and display the Best Evaluated bidder notice violated the procurement laws.**

11. The notice of best evaluated bidder in this procurement is dated 30<sup>th</sup> July 2021. It indicates a date of display of 30<sup>th</sup> July 2021 and a date of removal of 3<sup>rd</sup> August 2021.
12. Regulation 85 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* provides as follows:
85. (1) A procuring and disposing entity shall, within five days of the decision of the Contracts Committee to award a contract, display a notice of the best evaluated bidder.
- (2) A notice of the best evaluated bidder shall not amount to a contract.
- (3) A notice of best evaluated bidder shall be displayed on a procuring and disposing entity's notice board and may be posted on the Authority's website.
- (4) A notice of best evaluated bidder shall be published for a minimum of—
- (a) ten working days prior to contract award in the case of open or restricted bidding; and
- (b) ten working days prior to contract award, in the case of quotations and proposals procurement or direct procurement.

- (5) *A notice of best evaluated bidder shall, at the time it is displayed in accordance with subregulation (6), be sent to all bidders who participated in the procurement.*
- (6) *Where a decision to award a contract is changed after the publication of a notice of best evaluated bidder, a new notice of best evaluated bidder shall be displayed, in accordance with this regulation, prior to contract award or placement.*
13. A similar provision in the law applicable to central government procuring and disposing entities is found in regulation 4(1)(a)-(c) of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations, 2014* which states as follows;
- A procuring and disposing entity shall, within five working days after the decision of the Contracts Committee to award a contract-*
- a) to deliver a copy of the notice of best evaluated bidder to all bidders who participated in the bidding process;*
  - b) display a notice of best evaluated bidder on the notice board of the procuring and disposing entity; and*
  - c) send a copy of the notice of best evaluated bidder to the Authority for publication on the website of the Authority.*
14. We note that the requirement that the entity delivers a copy of the notice of best evaluated bidder to all bidders who participated in the bidding process is missing from Regulation 85 (1) and (3) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*;
15. The bidder is only expected to find out the details of the conclusion of a procurement process from a notice of best evaluated bidder displayed on the notice board of a procuring and disposing entity. Further, the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations* makes the submission of the *notice of best evaluated bidder* to the Authority for publication on its website discretionary.
16. Nonetheless, ITB 42.1 at page 24 of the bidding document required the procuring and disposing entity to “... *issue a Notice of Best*



*Evaluated Bidder, place such Notice on public display for the prescribed period and copy the notice to all Bidders prior to proceeding with the Contract award*". The 1<sup>st</sup> Respondent was therefore under a duty to copy and deliver the notice of best evaluated bidder to all bidders who participated in the said procurement process.

17. In view of the requirement of ITB 42.1 and having indicated on the notice of best evaluated bidder that it was copied to three bidders namely *Segamu 14 Consults Ltd, Obon & Infrastructure Development JV* and *MBJ Technologies Ltd in association with Hersun Consults Ltd*, it was incumbent on the 1<sup>st</sup> Respondent to deliver the notice of best evaluated bidder to all bidders who participated in the said procurement process.
18. The 1<sup>st</sup> Respondent's Response to the Application stated that "The best evaluated bidder notice was displaced [SIC] and delivered in accordance with the law". Counsel for the Entity submitted that the best evaluated bidder notice was displayed in accordance with the law on the 30<sup>th</sup> day of July 2021 and served to all the "best evaluated bidders" [SIC].
19. Under section 103 of the Evidence Act, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Under section 106 of the Evidence Act, in civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.
20. The 1<sup>st</sup> Respondent, who alleges that the best evaluated bidder notice was displayed and served, must prove that fact. That is a fact especially within the knowledge of the 1<sup>st</sup> Respondent. However, no evidence was led by the 1<sup>st</sup> Respondent to prove that averment. The Town Clerk of the 1<sup>st</sup> Respondent attended the hearing but claimed that he had no knowledge of the matter.
21. The notice of best evaluated bidder itself illegally provided a period of display from 30<sup>th</sup> July 2021 to 3<sup>rd</sup> August 2021, which is shorter than the ten working days prescribed under regulation 85 (4) (a) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.



22. At the hearing of the application, we asked the Town Clerk about the propriety of the display period in the notice of best evaluated bidder. He claimed that he had no knowledge of the matter and asked for time to consult the procurement officer. We agreed to give him time and allowed him to respond to our queries by email.
23. The queries were duly sent by email but the response to this query was made by the 1<sup>st</sup> Respondent's counsel, who is not a staff of the entity and surely not a witness in this case. He claimed that the best evaluated bidder notice is still on display. That claim is in stark contrast to the plain terms of the notice which indicates a removal date of 3<sup>rd</sup> August 2021. A communication of counsel cannot override the express terms of a written document issued by the 1<sup>st</sup> Respondent.
24. There was failure to display and serve the notice of best evaluated bidder, contrary to ITB 42.1, regulation 85 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* and section 45 of the *Public Procurement and Disposal of Public Assets Act 2003*.
25. Where there is no evidence that the notice of best evaluated bidder was displayed or even proof of delivery of the same, then there is no compliance as required under the law. See decisions of the Tribunal in *Kasokoso Services Limited Vs. Jinja School of Nursing and Midwifery, Application No. 13 of 2021* and *Abasamia Hwolerane Association Ltd Vs. Jinja City Council, Application No. 12 of 2021*.
26. We are persuaded that no valid notice of best evaluated bidder was displayed and served in accordance with the law and the bidding document.
27. **Issue no. 1 is answered in the affirmative.**

**Issue no.2**

**Whether the 1<sup>st</sup> Respondent erred in conducting a procurement process that had been cancelled.**

28. The Tribunal in its decision in Application No. 5 of 2021 issued on May 17, 2021 set aside the decisions of the Accounting Officer of

the Entity dated 12<sup>th</sup> March 2021 and the decision of the Authority dated 26<sup>th</sup> April 2021 and directed the cancellation of the impugned procurement pursuant to section 91I (5) (c) of the Act. The High Court vide Misc. Cause No. 171 of 2021 declared the Tribunal's decision void, quashed it and issued an injunction restraining the Entity from implementing the decision. The effect of the order of the High Court meant that the entity was bound to continue with the procurement process to a logical conclusion, in accordance with the law.

29. In view of the decision of the High Court, we cannot agree with the Applicant that the procurement remained cancelled.
30. Subject to our other findings below, issue no. 2 as framed is answered in the negative.
31. Nevertheless, nullification of the Tribunal's decision did not mean that the Entity can resume the procurement in an illegal manner. The procurement still had to be continued to its logical conclusion in accordance with the law and the bidding document.
32. This Tribunal has jurisdiction to enquire into the impugned contract and determine whether it was lawful. As a merits review body, the Tribunal's inquiry is not limited to the issues raised by the parties. Under section 91I of the *Public Procurement and Disposal of Public Assets Act, 2003* as amended by Act 15 of 2021, the Tribunal has jurisdiction to review decisions of a procuring and disposing entity.
33. In *Public Procurement and Disposal of Public Assets Authority v Basaar Arua Bus Operators Cooperative Society Limited, High Court at Arua, Civil Appeal no. 0004 of 2016 (arising from PPDA Appeals Tribunal Application no. 6 of 2015)*, the substance of the appeal questioned the scope of powers exercisable by the Public Procurement and Disposal of Public Assets Tribunal. Counsel for the appellant argued that by the Tribunal formulating its own issue was a violation of the rules of natural justice.



34. We respectfully wish to adopt Hon Justice Stephen Mubiru's exposition of the principles governing the powers of a merits review body such as this Tribunal.
35. Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the correct decision, if there is only one, or the preferable decision, if there is more than one correct decision. Merits review involves standing in the shoes of the original decision maker, reconsidering the facts, law and policy aspects of the original decision. In a merits review, the whole decision is made again on the facts.
36. The power to set aside the original decision and substitute it with a new decision of its own requires the PPDA Tribunal to stand in the shoes of the original decision maker, reconsider the facts, law and policy aspects of the original decision. It is authorised to exercise all the powers and discretions that are conferred on the person who made the decision under review based on the material that was before and that which ought to have been before that person, whether or not that person took all that material into account or not, provided that it is material which ought to have been reasonably taken into account.
37. The PPDA Tribunal is required to determine the substantive issues raised by the material and evidence advanced before it and, in doing so, it is obliged not to limit its determination to the "case" articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant. In doing so, it may frame the case differently from how it has been framed by the parties.
38. We shall therefore proceed to re-examine and review the documents before us to determine whether the 1<sup>st</sup> Respondent conducted the resumed procurement in accordance with the law and the bidding document.
39. ITB 20.1 of the bidding document indicates that the bids shall remain valid for the period specified in the BDS after the date of



the bid submission deadline prescribed. The BDS prescribed a bid validity period of 180 working days. The date of bid opening is indicated to be November 11, 2020 as per ITB 27.1 of the bidding document and the BDS. The 180 working days from November 11, 2020 were due to expire on August 4, 2021.

40. A review of the procurement action file indicates that on 30<sup>th</sup> July 2021, the Senior Procurement Officer/Head Procurement and Disposal Unit of the Entity made a submission to the Contracts Committee seeking retrospective approval of the proposal validity period for six months from April 2021 to September 2021. He also sought approval of the financial evaluation report and its recommendations. The submission was made using LG PP Form 2.
41. On the same day 30<sup>th</sup> July 2021, under Minute No. 05/CC/30/07/21/22, the Contracts Committee awarded the tender to *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* at a total contract price of UGX. 1,754,680,000 VAT exclusive. The minutes of the Contracts Committee are silent on the request for retrospective approval of the proposal validity period.
42. By a letter dated 3<sup>rd</sup> August 2021 the Entity sought clearance of the contract by the Attorney General. The Solicitor General cleared the contract on 20<sup>th</sup> August 2021.
43. By a letter dated 23<sup>rd</sup> August 2021, the Accounting Officer of the Entity notified *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* of the contract award. *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* accepted the award by letter dated 24<sup>th</sup> August 2021.
44. The agreement between *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* and Mbarara City was signed on 25<sup>th</sup> August 2021.
45. At the hearing of this application, we asked Mr. John M. Bahengane, the Town Clerk/Accounting Officer of the Entity about the validity of the notice of best evaluated bidder and the signed contract. He claimed that he had no knowledge of the matter and asked for time to consult the procurement officer. We agreed to give him time and allowed him to respond to our queries by email. The

following queries were accordingly sent by email on 13<sup>th</sup> October 2021 and the Entity was required to provide the information by close of business on 14<sup>th</sup> October 2021.

- *The best evaluated bidder notice indicates a display date of 30<sup>th</sup> July 2021 and a removal date of 3<sup>rd</sup> August 2021. Was that proper?*
- *Under the bidding document, bids were to be valid for 180 working days. When did the bids expire?*
- *Were the bidders ever requested to extend their bids validity?*
- *If so, what procedure was used?*
- *Was the best evaluated bidder's bid still valid when the contract was signed on 25 August 2021?*

46. The response to these queries was made by the 1<sup>st</sup> Respondent's counsel. By letter dated 15 October 2021, Paul Byaruhanga Advocates advised as follows:

- The best evaluated bidder notice is still on display.
- The contract was signed on the 25<sup>th</sup> day of August 2021 more than 10 working days after the display period.
- The bids were meant to expire 180 working days excluding public holidays from the 19<sup>th</sup> day of November 2020. Calculation of this would put the expiry date on approximately 12<sup>th</sup> August 2021.
- The bidders were requested to extend their bids validity under minute dated 30<sup>th</sup> July 2021, that is part of the procurement documents submitted by the 1<sup>st</sup> Respondent. Response to the extension by *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* dated 9<sup>th</sup> August 2021 was attached.
- Basing on the above, the best evaluated bidder's bid was not valid when the contract was signed on 25<sup>th</sup> August 2021.

47. With due respect, counsel is not a staff of the Entity. He was not a witness in this case. Mr. John M. Bahengane, the Town Clerk/Accounting Officer of the Entity did not bother to respond to the queries. He did not make any effort to cause any other



technical person in the Entity's Procurement and Disposal Unit to respond to the queries.

48. Be that as it may, we are not in the least persuaded by the Entity's defence of the validity of the bids and the executed contract.

49. Bid validity and extension is governed by regulation 49 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. It provides as follows:

*49 (1) Bid documents shall state the period within which a bid is to remain valid.*

*(2) The bid validity period shall be calculated from the closing date of the bid submission and shall remain in force until the close of business on the last day of the validity period.*

*(3) When determining the duration of a bid validity period, sufficient time shall be allowed to enable—*

*(a) the procuring and disposing entity to undertake an evaluation, post-qualification and negotiations, as appropriate;*

*(b) the Contracts Committee to adjudicate the award of contract recommendations;*

*(c) a bidder to challenge the award decision before a contract is formed; and Bid validity.*

*(d) the procurement and disposal unit to prepare a letter of bid acceptance or contract document and obtain all necessary approvals prior to issue of the letter or document, within the validity period of the bid .*

*(4) An extension to the initial period of a bid validity shall not normally be requested from a bidder.*

*(5) Where an extension to the bid validity period becomes necessary, a bidder shall be requested in writing, before the expiry of validity of their bid, to extend the validity for a minimum period to complete the process outlined in sub regulation (3).*

*(6) In extending the validity of a bid, the bidder shall not be permitted to change the price or any other details of the bid except those conditions relating to the validity of the bid.*

- (7) *A bidder is free to refuse to extend the validity of the bid, without forfeiting his or her bid security.*
50. ITB 20.3 of the bidding document provides as follows:  
*In exceptional circumstances prior to the expiration of the bid validity period, the Procuring and Disposing Entity may request Bidders to extend the period of validity of their bids. The request and the responses shall be made in writing. If a Bid Security is required in accordance with ITB Clause 21, it shall also be extended for a corresponding period. A Bidder may refuse the request without forfeiting its Bid Security. A Bidder granting the request shall not be required or permitted to modify its bid.*
51. The only method available for bid extension is provided for under regulation 49(5) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. The provision is to the effect that where an extension to the bid validity period becomes necessary, a bidder shall be requested in writing before the expiry of the validity of their bid, to extend the validity for a specified period.
52. It is worthy to note that extension of bids applies to all bidders in a procurement process and not exclusive to a single bidder. The extension to the bid validity period and a request for a bidder to extend the validity of its bid is supposed to be made in writing and before the expiry of validity of their bid. The law therefore assumes a prospective but not retrospective extension of bid validity.
53. According to the 1<sup>st</sup> Respondent's counsel, the bidders were requested to extend their bids validity under the minute dated 30<sup>th</sup> July 2021. A purported response to the extension was made by *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* on 9<sup>th</sup> August 2021. However, that letter is not on the procurement file. It also bears no acknowledgment of receipt by the Entity.
54. Under the law, the Entity must request all bidders to extend the validity of their bids before expiry thereof. Where the bids had expired by August 4, 2021, the 1<sup>st</sup> Respondent could not retrospectively extend the validity of bids. In absence of any proof



- that the bidders were actually requested to extend validity of their bids and that they actually did extend their bids, it follows that the procurement process had come to an end.
55. Expiry of a bid's validity is a matter of law and the Tribunal has consistently held that once the bid validity expires, the procurement process comes to an end. See Tribunal Decisions in *Kasokoso Services Limited vs. Jinja School Of Nursing And Midwifery* Application No.13 of 2021; *Acacia Place Ltd vs. PPDA & Electoral Commission* Application No. 10 of 2021; *Kazini Fredric vs. PPDA* Application No. 16 of 2015; and *Twed Property Development Limited vs. PPDA* Application No. 9 of 2015.
  56. A similar position was arrived at in *Hoima Taxi/Bus Owners & Drivers Saving & Credit Cooperative Society vs PPDA, Application No.5 of 2014* where bids in the said Application expired and Hoima District Council did not request bidders to extend their bids. The Tribunal held that there was no valid bid.
  57. In any case, the Entity cannot purport to extend the validity of bidders' bids. The purported submission by the Senior Procurement Officer/Head Procurement and Disposal Unit of the Entity to the Contracts Committee seeking retrospective approval of the proposal validity period for six months from April 2021 to September 2021 was therefore illegal. The purported extension of bid validity by *M/S MBJ Technologies Ltd in association with Hersun Consults Ltd* on 9<sup>th</sup> August 2021 was also illegal.
  58. There is also no evidence that there was extension of bid security.

**Issue no.3:**

**What remedies are available to the parties**

59. Having found that the bid validity come to an end, it follows that the letter of award of contract to *MBJ Technologies Ltd in association with Hersun Consults Ltd* dated 23<sup>rd</sup> August 2024 and the subsequent execution of the contract on 25<sup>th</sup> August 2021 were inconsequential and void.

60. The decision in *Makula International V Cardinal Nsubuga, Civil Appeal No. 4 of 1981* is very instructive on illegalities;

*“A court of law cannot sanction that which is illegal. Illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is dully brought to the notice of court”.*

61. Similarly, in *Galleria in Africa Vs UEDCL, SCCA 08/2017*, the Supreme Court in a lead judgement delivered by Faith Mwendha JSC stated at page 9;

*“On the other hand, with respect, I do not agree with the High court decision that procurement can be valid if the provisions of the law are not complied with provided the objectives of the Act are met. Firstly, the objectives of the Act cannot be met without due regard to the provisions of the law as already stated in this judgment. The provisions of the Public Procurement and Disposal of Public Assets Act are the life engine of its objectives.*

*The provisions in issue are clear. The objectives of the Act for all purposes and intents are to achieve fairness, transparency and value for money procurement among others. Therefore, breach of the provisions is not a mere irregularity since it goes to the core of the Act. The wording in S.76 (3) is mandatory so non observance leads to fatality”.*

62. It therefore follows that the award to and execution of a contract with *MBJ Technologies Ltd in association with Hersun Consults Ltd* was contrary to the law. The result of this, is that the contract is cancelled and set aside.

63. In view of the cavalier and illegal conduct of the 1<sup>st</sup> Respondent and the casual way in which its Accounting Officer handled this procurement and the hearing, this is a proper case where we shall exercise our discretion to award costs to the Applicant.

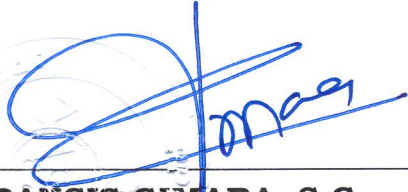


64. It seems to us that Mr. John M. Bahengane, the City Town Clerk of the 1<sup>st</sup> Respondent does not understand his responsibilities as an Accounting Officer.
65. Under section 26(1) of the *Public Procurement and Disposal of Public Assets Act*, and regulation 14 of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, the Accounting Officer of a procuring and disposing entity has overall responsibility for the execution of the procurement and disposal process in the procuring and disposing entity.
66. Regulation 13 (3) of the *Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* requires every accounting officer of a procurement and disposal entity to ensure that its duty is properly and professionally performed in accordance with the legal requirements and in order to guarantee independence of action with the objective of eliminating corrupt or fraudulent practices.
67. Mr. John M. Bahengane, the City Town Clerk/Accounting Officer of the Entity, failed to respond to basic queries and tried to shift responsibility to the Procurement Officer. We were not in the least impressed by Mr. John M. Bahengane. He bears responsibility for mismanagement of this procurement and the loss occasioned in terms of resources and delay in project implementation.

**L. DISPOSITION**

1. The application is allowed.
2. The contract between Mbarara City Council and *MBJ Technologies Ltd in association with Hersun Consults Ltd* dated 25<sup>th</sup> August 2021 is cancelled and set aside.
3. The 1<sup>st</sup> Respondent shall pay the Applicant's taxed costs for this Application.

Dated at Kampala this 18<sup>th</sup> day of October, 2021.



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



**NELSON NERIMA**  
**MEMBER**



**THOMAS BROOKES ISANGA**  
**MEMBER**



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



**PAUL KALUMBA**  
**MEMBER**

