

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

APPLICATION NO. 45 OF 2022

BETWEEN

IMPIGER TECHNOLOGIES PRIVATE LIMITED ===== APPLICANT

AND

HIGHER EDUCATION STUDENTS FINANCING BOARD==RESPONDENT

**APPLICATION FOR ADMINSTRATIVE REVIEW OF THE DECISION OF
THE ACCOUNTING OFFICER IN RESPECT OF THE PROCUREMENT FOR
CONSULTANCY SERVICES TO UPGRADE THE INTEGRATED LOAN
MANAGEMENT INFORMATION SYSTEM (ILMIS) UNDER PROCUREMENT
REFERENCE NUMBER HESFB/CONS/2021-22/00030.**

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

A. BRIEF FACTS

1. On 28th October 2021, the Higher Education Students Financing Board (the Respondent) published a Notice of Expression of Interest in the New Vision newspaper for the procurement of consultancy services to upgrade the integrated loan management information system (ILMIS) and integrate other modules of finance and accounting, human resources, procurement, stores and inventory management under Procurement Ref No. HESFN/ CONS/2021-22/00030
2. On 11th November 2021, three (03) bidders namely *Impiger Technologies Private Ltd* (the Applicant), *MFI Document Solution Ltd* and *Future Technologies Ltd* submitted expressions of interest. The bidders were shortlisted and invited to submit technical and financial proposals on 14th December 2021. Proposals from the shortlisted bidders were received and opened on 10th February 2022.
3. On 9th March 2022, the Contracts Committee approved the technical evaluation report. The Evaluation Committee in its technical evaluation report dated 4th March 2022 found the technical proposals of *Impiger Technologies Private Ltd* and *MFI Document Solution Ltd* to be non-responsive to the requirements of the Bidding Document having scored 60% and 51% respectively, below the minimum qualifying mark of 70%. *Future Technologies Ltd* scored 81% at the technical evaluation stage and was recommended for evaluation of its financial proposal.
4. On 23rd March 2022, the Applicant being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer of the Respondent.
5. On 9th August 2022, following numerous administrative actions taken by the Respondent, the Accounting Officer of the Respondent informed the Applicant that the Evaluation Committee had found merit in its complaint of 23rd March 2022 and that the administrative review fees paid by the Applicant were being refunded. However, the Accounting Officer further informed the Applicant that due to significant changes

in the terms of reference, the Contracts Committee had cancelled the procurement with the recommendation to re-tender.

6. On 18th August 2022, the Applicant being aggrieved by the decision of the Accounting Officer to cancel the procurement, applied for administrative review before the Accounting Officer. On 24th August, the Accounting Officer responded contending that he had no mandate to handle the complaint again.
7. On 26th August 2022, the Applicant filed **Application No. 25 of 2022** with this Tribunal for review of the decision of the procuring and disposing entity to cancel the procurement process.
8. In a decision rendered on 16th September 2022, the Tribunal allowed **Application No. 25 of 2022** having found that the purported cancellation of the procurement was unlawful. The Tribunal directed the Respondent's Contracts Committee to determine a course of action subsequent to rejection of the technical re-evaluation report in a manner consistent with the law and its decision within ten days from date of the Tribunal decision.
9. The Respondent undertook a re-evaluation following the decision of the Tribunal and on 26th September 2022, *Future Technologies Ltd* was informed that its submitted technical proposal was non-complaint for omission to provide a manufacturer's authorization from Microsoft Dynamics 365 as proposed for the Financial Module and Pro servers and as such, its financial proposal would be returned unopened after the award of the contract.
10. On 7th October 2022, *Future Technologies Ltd* being dissatisfied with the evaluation process, applied for administrative review before the Accounting Officer of the Respondent.
11. On 17th October 2022, the Accounting Officer responded to the complaint of *Future Technologies Ltd* dated 7th October 2022 contending that there were significant changes in the technical details

and circumstances of the procurement requirement and that the procurement process would be cancelled and retendered.

12. On 25th October 2022, the decision by the Respondent to cancel the procurement process was communicated to *Impiger Technologies Private Ltd* (the Applicant) and *Future Technologies Ltd*.
13. On 1st November 2022, the Applicant's lawyers prepared a complaint on behalf of the Applicant in a letter addressed to the Respondent's Executive Director (Accounting Officer) challenging the cancellation of the procurement process. The letter was received by the Respondent on 4th November 2022.
14. On 14th November 2022, the Respondent's Accounting Officer in a letter responded to the Applicant's complaint dated 1st November 2022 by upholding the cancellation of the procurement process.
15. On 15th November 2022, the Applicant's lawyers wrote a letter notifying the Accounting Officer of the Applicant's intention to apply for further administrative review before this Tribunal.
16. On 23rd November 2022, being aggrieved by the Accounting Officer's decision, the Applicant lodged this instant application with the Tribunal.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant averred that the procurement process was illegally cancelled by the Respondent.
2. The Applicant contended that any changes in the Statement of Requirements must be initiated by the User Department evidenced by a report of the User Department which must contain required changes with the necessary recommendation to the Procurement Disposal Unit (PDU) to cancel the procurement based on the initiated and proposed changes in accordance with section 34 and 35 of the PPDA Act. That

in absence of the report or minutes of the User Department, there will be no valid submission by the PDU to the Contracts Committee to approve the cancellation of the procurement in accordance with section 75(3) of the PPDA Act and any purported cancellation will be null and void.

3. The Applicant averred that the Respondent did not adhere to the roles of the User Department enshrined under section 34 and 35 of the PPDA Act prior to the decision to cancel the procurement by the Accounting Officer as stated in his communication dated 17th October 2022 and that therefore the alleged submission by the PDU to the Contracts Committee without recommendation of the User Department to specifically cancel the contract made the alleged cancellation illegal and not in accordance with section 75 of the Act.
4. The Applicant contended that the Respondent's proceedings of 24th October 2022 were a mere cover up by the Respondent's procurement in an attempt to validate an illegal cancellation which was made by the Accounting Officer on 17th October 2022 without regard to lawful procedure set out in the PPDA Act and the Regulations thereunder.
5. The Applicant prayed that the Tribunal finds and declares that the purported cancellation to be null and void ab initio; that there is persistent breach of the PPDA Act by the Respondent; that the procurement process referred to the Authority to temporarily transfer the procurement and disposal function to a third-party agency to complete the procurement process; that the Applicant's deposit of UGX 5 Million for administrative review be refunded; that the Applicant be awarded general damages for the time, inconvenience and forbearance arising from the illegal actions of the Respondent; and that costs be awarded to the Applicant for this application and the administrative review complaint before the Accounting Officer.

C. REPLY TO THE APPLICATION

1. The Respondent averred that the cancellation of the procurement process is valid and that the Respondent followed all the procedures provided for in the PPDA Act, 2003 and the Regulations made thereunder.
2. The Respondent contended that during the administrative review investigation, the Accounting Officer received information from the Manager ICT on 20th October 2022 that there was a significant change in the technical requirements of the procurement. That this information was sought from the various departments of the Respondent by the Accounting Officer in accordance with Regulation 5(c) of the PPDA (Administrative Review) Regulations, 2014.
3. The Respondent averred that on 24th October 2022, the Contracts Committee under Minute No. 141 approved the cancellation of the procurement process on the basis of the need for significant changes to the Terms of Reference.

D THE ORAL HEARING

The Tribunal held an oral hearing on **12 December 2022** via zoom software. The appearances were as follows:

1. Mayende David Ojiambo represented the Applicant.
2. The Respondent was represented by Ojara Timothy, Manager Legal of Higher Education Students Financing Board.

E. SUBMISSIONS

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

Applicant

1. The Applicant averred that the procurement process was illegally cancelled by the Respondent.
2. The Applicant contended that any changes in the Statement of Requirements must be initiated by the User Department evidenced by a report of the User Department which must contain required changes with the necessary recommendation to the Procurement Disposal Unit to cancel the procurement based on the initiated and proposed changes in accordance with section 34 and 35 of the PPDA Act. That in absence of the report or minutes of the User Department, there will be no valid submission by the PDU to the Contracts Committee to approve the cancellation of the procurement in accordance with section 75(3) of the PPDA Act and any purported cancellation will be null and void.
3. The Applicant averred that the Respondent did not adhere to the roles of the User Department enshrined under section 34 and 35 of the PPDA Act prior to the decision to cancel the procurement by the Accounting Officer as stated in his communication dated 17th October 2022 and that therefore the alleged submission by the PDU to the Contracts Committee without recommendation of the User Department to specifically cancel the procurement made the alleged cancellation illegal and not in accordance with section 75 of the Act.
4. The Applicant further contended that the Respondent's proceedings of 24th October 2022 were a mere cover up by the Respondent's procurement in an attempt to validate an illegal cancellation which was made by the Accounting Officer on 17th October 2022 without regard to lawful procedure set out in the PPDA Act and the Regulations thereunder.
5. The Applicant prayed that the Tribunal finds and declares that the purported cancellation to be null and void ab initio; that there is persistent breach of the PPDA Act by the Respondent; that the

procurement process referred to the Authority to temporarily transfer the procurement and disposal function to a third party agency to complete the procurement process; that the Applicant's deposit of UGX. 5 Million for administrative review be refunded; that the Applicant be awarded general damages for the time, inconvenience and forbearance arising from the illegal actions of the Respondent; and that costs be awarded to the Applicant for this application and the administrative review complaint before the Accounting Officer.

Respondent

1. The Respondent averred that the cancellation of the procurement process is valid and that the Respondent followed all the procedures provided for in the PPDA Act, 2003 and the Regulations made thereunder.
2. The Respondent contended that during the administrative review investigation, the Accounting Officer received information from the Manager ICT on 20th October 2022 that there was a significant change in the technical requirements of the procurement. That this information was sought from the various departments of the Respondent by the Accounting Officer in accordance with Regulation 5(c) of the PPDA (Administrative Review) Regulations, 2014.
3. The Respondent averred that on 24th October 2022, the Contracts Committee under Minute No. 141 approved the cancellation of the procurement process on the basis of the need for significant changes to the Terms of Reference.

F. RESOLUTION BY THE TRIBUNAL

Issues

We now revert to the substantive issues in this application:

- i. *Whether the cancellation of the procurement process was valid?*
- ii. *What remedies are available to the Parties?*

Resolution of Issues

Issue 1

Whether the cancellation of the procurement process was valid?

1. **Section 91I (3) (a)** of the PPDA Act, 2003 as amended states that for the avoidance of any doubt, a decision by a procuring and disposing entity to reject or cancel any or all bids prior to award of a contract under section 75 of the Act shall not be subject to review by this Tribunal.
2. **Section 75(1) of the PPDA Act** as amended provides that a procuring and disposing entity may, on the approval of the Contracts Committee, cancel a procurement process or a disposal process at any time, before a contract is awarded to the Best Evaluated Bidder, as may be prescribed.
3. The Tribunal can only lack jurisdiction when it satisfies itself that the purported cancellation was conducted in full accordance and compliance with the PPDA Act, 2003 as amended.
4. In ***Kingdom Kampala versus Judicial Service Commission Application 34 of 2022***, the Tribunal held that it has jurisdiction to inquire into the decision-making process leading to the cancellation in order to determine whether there is a valid cancellation within the meaning of section 75 of the PPDA Act, 2003 as amended.
5. The Tribunal has dealt with a similar issue in ***DOTT Services Ltd versus UNRA & PPDA Application 3 of 2017*** wherein it held that the Accounting Officer can only exercise powers under section 75 of the PPDA Act during the evaluation of bids stage and prior to a declaration of the Best Evaluated Bidder by the Contracts Committee. After the Contracts Committee has awarded the contract to the Best Evaluated Bidder, the procuring and disposing entity ceases to exercise their powers to cancel the procurement process under section 75 of the PPDA Act.. In order for the Tribunal to be precluded from having

jurisdiction, such action of the procuring or disposing entity must have been done prior to the award of the contract to the Best Evaluated Bidder.

6. From the Tribunal's careful reading of **section 75 of the PPDA Act**, the power of the procuring and disposing entity to cancel the procurement process is subjected to the approval of the Contracts Committee. The Tribunal recently expounded on this in ***Preg-Tech Communications Limited v Uganda Police Force Application 32 of 2021***. As held in that case, the Tribunal maintains the need for the approval of the Contracts Committee in cancellation of the procurement process.
7. In ***Impiger Technologies Private Limited versus Higher Education Students Financing Board Application 25 of 2022***, the Tribunal held that once it determines as a fact that there exists a cancellation which was effected in accordance with section 75 of the PPDA Act, the Tribunal would have no jurisdiction to inquire into the reasons for the said cancellation.
8. The Tribunal has extensively guided on processes leading to cancellation and legality of cancellations. See ***Application No.40 of 2022 Seyani Brothers and Co. (U) Ltd & Parbat Siyani Construction Ltd Joint Venture vs Directorate of Govt Analytical Lab, Application No.34 of 2022 Kingdom Kampala Ltd vs Judicial Service Commission*** and ***Application No. 25 of 2022: Impiger Technologies Pvt Ltd Versus Higher Education Students Financing Board***.
9. The Accounting Officer requested the Manager Information and Communication Technology (Manager, ICT) by an internal memo dated 17th October 2022, to engage all users of the system to develop a detailed report incorporating all changes that are required to be made to the system.

10. The Manager ICT generated a report from users of the system and forwarded the same to the Accounting Officer through Loose Minute dated 20th October 2022. The report under paragraph 4.0 made 2 recommendations on changes to the statement of requirements: to overhaul the old terms of reference and strengthen the newly proposed ones in order to achieve the core banking solution desired by the users; **or** to adopt the existing Terms of Reference and incorporate some of the new the proposals.
11. The said report with **two options** made by the user department, Manager, ICT was presented without a recommendation to cancel the procurement by the PDU to the Contracts Committee which at its 141st sitting held on 24th October 2022, approved the proposed changes contained in the Manager ICT's report and in light of the said significant changes, approved the cancellation of the entire procurement process.
12. What is expected of the Procuring and Disposing Entity intending to cancel a procurement process is that a submission for purposes of cancellation must be made with a clear recommendation to cancel the procurement by the Procurement and Disposal Unit to the Contracts Committee, which will then form a basis of approval or rejection of the cancellation. See **section 28(1)(a) of the PPDA Act 2003 and regulation 13 of the PPDA (PDE) Regulations 2014.**
13. The conclusions of the user department as deduced from the Manager Information and Communication Technology's report to the Accounting Officer and conclusions drawn by the Manager ICT on page 3 of 4 of the minutes of the Contracts Committee (i) to (iii) expressly show that there are numerous significant changes in the technical details and circumstances of the procurement requirement including need to hire a developer to provide the core banking solution.
14. These circumstances contained in the Manager Information and Communication Technology's report to the Accounting Officer, in our

view are sufficient enough for the Contracts Committee to approve the said changes in the circumstances of the procurement requirement and consequentially cancel the procurement process. This tritely falls under the circumstances contemplated in **section 75(2)(b) & (c) of the PPDA Act, 2003**.

15. Despite the existence of circumstances that would merit a cancellation, the process of seeking approval of such cancellation from the Contracts Committee had to have been followed to the letter.
16. As such, a specific request for the Contracts Committee to (1) approve the numerous significant changes in the technical details and circumstances of the procurement requirement including need to hire a developer to provide the core banking solution and (2), approve the request for cancellation should have been made to the Contracts Committee.
17. The rationale for specific requests made in submissions of the Procurement and Disposal Unit is based on the fact that the Contracts Committee is mandated to consider **each request** based on the information contained in the Form submitted by the entity and the supporting documents, and may approve or reject the request. See **Regulations 13(1) and 13 (2) of the Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014**.
18. The Procurement and Disposal Unit only submitted the Manager ICT's report on the review of terms of reference proposed by user dated October 2022 (*marked as R4 in the Respondent's statement in reply giving reasons for decision*), to the Contracts Committee. See Minute No. MIN3/CC663/24/10/2022, 3.2 and 3.3 of the Minutes of the 141st Contracts Committee meeting held on October 24, 2022 (*marked as R6 in the Respondent's statement in reply giving reasons for decision*).
19. The Procurement and Disposal Unit only sought "Approval of the major changes in the terms of reference for consultancy services for upgrading

the integrated loan management information system (ILMIS) and integrate other modules of finance and accounting, human resources, procurement, stores and inventory management. See **Minute No. MIN4/CC663/24/10/2022, 4.1 on page 3 of the Minutes of the 141st Contracts Committee meeting held on October 24, 2022**

20. There was no specific request to the Contracts Committee to approve a request for cancellation. Therefore, the Contracts Committee could not on its own, initiate or approve a cancellation without a specific request to do so. The said cancellation was therefore irregular and illegal.
21. The Tribunal continues to stress the Supreme Court decision in **Galleria in Africa Ltd versus UEDCL Supreme Court Civil Appeal No. 8 of 2017** where it was held that:
“.....there’s no way the Act can regulate practices in respect of public procurement and disposal of public assets unless if the provisions are adhered to strictly to the letter. The provisions cannot be directory merely. They are for all purposes and intents mandatory and noncompliance with them makes the proceedings fatal. Procurement and Disposal activities are processes; one cannot move to another stage of the processes without fulfilling the first one”.
22. **The Tribunal therefore resolves this issue in the negative.**

Issue 2

What remedies are available to the parties?

23. The Applicant successfully proved that the impugned cancellation was unlawful. The Tribunal has in the recent past given guidance to the Respondent on how to proceed with the procurement process in **Application No. 25 of 2022: Impiger Technologies PVT Ltd versus Higher Education Students Financing Board.**

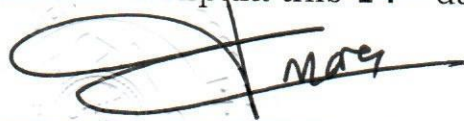
24. The Tribunal emphasizes that public procurement must be carried out in accordance with the principles of public procurement specified under Section 43 of the PPDA Act and this has been well stated that, “Public Procurement must conform to the three (03) pillars of integrity, transparency and accountability. Decision making at all stages must be clear, justifiable and objective”. See Mubiru J in ***Uganda Development Corporation versus Rocktrust Contractors Ltd Misc cause No. 85 of 2019.***

25. **The Tribunal hereby refers the matter back to the entity for further proceedings consistent with the law and this decision.**

G. DECISION OF THE TRIBUNAL

1. The Application is allowed.
2. The impugned cancellation of the procurement process is set aside
3. The entity is directed to determine a lawful course of action in a manner consistent with the law and this decision.
4. The determination in (3) above must be made within ten (10) days from the date hereof.
5. The Tribunal's suspension order dated 23rd November 2022 is vacated.
6. The administrative review fees paid by the Applicant should be refunded.
7. Each party should bear own costs.

Dated at Kampala this **14th** day of **December 2022**.



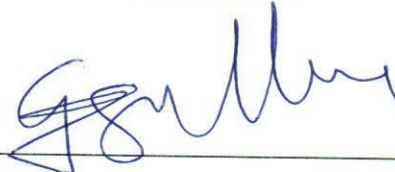
FRANCIS GIMARA, S.C
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