

**THE REPUBLIC OF UGANDA
THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
APPEAL TRIBUNAL HOLDEN AT KAMPALA**

APPLICATION No. 8 OF 2021

ELITE CHEMICALS LIMITED :::APPLICANT

VERSUS

UGANDA COFFEE DEVELOPMENT AUTHORITY ::::::::::::::::::::RESPONDENT

APPLICATION FOR REVIEW OF THE DECISION OF THE ACCOUNTING OFFICER OF UGANDA COFFEE DEVELOPMENT AUTHORITY IN RESPECT OF THE PROCUREMENT FOR SUPPLY OF IMIDACLOPRID PESTICIDES UNDER PROCUREMENT REFERENCE NO.UCDA/SUPLS/20-21/00119

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

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DECISION OF THE TRIBUNAL

A. Brief Facts

1. On 21st December 2020, Uganda Coffee Development Authority (the Respondent) published an invitation to bid both in the New Vision newspaper and Daily Monitor for the supply of Imidacloprid pesticides under open domestic bidding method.
2. Bids were received from two bidders namely Trust Chemicals Ltd and Elite Chemicals Limited (the Applicant).
3. The Respondent displayed on its Procurement Notice Board the Notice of Best Evaluated Bidder ("the NOBEB") on 26th May 2021 and with a removal date of 11th June 2021, indicating Trust Chemicals Ltd as the best evaluated bidder.
4. The Notice of Best Evaluated Bidder indicated that the Applicant's bid was unsuccessful due to the following reasons: *Bidder failed at the preliminary Evaluation Stage. Bidder failed at the Ethical Code of Conduct because bidder submitted documents with irregularities.*
5. On 11th June 2021 the Applicant applied to the Respondent's accounting officer for administrative review, contending that it submitted a signed code of ethical conduct and authentic documents as required the Bid data sheet (BDS).
6. By letter dated 21st June 2021, the Respondent's accounting officer dismissed the Applicant's application for administrative review.

B. Application to the Tribunal

1. Being dissatisfied and aggrieved by the decision of the Respondent's accounting officer, the Applicant appealed to this Tribunal on 9th July 2021.
2. The application raises 2 Grounds/Issues:



1. *Whether the AO erred in law and fact when he dismissed the Applicant's Administrative Review application on the account that the Administrative Review Committee found that the two Local Purchase Orders (LPO No. 21 dated 16th April 2018 from M/ S Ruki-Tech Agro-Fore Agencies Ltd of UGX 42,000,000 and LPO No.BA 73 dated 20th March 2019 from M/ S Bani Agro-Forests Ltd of UGX 48,000,000 attached in your bid documents were irregular since you traded without certificates from the Ministry of Agriculture, Animal Industry and Fisheries (hereinafter called "MAAIF") and in accordance with the Section 4(1), (2) & (3) of the Agricultural Chemicals (Control) Act 2007, you breached the ethical code of conduct in tendering business in the procurement of Imidacloprid by uttering false and irregular documents because they show that Elite Chemical Ltd participated in illegal trade when it supplied Imidacloprid pesticide in 2018 and 2019 without a product certificate from MAAIF.*

2. *Whether the AO erred in law and fact when he dismissed our application on the account that the Articles of Association from Uganda Registration Services Bureau (URSB) confirmed that Ms. Chemutai Joweria, the submitted authorized dealer in agrochemicals was not one of the Directors or person authorized to perform business on behalf of Elite Chemicals Ltd, as evidenced from the attached Powers of Attorney in the bid document.*

3. The Applicant sought 2 remedies, *viz*;
 - i. that the Honourable Tribunal annul and set aside the decision of the accounting officer and direct the accounting officer and the Entity to award the Applicant the contract and in the alternative re-evaluate the bids.

 - ii. the accounting officer/Entity be ordered to refund administrative review fees and pay all the costs of the Applicant for this application including the professional fees and filing fees.

Response to the Application by the Respondent

4. The Respondent averred that the bid document required a bidder to furnish documentary evidence in form of contracts or local purchase orders or completion certificates or delivery notes for supplies

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cumulatively totalling to UGX. 3,200,000,000 in the last five years and at least two of the above should be of similar systematic pesticide.

5. That the Applicant responded to the bid and in support attached Local Purchase Orders issued by M/s Bani Agro-Foresters Ltd and from M/s Ruki Tech-Agro-Fore Agencies Ltd as evidence of supplies of Imidacloprid pesticides in the years 2018 and 2019.
6. That the Evaluation Committee using the methodology and criteria stated in the bid document recommended the award of the contract to the Applicant as the best evaluated bidder and the Contracts Committee approved the evaluation report and awarded the contract to the Applicant.
7. That the Accounting Officer conducted a due diligence whose report established that Elite Chemicals Ltd did not have the required experience and technical capacity; had submitted forged documents; and breached the Agricultural Chemicals Act 2006.
8. That the Applicant was requested to submit documents evidencing local outsourcing of Imidacloprid pesticides supplied in the years 2018 and 2019, to confirm the authenticity of the LPOs attached on its bid document.
9. That the Applicant failed to explain the source of pesticides it alleged to have supplied in the years 2018 and 2019 and the Local Purchase Orders submitted to confirm supply of the pesticides in the aforesaid period were insufficient to prove the alleged supply and or experience in supplies of similar nature.
10. That in the absence of the documents requested for above, the Accounting officer compiled a due diligence report and forwarded the findings to the Chairman of the Contracts Committee.
11. That the contracts committee in its 23rd meeting held on 25th May, 2021 considered the due diligence report, upheld its findings and cancelled the earlier contract award to the Applicant and instead awarded it to the second best evaluated bidder M/S Trust Chemicals Limited and the best evaluated bidder notice was displayed on the Respondent's notice board and served to all bidders.

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12. The Respondent further averred that the Applicant filed an administrative review application to the Respondent's Accounting Officer who commissioned an Administrative Review Committee to look into the complaint.
13. That the Administrative Review Committee upheld the due diligence findings and the decision of the contracts committee and the accounting officer communicated the findings of the Administrative Review Committee to the Applicant on the 21st of June, 2021.
14. The Respondent therefore averred that the decision to cancel the award of contract to the Applicant was proper and lawful in the circumstances.

Response to the Application by the Best Evaluated Bidder

15. The Tribunal served Trust Chemicals Ltd (best evaluated bidder) with a copy of the application. By a letter dated 16th July 2021, it indicted that its submission was not for defence nor a response but was as a witness. It urged the Tribunal to uphold the decision of the Respondent.

C. Submissions

Applicant

1. The Applicant disagreed with allegation that its documents were forged and contended that the due diligence was done in bad faith as a calculated design intended to mislead the contracts committee. That the due diligence unfairly prejudiced the Applicant and was contrary to the Applicant's right to a fair hearing under articles 28, 42 and 44 of the Constitution. That it was not the mandate of the Respondent to enforce the Agricultural Chemicals (Control) Act. That there was violation of section 45 of the PPDA Act, 2003 which requires all procurements to be conducted in a manner that promotes transparency, fairness and accountability.

Respondent

2. The Respondents counsel raised two preliminary objections. The first objection was that the application cited wrong sections of the PPDA Act as amended.



The second objection was that the Applicant did not give notice to the accounting officer of the Respondent before filing this application, contrary to section 89(10) of the PPDA Act as amended.

3. On the merits of the application, the Respondent's counsel basically defended the due diligence carried out as necessary to verify the technical experience of the Applicant as represented in its bid.

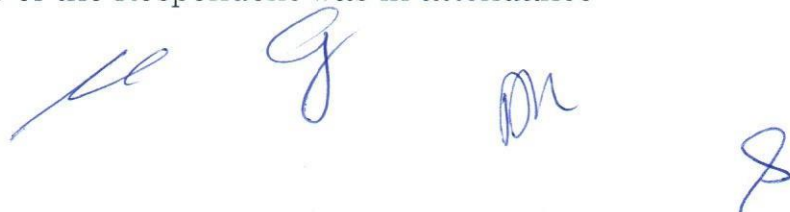
That the Applicant was given a chance to prove the authenticity of the local purchase orders and compliance with the Agricultural Chemicals (Control) Act.

That the Applicant made misrepresentations about its experience with amounted to a violation of the code of ethical conduct in procurement.

That all the actions taken by the Respondent were in accordance with the law and the terms of the bidding documents.

D. The hearing

1. The Tribunal held a virtual hearing using the Zoom cloud meetings software on 27th July, 2021.
2. Counsel for both parties highlighted the salient arguments in the parties' respective pleadings and written submissions also made clarifications to the Tribunal.
3. Representations were as follows;
 - (i) Nkoreki Chrissy Abel, a Director of Elite Chemicals Ltd represented the Applicant.
 - (ii) Adv. Richard Adubango from Lwere, Lwanyaga and Company Advocates as counsel for the Respondent
 - (iii) Dr. Emmanuel Iyamulemye Niyibigira, the Managing Director/Accounting Officer of the Respondent was in attendance.
 - (iv) Doreen Rose Rweihangwe, the Quality Assurance Manager of the Respondent was in attendance
 - (v) Alex Rugonde, the Procurement Officer/ Ag. Manager Procurement of the Respondent was in attendance
 - (vi) Eunice Kabibi, the Manager Legal and Member of the Contracts Committee of the Respondent was in attendance



- (vii) Byabashija Moses, a Director of Trust Chemicals Ltd, represented Trust Chemicals Ltd (best evaluated bidder) as an interested party, who was invited by the Tribunal.
- (viii) Mr. Atiku Saki Mansoor, the Registrar and Mr. Kiwa Francis Franck, the Senior Legal Officer of the PPDA Appeals Tribunal were in attendance.

E. RESOLUTION BY THE TRIBUNAL

Reframing of issues

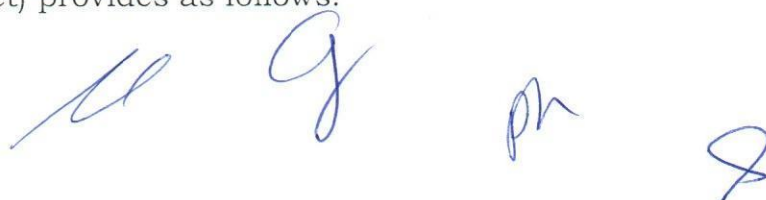
1. The Applicant framed the issues in a rather prolix manner. The Tribunal has reframed the issues in a more concise and precise way as follows:
 - 1) *Whether the Accounting Officer erred in law and fact when he dismissed the Applicant's application for administrative review on the ground that the Applicant submitted documents with irregularities.*
 - 2) *What remedies are available to the parties*

Resolution of preliminary objections

2. This Tribunal has jurisdiction under Part VIIA of the PPDA Act as amended. Our jurisdiction is conferred by the statute and is not affected by the non-citation or wrong citation of the applicable sections. The first preliminary objection is overruled.
3. Regarding non service of notice under section 89 (10) of the PPDA Act as amended, it is now settled law that failure to serve statutory notice does not vitiate the proceedings. See ***Kampala Capital City Authority vs Kabandize and 20 Others, Supreme Court Civil Appeal No. 13 of 2014.***
The second preliminary objection is overruled.

Resolution of issue No. 1

4. ***Whether the Accounting Officer erred in law and fact when he dismissed the Applicant's application for administrative review on the ground that the Applicant submitted documents with irregularities.***
5. Section 71 of the Public Procurement and Disposal of Public Assets Act 2003 (PPDA Act) provides as follows:



71.Evaluation.

(1) The choice of an evaluation methodology shall be determined by the type, value and complexity of the procurement or disposal.

(2) All solicitation documents shall fully and comprehensively detail the evaluation methodology and criteria which shall apply.

(3) No evaluation criteria other than that stated in the bidding documents shall be taken into account.

(4) A procuring and disposing entity shall ensure that this evaluation of bids is done expeditiously in accordance with regulations made under this Act.

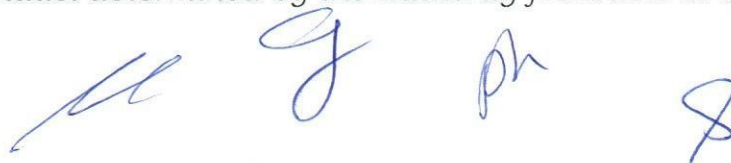
6. Regulation 15 of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, S.I No. 9 of 2014** states that the evaluation of a bid for the procurement of supplies, works or non-consultancy services using the technical compliance evaluation method shall be conducted under the following four stages—
- (a) a preliminary examination to determine the eligibility of the bidders and the administrative compliance of the bids received;
 - (b) a detailed evaluation of the bids to determine their technical responsiveness of the bids that are eligible after the preliminary examination carried out under paragraph (a); and
 - (c) a financial comparison of the bids that are eligible after the detailed evaluation carried out under paragraph (b) and to determine the best evaluated bid; and
 - (d) post qualification in accordance with regulation 34, to determine that the best evaluated bidder has the capacity and the resources to effectively execute the contract.
7. Accordingly, section 3 of the Standard Bidding Document issued by the Respondent provided an evaluation methodology comprising four sequential stages- preliminary evaluation to determine the eligibility of bidders; a detailed evaluation to determine to commercial and technical responsiveness of the eligible and compliant bids; financial comparison to compare costs of the eligible, compliant responsive bids received and determine the best evaluated bid; and post qualification on the best evaluated bidder to confirm whether the best evaluated bidder has the capacity and financial resources to execute the procurement.
8. The Notice of Best Evaluated Bidder dated 26th May 2021, Annex 1 A to the Applicant's application states that the Applicant's bid was unsuccessful due to the following reason: *Bidder failed at the*

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preliminary Evaluation Stage. Bidder failed at the Ethical Code of Conduct because bidder submitted documents with irregularities.

9. However, the above Notice of Best Evaluated Bidder is contradicted by the Respondent's Response to this Application. Annexure "R2" to the Respondent's Response to the Application is a copy of the evaluation report dated 7th April 2021. The report states that *the Evaluation Committee using the methodology and criteria stated in the bid document recommended the award of the contract to the Applicant as the best evaluated bidder and the Contracts Committee approved the evaluation report and awarded the contract to the Applicant.*
10. A further scrutiny of the report and the minutes of the evaluation committee indicate that the Applicant passed all the stages of the procurement as highlighted below -
 - a) Part 8 of the evaluation report states that the preliminary evaluation did not eliminate any bidder.
 - b) Part 9 of the evaluation report indicates that both bidders were responsive to the detailed technical evaluation.
 - c) Part 10 of the evaluation report on financial comparison, indicates that both bidders that were eligible, compliant and substantially responsive were ranked and the Applicant being the lowest priced was ranked 1st.
 - d) Part 11 of the evaluation report indicates that the Applicant was subjected to post-qualification using the post-qualification criteria and qualified successfully
 - e) Part 12 of the evaluation report therefore recommended that the best evaluated bid for the supply of imidaclopid is from Elite Chemicals Ltd with a total evaluated price of UGX. 2,257,030,000.
11. In view of the unequivocal pleadings of the Respondent and the information in the evaluation report, the Tribunal cannot agree with the statement in the Notice of Best Evaluated Bidder dated 26th May 2021 that the Applicant's bid *failed at the preliminary Evaluation Stage.*
12. The Notice of Best Evaluated Bidder also states that the Applicant *failed at the Ethical Code of Conduct because bidder submitted documents with irregularities.*

Section 93(2) of the PPDA Act states that; all *providers of works, services or supplies shall be required to sign a declaration of compliance with those codes of conduct determined by the Authority from time to time.*





The Authority prescribed the code under Guideline no. 4 of 2014 dated 3rd March 2014.

Instruction to Bidders (ITB) 3.4 of the bidding document, required every bidder to sign the *Code of Ethical Conduct for Bidders and Providers* and submit it together with the other bidding forms.

It is not in dispute that the Applicant signed and submitted the *Code of Ethical Conduct for Bidders and Providers*.

In the instant procurement, the requirement for signing and submitting the ethical code of conduct was a criterion for administrative compliance under the **Preliminary Examination**. Page 5 of the Evaluation Report of 7th April 2021 indicates that the Applicant both bidders had complied with and passed this criterion.

As already stated, the Applicant passed the preliminary evaluation, detailed evaluation, financial comparison, and post-qualification.

13. The Tribunal again cannot agree with the statement in the Notice of Best Evaluated Bidder dated 26th May 2021 that the Applicant's bid *failed at the Ethical Code of Conduct because bidder submitted documents with irregularities*.
14. The Entity erroneously mixed up preliminary evaluation criteria with criteria which belongs to detailed evaluation/post qualification/due diligence. To that extent, the Respondent erred in law and fact when it issued a Notice of best Evaluated Bidder with a statement that the Applicant's bid *failed at the Ethical Code of Conduct because bidder submitted documents with irregularities*
15. Be that as it may, mere signature and submission of the *Code of Ethical Conduct for Bidders and Providers* does not automatically prove a bidder's ethical credentials. Similarly, passing of the preliminary evaluation, detailed evaluation, financial comparison, and post-qualification stages does not also automatically preclude an entity from further inquiring into the authenticity of the documents relied upon, of course subject to the law as discussed hereunder.
16. Regulation 31 of ***The Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, S.I No. 7 of 2014***, provides that a procuring and disposing entity may at any time during a procurement and disposal process carry out a due diligence test on a bidder or a bid.

17. Further, that a due diligence test shall cover any area of operation of a provider or any area of the bid that the procuring and disposing entity determines requires verification or checking, in exercising due care in a procurement or disposal process. It follows that even after post-qualification, the Respondent was entitled to carry out due diligence on the Applicant in respect of any area of operation of the Applicant or any area of the bid that the Respondent determined to require verification or checking, in exercising due care in the procurement process. The Applicant was therefore empowered to carry out due diligence on the experience and technical capacity of the Applicant.
18. The Evaluation Committee had recommended the award of the contract to the Applicant as the best evaluated bidder and the Contracts Committee approved the evaluation report and awarded the contract to the Applicant. Subsequently the notice of the best evaluated bidder was submitted to the accounting officer for signature and display from 12th April 2021 to 23rd April 2021. It would appear that the accounting officer did not agree with the contracts committee award decision, and he proceeded to conduct a due diligence on the successful bidder and on 14th May 2021 he shared his findings in form of an office memo attached as Annexure "R8" to the Respondent's response to the Application.
19. It was within his rights to disagree with the decision of the contracts committee. Regulation 18 of ***The Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations, 2014*** is instructive in this respect. It provides as follows:

18. Disagreement between Accounting Officer and Contracts Committee.

Where the Accounting Officer does not agree with a decision of the Contracts Committee in respect of the application or interpretation of a procurement or disposal process or method, the Accounting Officer shall—

- (a) return the decision with the reasons for rejection, to the Contracts Committee for its review; or*
(b) refer the decision with the reasons for rejecting the decision, to the Authority, with a request for an independent review of the decision by the Authority.



20. The Tribunal noted that the Accounting Officer did not communicate his apparent disagreement with the contracts committee decision immediately until 14th May 2021 when he forwarded the due diligence report to the contracts committee. The accounting officer claims in the memo of 14th May 2021 that arising from a due diligence conducted under regulation 31 of ***The Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations***, he had noted a number of issues to be addressed by the contracts committee. He accordingly attached the report of the due diligence for consideration and necessary action. He also attached evidence of the alleged discrepancies.
21. Under Minute 19/23/2021 of the 23rd Contracts Committee meeting held on 25th May 2021, the Contracts Committee made the following decisions:
- Concurred with the due diligence report and cancelled the award of contract to the Applicant.
 - Awarded the contract to the second evaluated bidder M/S Trust Chemicals Ltd.
 - Recommended that the PDU takes necessary action against the Applicant under section 26(1) (h) of the PPDA Act.
22. Unfortunately, as enumerated hereunder, the impugned due diligence and the cancellation of the award to the Applicant were tainted with irregularities and was not done in accordance with the applicable laws and procedures.

The law cited above gives the accounting officer only two options where he does not agree with the decision of the contracts committee. The first option is to reject the decision and return it with the reasons for rejection to the Contracts Committee for its review.

23. The second option is to refer the decision with the reasons for rejection to the Authority with a request for an independent review of the decision by the Authority.
24. In the instant case the accounting officer did neither. He simply returned the decision to the contracts committee on 14th May 2021, stating that he had *noted a number of issues to be addressed by the contracts committee*. He attached the report of the due diligence for *consideration and necessary action*. He did not make any determination as required by law. Such a course of action is tantamount to interference with the functions of the contracts committee, which has exclusive jurisdiction to award contracts.



25. The Respondent failed to issue and display a notice of best evaluated bidder within five working days after the decision of the contracts committee to award the contract to the Applicant on 9th April 2021. This omission was contrary to regulation 4 of **The Public Procurement and Disposal of Public Assets (Contracts) Regulations** and Instruction to Bidders no. 39.1 in the bidding document.
26. At this stage, a notice of best evaluated bidder had not been signed, issued or communicated. However, the due diligence report falsely states in the background that the accounting officer conducted the due diligence following notification to Elite Chemicals Limited as the best evaluated bidder.
27. The contracts committee purported to cancel the contract award to the Applicant and made a fresh award to Trust Chemicals (U) Ltd, but in the absence of any fresh evaluation or submission by the procurement and disposal unit. The contracts committee acted without jurisdiction. Under section 28 (1) (a) of the PPDA Act the contracts committee should adjudicate recommendations from the procurement and disposal unit and award then award contracts. Under regulation 3 of **The Public Procurement and Disposal of Public Assets (Contracts) Regulations**, after evaluation and any negotiation process, a procurement and disposal unit is required to submit to the contracts committee a recommendation to award a contract. Regulation 13 (2) and (3) of the **Public Procurement and Disposal of Public Assets (Procuring and Disposing Entities) Regulations** provides as follows:
- (2) A Contracts Committee shall consider each request based on the information contained in the Form submitted and the supporting documents, and may approve or reject the request.*
- (3) Where a Contracts Committee rejects a request, the Contracts Committee shall indicate the reasons for rejecting the request.*
28. Even where a bidder fails post qualification an award to the next best evaluated bidder should be recommended by the evaluation committee and a submission accordingly made by the procurement and disposal unit. See No. 38.3 of the the Instruction to Bidders in the Standard Bidding Document issued by the Respondent.



29. The contracts committee purported to cancel the award to the Applicant and made a fresh award to Trust Chemicals (U) Ltd and a notice of best evaluated bidder was displayed on 26th May 2021 before carrying out any post qualification on Trust Chemicals (U) Ltd. This was contrary to Regulation 15 (d) of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations, S.I No. 9 of 2014**, No. 38 of the Instruction to Bidders, and section 3E of the Standard Bidding Document issued by the Respondent.
30. The inquiry into the Applicant's compliance with the Agricultural Chemicals (Control) Act in the period 2018-2019 also seems to have exceeded the criteria in the standard bid document.
31. A due diligence test should be relevant to the bid. Due diligence should not extend to extraneous or remote matters which have no proximity to the evaluation criteria.
32. In the instant case, Section 3E of the standard bidding document required a bidder to furnish documentary evidence in form of contract or local purchase orders or completion certificates or delivery notes to have supplied cumulatively totalling to UGX 3,200,000,000 in the last five years. At least two of the supplies should have been of similar systemic pesticide.
33. According to the evaluation report, the Applicant submitted local purchase orders from National Medical Stores, Mulago Referral Hospital, Ban Agro-Foresters Ltd and Ruki-Tech Agro Fore Agencies Ltd. M/s Crystal Crop Protection India confirmed manufacturer's authorization and capacity in terms of availability of the required supplies. M/s Equity Bank confirmed financial capacity by a line of credit of UGX 3.2 Billion. M/s BWK & Associates confirmed the audited accounts. The Evaluation Committee accordingly recommended the Applicant bid for contract award.
34. The Respondent was entitled to carry out a due diligence to confirm the authenticity of the local purchase orders submitted by the Applicant.
35. According to Section 3E of the standard bidding document, post qualification is meant to confirm whether the best evaluated bidder has the capacity and resources to execute the procurement.
36. Similarly, Instruction to Bidders 38.1 of the bidding document states that the entity shall determine to its satisfaction whether the bidder that is



selected as having submitted the best evaluated bid is qualified to perform the contract satisfactorily.

37. The qualification of the best evaluated bidder speaks to present or current capacity based on the criteria in the bidding document. To extend-post qualification or due diligence to historical compliance with various laws would amount to an unlawful departure from the evaluation criteria, which is prohibited by section 71 of the PPDA Act and regulation 7 of the **Public Procurement and Disposal of Public Assets (Evaluation) Regulations**. Such a course of action would also have the effect of limiting competition, contrary to section 46 of the PPDA Act.
38. Under regulation 7 (3) (b) and (c) of **The Public Procurement and Disposal of Public Assets (Evaluation) Regulations**, the purpose of evaluation is to assess the ability of the bidder to perform the contract and to meet the objectives of the procurement at hand.
39. From our understanding, the evaluation criteria only required the bidders to have these authorisations at the time of submission of their respective bids. Had the bidding document required for bidders submit LPOs for supplies made only by registered bidders or bidders who made the supplies while they were in possession of a product certificate and premises be registered with the Ministry of Agriculture, then it would have been expressly stated so. In the instant case, it is not.
40. Where a statutory compliance document is deemed relevant to a procurement, it should specifically be made listed as an evaluation criteria.
41. Ordinarily, the duty to investigate compliance with laws or commission of offences lies with the law enforcement agencies and other bodies with the relevant statutory mandate. For instance, in public procurement, breach of the law or other misconduct is dealt with by the Authority and may lead to suspension of the provider.
42. We have carefully scrutinised the correspondence between the Respondent and the Applicant during the due diligence exercise. The Tribunal is also not satisfied that the rules of natural justice were followed in the impugned due diligence.
43. We respectfully cite the guidance of the Supreme Court in the lead judgment of Katureebe JSC (as he then was) in **SCCA No. 17 of 2001-Mpungu & Sons Transporters Ltd v Attorney General & Kambe Coffee Factory (Coach) Ltd.**



It was held:

“I agree that the Audi Alteram Partem rule is a cardinal rule in our administrative law and should be adhered to. Simply put the rule is that one must hear the other side. It is derived from the principle of natural Justice that no man should be condemned unheard. (See Black's Law Dictionary) 6th Edition. However, one would have to prove that one had a right to be heard which had been breached, and that the decision arrived at by the administrative authority had either deprived him of his rights or unfairly impinged on those rights thereby causing damage to the individual concerned. Most cases involving the right to be heard have dealt with situations where a person was being deprived of his property or livelihood. But each case has to be looked at on its own merits.

44. Nevertheless, the application of the right to be heard may vary depending on the circumstances of each case. It is for instance not mandatory that in every decision making, the elaborate procedures for a criminal trial must be transplanted and applied.

For example, in **HIGH COURT CIVIL DIVISION MISCELLANEOUS CAUSE NO.317 OF 2017-ASOBASI DANIEL OKUMU VERSUS UGANDA LAW COUNCIL & LAW DEVELOPMENT CENTRE**, the Applicant was challenging the setting of pre-entry examination as the yardstick for the applicant to be admitted at Law Development Center to study a postgraduate Diploma in Legal Practice. He complained about denying him the right to access his pre-bar examination results, the marked scripts and it's marking guide to allow him crosscheck and appeal for a remarking.

The court (Ssekaana, J) guided as follows:

The courts should not allow the litigation process to be transplanted in matters of this nature since the 1st respondent regulates its procedure of what would amount to a fair hearing as set out under the law.

*As was held in **Simon Gakuo v Kenyatta University and 2 others Miscellaneous Civil Application No. 34 of 2009**:*

“ The audi alteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the court room situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good



administration in view. I urge practitioners of law not to rigidly import the hearing requirements in the courtroom situation etc.”

45. In the instant case, the due diligence made conclusions that Elite Chemicals Ltd did not have the required experience and technical capacity; had submitted forged documents; and breached the Agricultural Chemicals (Control) Act.
46. The Tribunal has determined that in conducting the due diligence and reaching those conclusions, the information provided to the Applicant was not sufficient. The Applicant was not informed that the Respondent was conducting a due diligence. In the letter dated 20th April 2021, the Respondent’s accounting officer requested the Applicant to submit a bill of lading for importation of imidaclopid in 2018 and 2019, as well as delivery and goods received notes. **The purpose of the submission was stated as to enable us conclude the contracting process.**
47. The Respondent did not notify the Applicant about the inquiry relating to non-compliance with the Agricultural Chemicals (Control) Act.
48. The Respondent did not notify the Applicant that the authenticity of the local purchase orders submitted as proof of experience was being inquired into.
49. Similarly, the finding of the due diligence report that Ms. Chemutai Joweria, an employee of the Applicant whose certificate had been submitted as part of the Applicant’s bid, was not a director, shareholder or person authorised to transact on behalf of the company is faulted on the same grounds.
50. Even after the due diligence, the findings were not shared with the Applicant to enable them make a response. The contracts committee proceeded to cancel the award to the Applicant without giving them a hearing. Natural justice demands that where adverse findings are made in a due diligence, the affected bidder must be given a chance to make any representations before any adverse decision is taken.
See our decision in **COIL LIMITED VS PPDA & UNRA, PAT APPLICATION NO.3 OF 2021**
51. The contracts committee also purported to recommend that the PDU takes necessary action against the Applicant under section 26(1) (h) of the PPDA Act. Section 26 (1) (h) of the PPDA Act merely provides that the accounting officer shall be responsible for investigating complaints by providers. In the instant case, there was no complaint by any provider which called for investigation under section 26(1h) of the PPDA Act. Even if there had been a



complaint, the power to investigate the complaint is vested in the accounting officer but not the PDU.

52. In view of the above shortcomings, the findings and conclusions of the due diligence were arrived at in violation of the rules of natural justice.
53. There was also violation of the principles of transparency, accountability and fairness as enshrined in section 45 of the PPDA Act.
54. In **High Court Civil Division Misc. Cause No. 303 of 2013 - Ojangole Patricia & 4 Others v Attorney General**, the court cited with approval the Kenyan case of **Onyango Oloo Vs Attorney General [1986 -1989] EA 456** where the Court of Appeal of Kenya held that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.
55. Where an administrative agency acts contrary to this rule, it exceeds powers conferred upon it by Parliament.
56. A decision arrived at in breach of the *audi alteram partem* rule is of no consequence in the same way as a decision made without jurisdiction is a nullity and void *ab initio*. See: **Matovu & 2 Others v Sseviri & Another [1979] HCB 174**.
57. In the result, the purported due diligence report; the decision of the contracts committee to cancel the award of contract to the Applicant; the decision of the contracts committee to award the contract to Trust Chemicals Ltd; and the decision of the contracts committee recommending that the PDU takes necessary action against the Applicant, are a nullity.
58. The 1st issue is answered in the affirmative.

Resolution of issue No. 2- What remedies are available to the parties

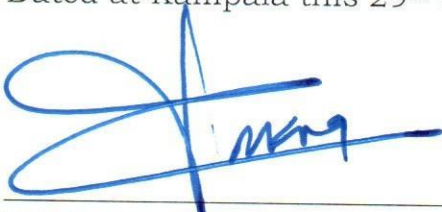
59. In view of the errors and omissions discussed in issue no. 1, the application has merit. We shall therefore set aside the administrative review decision of the Respondent's Accounting Officer and remit the procurement back for re-evaluation.



F. DISPOSITION

1. The Application is allowed.
2. The administrative review decision of the accounting officer of the Respondent is set aside.
3. The procurement is remitted back to the Entity, with directions to conduct a fresh evaluation, post qualification and due diligence (if necessary), in a manner consistent with this decision, the PPDA Act and regulations and the bidding document.
4. The Entity must refund the administrative review fees paid by the Applicant.
5. The Tribunal's suspension order dated July 12, 2021 is hereby vacated.
6. Each party to bear its own costs.

Dated at Kampala this 29th day of July 2021.



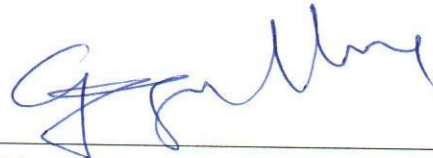
FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER