

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0006 OF 2016
(Arising from PPDA Appeals Tribunal Application No. 3 of 2015)

**PUBLIC PROCUREMENT AND DISPOSAL
OF PUBLIC ASSETS AUTHORITY** **APPELLANT**

VERSUS

PEACE GLORIA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

On 27th April 2015, Arua District Local Government published in the Daily Monitor Newspaper, an invitation to interested bidders for the management for the management of markets in the District. Four bidders, including the respondent, had submitted their bids for Ejupala Market by the closing date of 18th May 2015. Following an Open Domestic Bidding procurement process, the Contracts Committee on 4th June 2015 awarded the contract to one of the bidders chosen as the best evaluated bidder. Notice of the best evaluated bidder was displayed on 4th June 2015.

Being dissatisfied with the decision of the Contracts Committee, and in accordance with section 139 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* the respondent on 17th June 2015 applied to the Chief Administrative Officer, Arua for Administrative Review where she argued that; whereas hers was the highest bid price at shs. 2,950,000/=, the procurement entity selected the third best evaluated bidder at the sum of shs. 2,650,000/= only because that respondent had failed to demonstrate financial capacity based on her average closing balances for the required period stated in the evaluation criteria. She contended further that her elimination on account of her balance sheet was done unfairly for selfish motives since it is not one of the criteria provided for by law or by the Standard Bidding Document issued by the PPDA. She argued that the procurement entity acted with bias and had

discriminated against her yet they should have invoked Regulations 74 and 89 and given her an opportunity to prove her financial capacity.

The Chief Administrative Officer on 3rd July 2015 issued his decision in accordance with section 90 (2) of *The Public Procurement and Disposal of Public Assts Act, 2003* and Regulation 139 (5) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*. By that decision, he concluded there was no merit in the application for administrative review on grounds that; by the terms of the bid duly signed by the respondent, the procurement entity was not bound to accept the highest or any bid. Whereas one of the conditions of the tender was for the successful bidder to pay three months in advance the amount quoted in the bid, the respondent's bank balances as indicated on her bank statements for the previous six months showed that the only substantial deposit was of shs. 7,000,000/= made on 16th January 2015 but which was then withdrawn on 21st January 2015. He further found that the respondent had not been eliminated on account of her balance sheet since that was a requirement directed only at firms and SACCOs. The procurement entity had prior to that obtained written authorisation from the Executive Director of the PPDA to customise the Standard Bidding Document issued by the PPDA on 3rd April 2014 in respect of services of Public Vehicle Parking (parks) to the procurement of services for the management of markets. He found that there was no need for seeking clarification from no evidence of bias or discrimination in the process as claimed by the respondent since the procurement entity had provided equal opportunity to all potential service providers by adopting the Open Domestic Bidding process and had received and evaluated all bids based on the same methodology and criteria. The award of the tender was not done capriciously but rather on the basis of responsiveness and compliance with the id terms and conditions stated in the solicitation document.

Being dissatisfied with the decision of the Chief Administrative Officer, Arua, the respondent on 16th July 2015 applied to the appellant for further administrative review. Before the appellant, she argued similarly that the elimination of her bid which was the highest on account only of a balance sheet / closing bank balances (she used these terms interchangeably) as evidence of financial incapacity, which was never a condition forming part of the bidding documents, was illegal and a manifestation of bias by the Evaluation Committee. The Committee had denied her

a chance to prove her financial capacity. It had customised the bidding document without authorisation from the appellant and introduced a criterion not provided for by the PPDA Act of the Standard Bidding Document issued by the PPDA, thereby incorporating an unauthorised deviation. It should as well have invoked Regulation 74 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* to seek clarification from the respondent rather than reject the bid as non-responsive.

The appellant considered the application and in its decision of 7th August 2015, rejected it. The reasons given were that; the procurement entity had adopted the Technical Compliance Selection methodology and found the respondent's bid non-responsive to the requirement of financial capacity which required the bidders to demonstrate access to or availability of financial resources to pay the monthly bid amount quoted, three months in advance. It was a further requirement that the bidder's bank balances for the last three months must not be less than three times the monthly quotation, and for this the bidders were required to provide their bank statements for the period November 2014 – April 2015. The bidding document at page 8 had indicated that the best evaluated bid would be the highest priced bid that is eligible and substantially responsive to the commercial and technical requirements of the entity. Her bid had been found to be non-responsive for the reason that her "average closing balance for the required period stated in the evaluation criteria had failed to demonstrate financial capacity to pay as per the terms of reference." Her average closing bank balance for the stated period was shs. 2,424,666/= yet in light of her bid price it ought to have been 8,850,000/=. As regards the deviation complained of, The appellant found that Regulation 48 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* permits procurement entities to customise the Standard Bidding Document for public vehicle parking areas (parks) as they all relate to revenue collection and management, by providing for the evaluation criteria and statement of requirements to suit the procurement. The entity did not have to seek subsequent authorisation in the process of customisation. Failure by the respondent to demonstrate access to or availability of financial resources to pay the monthly bid amount quoted three months in advance was a material deviation in respect of which Regulation 74, designed for non-conformity or omissions not of a material nature, could not be invoked.

When reviewing the best evaluated bidder's compliance with the financial capacity requirement, the appellant found that this bidder too had failed to demonstrate financial capacity to pay as per the terms of reference. Her average closing bank balance for the stated period was shs. 3,995,643/= yet in light of her bid price it ought to have been 7,950,000/=. For that reason, the appellant, in accordance with section 91 (4) of *The Public Procurement and Disposal of Public Assets Act, 2003*, the procurement entity was advised to re-evaluate all the bids and not to refund the administrative review fees in accordance with *The Local Governments (Public Procurement and Disposal of Public Assets) Guideline 5 / 2008*.

Still dissatisfied with the decision of the appellant, the respondent on 28th August 2015 applied to the Public Procurement and Disposal of Public Assets Tribunal, to review it. There, the respondent contended and advanced two grounds, that;-

1. The appellant had erred in law and in fact by advising the procurement entity to re-evaluate bids which were non-responsive to the requirements of financial capacity.
2. The appellant had erred in law and in fact in holding that the respondent's administrative review fees should not be refunded despite finding the best evaluated bidder to have been non-responsive as well.

In its written submissions to the Tribunal, the appellant contended that it had found both bids, that of the respondent and the best evaluated bidder, to have been non-responsive and was therefore justified in advising the procurement entity to re-evaluate all the bids, as a corrective measure. As regards the directive that the administrative review fee should not be refunded, it submitted that the fact that the application was rejected as unsuccessful justified the directive since the issue of the best evaluated bidder having been non-responsive was not raised by the respondent but by the appellant *proprio motu*.

In her written submissions, the respondent argued that since all four bids were found to be non-responsive, the appellant should not have advised the procurement entity to re-evaluate them. It substantially was advice to open the tendering process afresh which is *ultra vires* the appellant's powers under section 38 of *The Public Procurement and Disposal of Public Assets Act, 2003* and Regulation 14 of *The Local Governments (Public Procurement and Disposal of Public Assets)*

Regulations, 2006. Since it was on basis of the respondent's application that the appellant obtained the opportunity to exercise its power *proprio motu* to find the hitherto declared best evaluated bidder non-responsive as well, there should have been a refund directed for the respondent's administrative review fees.

During the hearing of the application, the Tribunal considered and invited submissions from both parties regarding the extent to which a procurement entity may rely upon the provisions of Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* to customise bidding documents. Counsel for the appellant submitted that it was not one of the issues raised by the respondent as a ground for review by the Tribunal.

In its decision, The Tribunal found that the appellant had correctly exercised its powers under the provisions of Regulation 140 (7) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, when it advised the procurement entity to re-evaluate all the bids, as a corrective measure, since it only considered two out of the four bids and found them to have been non-responsive. The net effect of the appellant's decision was to uphold the application of the respondent in part in which case paragraph 3 of *The Guideline on Administrative review Local Governments (Public Procurement and Disposal of Public Assets) Guideline, No. 5 of 2008*, requiring a refund of the administrative review fee on an application which is upheld, should have been complied with. As regards customisation of the bidding document, Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* limits it to minor cosmetic change and is not a blank cheque for overhauling the entire bidding document. Permitting such customisation would be allowing the appellant to abdicate its obligations under section 7 (1) (d) and (e) of *The Public Procurement and Disposal of Public Assets Act, 2003*. As a result, the bidding document issued by the procurement entity in the instant case was a complete deviation from the Standard Bidding Document the appellant had issued for the management of Public Vehicle Parking Areas. The procurement entity should instead have invoked Regulation 10 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* to apply to the appellant for specific authorisation in writing, for approval of deviation from the use of the document. The tribunal therefore found that the entire bidding process, by virtue of that unauthorised deviation,

was *void ab initio* and thus a nullity. The Tribunal then set aside the decision of the appellant and ordered the procurement entity to refund the applicant's administrative review fees. It also awarded the respondent shs. 2,000,000/= to settle all her out of pocket expenses and legal costs.

The appellant is dissatisfied with that decision appealed to this court on seven grounds, namely;

1. The members of the PPDA Appeals Tribunal erred in deciding that the net effect of the decision of the Authority of 7th August 2015 was to uphold the complaint in part.
2. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that because the complaint succeeded in part, the Authority should have ordered a refund of the complainant's administrative review fees.
3. The members of the PPDA Appeals Tribunal erred in law and fact in framing the customization of bidding documents as a ground for review and on making a decision on the said ground although it was not raised by the appellant and the respondent had not been given prior notice to respond to the said ground.
4. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that Arua District Local Government used a bidding document that was a deviation from the Standard Bidding Document issued by the Authority for a different purpose, without seeking and obtaining approval from the Authority to use the bidding document.
5. The members of the PPDA Appeals Tribunal erred in law and fact in failing to consider and take into account the fact that at the material time there was no Standard Bidding Document for the management of markets issued by the Authority.
6. The members of the PPDA Appeals Tribunal erred in law and fact in deciding that the customisation of a Standard Bidding Document under Regulation 48 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* is limited to minor or cosmetic change.
7. The members of the PPDA Appeals Tribunal erred in law and fact in awarding the respondent costs of shs. 2,000,000/= (two million shillings).

Submitting in support of the third ground of appeal, counsel for the appellant Mr. John Kalemera argued that it was irregular for the tribunal to formulate its own issue regarding the customisation of the bidding documents, which had neither been raised by the applicant nor the respondent. By doing, the Tribunal violated the rules of natural justice since the appellant was not notified and could not prepare its defence adequately in this respect. The Tribunal became applicant and adjudicator at the same time. In respects of grounds 1 and 2, he argued that since the appellant rejected both grounds in the application presented to it, the application failed and did not succeed in part as determined by the Tribunal. The appellant did not uphold any of the grounds presented to it by the respondent. With regard to grounds 4 and 5, he submitted that Regulation 10 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* was inapplicable to the facts of the case since it is designed for situations where there is already a Standard Bidding Document in place, which was not the case here. Lastly, with regard to ground 7 he submitted that since the respondent was unsuccessful, she should not have been awarded costs.

In response, Mr. Ezadri Michael, counsel for the respondent argued that the Tribunal was right to fault the appellant for not issuing a Standard Bidding Document in respect of tenders for the management and collection of revenue from markets as a result of which there was a substantial deviation from the one issued for the management of Public Vehicle Parking Areas. Neither the procurement entity nor the respondent could be blamed for this deviation.

Ground three of this appeal in essence questions the scope of powers exercisable by the Public Procurement and Disposal of Public Assets Tribunal when considering applications from decisions of the appellant. The Public Procurement and Disposal of Public Assets Tribunal was established by section 91B of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*. Under section 91 I (6) of the same Act, for the purposes of reviewing a decision of the appellant, the Tribunal has powers to a) affirm the decision of the Authority; (b) vary the decision of the Authority; or (c) set aside the decision of the Authority, and (i) make a decision in substitution for the decision so set aside; or (ii) refer the matter to the Authority for reconsideration in accordance with any directions or recommendations of the Tribunal.

The Public Procurement and Disposal of Public Assets Tribunal lies at the apex of the administrative review structures in the area of public procurement and disposal of public assets. This administrative review structure, comprising both internal and external review options, provides a mechanism by which a person can seek redress against a procurement decision made by a procurement entity that affects them. It also provides a mechanism for an inexpensive and expeditious rectification of such decisions if they are wrong. It is comprised of four tiers; at the lowest ranks are the primary decision makers constituted by the procurement organs of the various procurement entities such as the Evaluation Committees, Contracts Committees and so on. A person aggrieved by decisions taken at that level has recourse to the next tier which is that of the Senior Management level of the procurement entity. This usually is at the level of the Accounting Officer of the entity. That level marks the end of the internal administrative review process. Internal review is easy for applicants to access, and enables a quicker and more inexpensive means of re-examining decisions where applicants believe a mistake has been made. A person aggrieved by the internal review mechanisms, then has recourse to the two tiers of external review constituted first by an application to the appellant (The Public Procurement and Disposal of Public Assets Authority) and finally by an application to the Public Procurement and Disposal of Public Assets Tribunal.

Any of the above-mentioned tiers, may take a merits review or a complaints handling approach in addressing the grievance referred to it. Merits review of a decision involves a consideration of whether, on the available facts, the decision made was a correct one while the complaints handling processes relates to reviewing the way the decision was made, including issues such as whether the actions or decisions made may be unlawful, unreasonable, unfair or improperly discriminatory. The complaints approach may also sometimes deal with the merits of the decision made, where the merits are inextricably interwoven with the procedural considerations.

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. The objective of merits review is to ensure that procurement decisions are correct or preferable, that is to say, that they are made according to law, or if there is a range of decisions that are correct in law, the best on the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making. The correct decision is made in a non-discretionary matter where only one decision is possible on either the facts or the law. However, where a decision requires the exercise of discretion or a selection between possible outcomes, judgement is required to assess which decision is preferable. Merits review concerns the review of both the factual basis and the lawfulness of a decision. It allows all aspects of an administrative decision to be reviewed, including the findings of facts and the exercise of any discretions conferred upon the decision-maker (see Dr David Bennett AO QC, “*Balancing Judicial Review and Merits Review*,” (2000) 53 Admin Review 3.)

At the level of internal administrative review, the merits review process involves reconsideration of the decision by a more senior person within the same procurement entity in which the decision was made. An internal merits review process involves a determination whether the right decision was made and is not a complaints handling system dealing only with complaints about the way in which the decision was made. Apart from providing a quick, simple and cost effective way to address an incorrect decision, internal review provides the procurement entity with an opportunity to quickly correct its own errors, while at the same time enabling more senior decision-makers to monitor the quality of the original primary decision making. This can then be dealt with by directly addressing the issue with the decision maker. The internal review undertaken by the procurement entity in response to the application ought to be thorough. This should include obtaining and placing on the record a full statement as to what occurred from any officer within the entity who may have direct knowledge. This is important for the efficacy of any external review that may take place thereafter, in which event access to precise evidence of what might have occurred, may not be readily available. Hopefully this was achieved in the instant case with the respondent’s application to the Chief Administrative Officer of Arua District Local Government.

In considering whether a decision should be subject to internal or external administrative review and the type of review that should be available, whether a merits or complaints review, the common law principles of natural justice apply. The basic principles of natural justice require that a person whose interests might be adversely affected by the decision be provided with an opportunity to present their case to the relevant decision-maker (the right to be heard), be notified in advance that a decision is to be made and be given an opportunity to respond (procedural fairness), and have the matter determined by an unbiased decision-maker (an absence of bias). It is imperative that the reasons for its decision, and the material that it considered in making it, should be squarely and unequivocally revealed at every level of the structures. It is the function of each of the tiers to determine whether the decision made was, on the material before it, the correct or preferable one. The issue was brought the attention of both parties and submissions were invited from both of them. In the event that counsel for the appellant required more time to prepare his response, he had the option to seek an adjournment for that purpose, which he did not take. I have therefore not found any breach of the rules of natural justice in the instant case as contended by counsel for the appellant.

Unlike judicial review which holds public officials accountable for the correct exercise of their powers, rather than the fairness of their decision with reference to the merits of the case, administrative merits review concerns the reconsideration of both the factual basis and the lawfulness of a decision, and is thus wider than judicial review, which is limited to the latter.

Judicial review is different from administrative merits review because the court cannot look at the substance of the decision maker's assessment of the facts, only the process by which that decision was made. The courts cannot remake the decision, so typically the remedies available from judicial review involve remitting the decision to the original decision maker with an order to remake the decision according to law. A court engaging in judicial review will generally not disturb factual findings, the assessment of credibility, the attribution of weight to pieces of evidence or the exercise of discretion, since this would be to intrude into the "merits" of the decision. Unlike external administrative merits review tribunals, courts are not entitled to re-visit the substance of the challenged decision. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not

allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. Within the adversarial system, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties. Administrative merits review tribunals, resources permitting, may inquire more widely than courts, and may adopt a function closer to that of pursuing the truth than that which a court may adopt. As statutory agencies, both The Public Procurement and Disposal of Public Assets Tribunal and the appellant's interests lie in the correct and preferable application of the relevant legislation and policy to procurement decisions, rather than on the procedural limitations of pleadings and arguments as found in courts of law. Administrative merits review allows for examination of the evidence with a view of reviewing agency forming its own view about the substantial merits of the case. Conduct of proceedings by both external procurement administrative review agencies ought to be more of an inquiry than adjudication.

This for example is evident in Regulation 140 (3) (d) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which authorises the appellant upon receipt of an application for administrative review, to conduct an investigation and during such an investigation, to consider; (i) the information and evidence contained in the application; (ii) the information in the records kept by a secretary contracts committee; (iii) information provided by staff of a procuring and disposing entity (iv) information provided by the other bidders; and (v) any other relevant information, under Regulation 140 (5) thereof.

The comment made by The Australian Law Reform Commission, in its report "*Managing Justice: A Review of the Federal Civil Justice System*", published in 2000, is instructive on this point. The Commission in that report commented:

In review tribunal proceedings there is no necessary conflict between the interests of the applicant and of the government agency. Tribunals and other administrative decision making processes are not intended to identify the winner from two competing parties. The public interest 'wins' just as much as the successful applicant because correct or preferable decision making contributes, through its normative effect, to correct and fair administration and to the jurisprudence and policy in the particular area. The values underpinning administrative review are said to encompass the desire for a review system which promotes lawfulness, fairness, openness, participation and rationality. The provision of administrative review can be seen to

fit neatly into a model of pluralist and participatory democracy. (see Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89), Australian Government Publishing Service, Canberra, 2000, at p 758 [9.11].)

I construe the argument advanced by counsel for the appellant that by the PPDA Tribunal formulating its own issue regarding the validity of the extent of customisation of the Standard Bidding Document the appellant had issued for the management of Public Vehicle Parking Areas to the procurement of management and revenue collection from markets by the procurement entity was a violation of the rules of natural justice, as envisioning the role of the tribunal to be comparable to that of a court of law. The argument that the PPDA Tribunal descended into the arena as applicant and adjudicator at the same time when it did that as conceiving administrative merits review in the light of a judicial adjudication. An external administrative merits review is not in the nature of an appeal. An External merits review involves fresh consideration of a primary decision by an external body, in this case by the appellant as a regulator and the tribunal as the final external administrative review agency. External administrative merits reviewers exercise the power of the original procurement entity's decision maker.

While external administrative merits review tribunals share many of the features of a court, including adherence to the rules of procedural fairness, impartial decision-making and the provision of written reasons, the inquisitorial function allows such tribunals to better investigate the truth and the merits of a matter, and to take a wider variety of considerations into account when making decisions. Such tribunals are ideally served by cooperative, helpful parties, providing them with relevant material, and eschewing an adversarial approach to their opponents. The aim of achieving the correct or preferable decision is a far more attractive one than the more constrained goal of courts to determine the correct decision, irrespective of administrative justice. That notwithstanding, although external administrative merits review decision makers may take an inquisitorial function in the sense that they may obtain information outside what the applicant places before them, this does not mean that they have a general duty to undertake their own inquiries in addition to information provided to them by the applicant and otherwise.

Section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, confers upon The Public Procurement and Disposal of Public Assets Tribunal wide powers to set aside the original decision and substitute it with a new decision of its own. Implicit within such a power is the authority to consider both the lawfulness of the procurement decision it is reviewing and the facts going to the exercise of discretion, whether raised by the applicant or not, provided all interested parties are provided with an opportunity to present their case (the right to be heard), are notified in advance that a decision is to be made on basis of that material and are given an opportunity to respond (procedural fairness), determine the matter in an unbiased manner (an absence of bias) and give reasons for the decision. The most common metaphor to describe the functions of an external administrative review tribunal engaging in merits review is that it stands in the shoes of the decision-maker (see *Minister for Immigration and Ethnic Affairs v. Pochi (1980) 31 ALR 666 at 671*). 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.

The metaphor by Smithers J in *Minister for Immigration and Ethnic Affairs v Pochi (1980) 31 ALR 666 at 671* that; “in reviewing a decision the Tribunal is to be considered as being in the shoes of the person whose decision is in question,” conveys the notion that the external administrative merits review tribunal may re-make a decision, as if it were the original decision-maker. The PPDA Tribunal does not have to find legal error first. The question for the determination of the PPDA Tribunal is not whether the decision which the appellant made was the correct or preferable one on the material before it. The question for the determination of the PPDA Tribunal is whether that decision was the correct or preferable one on the material before the PPDA Tribunal. This includes material that was before the primary decision maker including that which ought to have been before it. Merits review tribunals typically have powers to affirm a decision, vary it, set it aside and make a substitute decision, or set it aside and remit it to the

original decision-maker for reconsideration. The ability to make a substitute decision is one of the defining characteristics of merits review.

The PPDA Tribunal in performing its administrative review role, functions more like a court at first instance. It is not an Appeals Tribunal whose powers may be limited by law or restricted to questions of law and, only with the Appeal Panel's leave, which may be extended to the merits. Section 91 I (6) of *The Public Procurement and Disposal of Public Assets (Amendment) Act, 2011*, does not contain such restrictions. 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. In some cases such as this, failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, or to take into account an obvious fact or point of law, could constitute a failure to review.

Therefore in the instant appeal, the PPDA Tribunal did not err in considering an aspect of the material before it which the appellant ought to have considered but did not, i.e. that Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* is limited to minor cosmetic change and is not a blank cheque for overhauling the entire bidding document. Further, that permitting such customisation would be allowing the appellant to abdicate its obligations under section 7 (1) (d) and (e) of *The Public Procurement and Disposal of Public Assets Act, 2003*. As a result, that the bidding document issued by the procurement entity in the instant case was a complete deviation from the Standard Bidding Document the appellant had issued for the management of Public Vehicle Parking Areas, for which reason the procurement entity should instead have invoked Regulation 10 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* to apply to the appellant for specific authorisation in writing, for approval of deviation from the use of the document. The Tribunal concluded that the entire bidding process, by virtue of that unauthorised deviation, was *void ab initio* and thus a nullity.

Although this aspect was neither part of the substantive issues raised by the “case” articulated by the respondent or that of the appellant in their respective written submissions to the PPDA Tribunal, it formed part of the material accepted by, or not rejected by either party. In framing the case differently from how it has been framed by the parties, the PPDA Tribunal did not err since it was not obliged to limit its determination to the “case” articulated by the parties. Had the PPDA Tribunal failed to take into account this obvious point of mixed law and fact, it would in the circumstances of this case have failed in its duty of external administrative merits review. This ground of appeal fails.

Grounds 4, 5 and 6 of the appeal in essence assail the decision of the Tribunal regarding the validity of the extent to which the procurement entity customised the appellant’s Standard Bidding Document for the management of Public Vehicle Parking Areas to the procurement of management and revenue collection for Ejupala market. The appellant contends the Tribunal erred when it failed to consider and take into account the fact that at the material time there was no standard bidding document for the management of markets issued by the appellant and for that reason the procurement entity’s deviation from the Standard Bidding Document issued by the Authority for a different purpose, without seeking and obtaining approval from the Authority to use the bidding document, was permissible under Regulation 48 of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*.

The relevant regulation provides as follows;

48. Bid documents

- (1) Standard bid documents, and other documents issued by the Authority and any other competent authority, may be customized for use by a procuring and disposing entity by the entry of the contact details of the procuring and disposing entity such as, name and address, the addition of a logo or any other form of identification of the procuring and disposing entity.

Customization means the alteration of something in order to better fit the specific requirements at hand. One of the reasons for standardising bidding documents is the desire to establish a uniform, systematic, efficient and cost effective procedure, in accordance with the relevant rules and regulations of public procurement. Therefore, the customization of Standard bidding documents issued by the appellant to better fit the specific requirements of procurement entities

should conform to the limits imposed by that provision. In order to preserve uniformity, the provision limits the extent to which such documents may be customised. It prescribes the kind of alterations permitted in the standard templates and the cases where deviations from the standard provisions can be made. Although the list is not exhaustive, when a provision in a statute explicitly sets forth a series of terms to which it applies, and court has to determine whether the provision also applies to other situations not explicitly mentioned therein, according to the *ejusdem Generis* rule of statutory construction “general words that follow specific words in a statute are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words (see *Regina v. Edmundson* (1859) 28 LJMC 213, where it was held that “wide words associated in the text with more limited words are to be taken to be restricted by implication to matters of the same limited character”; and *R v. Cleworth* (1864) 4 B & S 927 at 932; *Gray v. News Group Newspapers Ltd and Another* [2011] 2 All ER 725; *Coogan v Same* [2011] 2 WLR 1401; *Registered Trustees of Kampala Institute v. Departed Asians Property Custodian Board*, S.C. Civil Appeal No. 21 of 1993 [1994] IV KALR 110; *Mobrama Gold Corporation Ltd v. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam* [1995-1998] 1 EA 199).

The provision lists alterations in the character of insertion of names and addresses, the addition of a logo or any other form of identification to such documents. When interpreted *ejusdem Generis*, this provision is not a licence to procurement entities’ effecting extensive alterations as will change the nature and character of the document or of the purpose to which such a document is to be applied. Even from the purposive approach of statutory interpretation, I construe the entire Statutory Instrument from which this provision is drawn as aiming to promote transparency, competition, fairness and elimination of arbitrariness through the standardisation of the bidding documents. Such a purpose will be achieved by limiting the permissible scope of variations by procurement entities rather than taking a liberal, expansive interpretation. The Tribunal therefore came to the right decision when it found that Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* is limited to minor cosmetic change and is not a blank cheque for overhauling the entire bidding document.

Where the alteration sought will change the nature and character of the document or the purpose to which such a document is to be applied, then the procurement entity must invoke Regulations 5 (1) (c) (ii), and 61 (1) (a) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006* which permit the appellant to authorise deviations in situations where there are exceptional requirements, the market conditions require such deviation, the international standards require such deviation, or where the practices which regulate or govern the procurement make it impossible, impracticable or uneconomical to comply with the Standard Document. For that purpose, Regulation 61 (2) (e) thereof requires the procurement entity to furnish the appellant with a statement of whether the deviation is required for a single requirement or for a number of requirements of the same class over a period of time. This is a further manifestation of the intent to closely regulate the extent to which Standard Bid Documents issued by the appellant may be customised.

A procurement entity which customises a Standard Bidding Document designed and issued by the appellant for the management of Public Vehicle Parking Areas, and instead applies it to the procurement of management and revenue collection of markets, does not simply undertake minor cosmetic change to it as is envisaged by Regulation 48 (1) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, but rather undertakes a process of extensive alterations which change the nature and character of the document and the purpose to which the document was designed to be applied. These are deviations caused by the absence of any standard document issued by the appellant for the latter purpose, thereby creating a situation where it is impossible or impracticable to comply with the Regulations. The corrective measure then must be undertaken by invoking Regulations 5 (1) (c) (ii), and 61 (1) (a) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, if such a deviation is to be undertaken. The Tribunal's conclusion was reasonable. Its interpretation of the applicable Regulations is not contrary to their plain meaning. For those reasons the Tribunal came to the correct conclusion and consequently grounds 4, 5 and 6 of the appeal fail.

Grounds one and two of the appeal fault the Tribunal for deciding that the net effect of the decision of the appellant of 7th August 2015, was to uphold the complaint in part and therefore the appellant should have ordered a refund of the complainant's administrative review fees. The

respondent filed an application to the appellant based on two grounds both of which the appellant found lacked merit and the application was rejected. But having found, *proprio motu*, that the procurement entity had erred in applying the financial capacity criteria in respect of the bidder declared as the best evaluated bidder, it directed the procurement entity to undertake a fresh evaluation of the bids. It is on this account that the Tribunal found that the respondent's complaint had been upheld in part.

According to Regulation 138 (3) of *The Local Governments (Public Procurement and Disposal of Public Assets) Regulations, 2006*, an application for administrative review made to the Accounting Officer of the procurement entity should be accompanied by payment of a prescribed fee in accordance with guidelines issued by the appellant. *The Guideline on Administrative review Local Governments (Public Procurement and Disposal of Public Assets) Guideline, No. 5 of 2008* fixed the fee payable and further provided that in the event of a successful application, the fee paid by the applicant should be refunded. The fee will not be refunded if the outcome of the administrative review is that the original decision is upheld. The guidelines do not provide for a partial refund in the case of partial success. Entitlement to refund is not *pro rata* the degree or level of success of the application.

In the instant case, in her application to the appellant for administrative review, the respondent asked the appellant to “quash the Accounting Officer's decision and consequently declare me as the best evaluated bidder for Ejupala Market.” The application therefore sought the remedy of quashing the decision of the Chief Administrative Officer and the relief of declaring her the successful bidder. Therefore, to the extent that the appellant did not uphold the decision of the Chief Administrative Officer but rather quashed it as prayed by the respondent, the application succeeded on a ground other than those submitted by the respondent.

That an application has failed on the grounds submitted by the applicant but the decision of the Chief Administrative Officer has nevertheless been annulled, would mean that the overall result is that the application is successful. From the perspective of the applicant, she succeeded in causing the annulment of the decision, albeit in an unintended manner, but failed to attain the reliefs sought, hence the Tribunal's view that it was a partial success. Other than rejecting the

application as having failed, the appellant ought instead to have found that the application had succeeded on grounds other than those advanced by the respondent. It instead found that the application had failed and therefore rejected it. Had the appellant drawn the conclusion that the application had succeeded on a ground other than those advanced by the respondent, as it ought to have found, then it would follow that the respondent was entitled to a refund of the administrative review fee under the *LG (PPDA) Guideline, No. 5 of 2008*. For that reason the Tribunal made the correct decision and consequently grounds one and two of the appeal fail.

The final ground of appeal assails the award of costs of shs. 2,000,000/= to the respondent by the PPDA Tribunal. Save in exceptional cases, an appellate court will not interfere with the assessment of what an administrative merits tribunal considers to be reasonable costs. It will however do so where it is shown that either the decision was based on an error of principle, or the amount awarded was manifestly excessive as to justify an inference.

Prima facie, parties before the PPDA Tribunal ought to bear their own costs, unless in particular instances, in the proper exercise of discretion, the PPDA Tribunal considers otherwise. The PPDA Tribunal should make such awards only if satisfied that it is fair to do so, having regard to whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as; failing to comply with an order or direction of the Tribunal without reasonable excuse, failing to comply with the PPDA Act, the regulations, rules or any other enabling enactment, seeking unnecessary or avoidable adjournments, causing unnecessary or avoidable, attempting to deceive another party or the Tribunal, the nature and complexity of the proceeding, a party who makes an application that has no tenable basis in fact or law or otherwise conducting the proceeding vexatiously.

The rules of natural justice require that before making awarding costs, the PPDA Tribunal must give the party to be affected by such an award, a reasonable opportunity to be heard. I have perused the record of PPDA Tribunal. Not only is there no evidence of the appellant having been heard on the decision to award costs to the respondent, but also the PPDA Tribunal did not furnish any reason for the award apart from the general comment that, “the applicant is awarded two million shillings to cover her out of pocket expense and legal costs.” There is no indication

whatsoever on the record as to how the PPDA Tribunal assessed the costs in order to arrive at that specific quantum. In the circumstances, this was an improper exercise of discretion and for that reason ground seven of the appeal succeeds. The award of costs to the respondent by the PPDA Tribunal is hereby set aside.

In the final result, the appeal succeeds only as regards the award of costs to the respondent. The appeal against the findings of the PPDA Tribunal is hereby dismissed. Since the appeal has succeeded only on one ground, the respondent is awarded half the costs of this appeal.

Dated at Arua this 23rd day of February 2017.

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Stephen Mubiru

Judge.