

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

APPLICATION NO. 19 OF 2021

BETWEEN

SEYANI BROTHERS & CO. (U) LTD=====APPLICANT

AND

ENTERPRISE

UGANDA=====RESPONDENT

APPLICATION FOR REVIEW OF A DECISION OF THE ACCOUNTING OFFICER OF THE RESPONDENT IN RESPECT OF THE PROCUREMENT FOR THE CONSTRUCTION OF THE PROPOSED OFFICE BUILDING FOR ENTERPRISE UGANDA ON PLOTS 2A & 2-4 BUTABIKA, KAMPALA UNDER PROCUREMENT REFERENCE NO. EUG/WRKS/2020-2021/00002

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

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 27th May 2021, Enterprise Uganda (the Entity) invited sealed bids for a construction project under Procurement Reference Number EUG/WRKS/2020-2021/00002.
2. On 7th June 2021, a pre-bid meeting was held at the proposed project site attended by eight (8) bidders namely: CRJE (East Africa) Ltd, Arab Contractors, GBH International (LLC), Habicon Ifra Ltd, Dott Services Ltd, Neweda Engineering and Scaffold Engineering and Construction Ltd.
3. The Entity received bids from thirteen (13) bidders including the Applicant. On 28th June 2021, the submitted bids were opened. Seven (7) bidders progressed to the financial comparison stage.
4. On 27th August 2021, the Notice of Best Evaluated Bidder was published wherein Reliable Engineering and Décor Ltd. & Sheeba Construction (JV) was declared the Best Evaluated Bidder and recommended for award of contract at an evaluated contract price of UGX. 25,233,780,692 VAT inclusive. The Applicant was ranked the second best evaluated bidder on the ground that it quoted a higher bid price of UGX. 25,945,698,989.
5. On 30th August 2021, the Applicant, being aggrieved with the results of the evaluation, requested the Entity for a detailed evaluation report. On 31st August 2021, the Entity provided the Applicant with the detailed evaluation report. The Applicant noted that the Entity did not apply the Margin of Preference in the process of financial evaluation.
6. On 8th September 2021, the Applicant applied for administrative review for the irregularity in the financial comparison and proposed corrective measures.
7. On 13th September 2021, the Entity communicated the findings of the administrative review committee that conducted investigations

into the matters raised by the Applicant and dismissed the Applicant's administrative review application stating that it was filed out of time contrary to the timeline stipulated under Section 89 (3) (b) of the PPDA Act, 2003 as amended.

8. Being aggrieved by the Entity's decision, the Applicant applied to the Tribunal for administrative review against the Entity's decision on 24th September 2021.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant raised two grounds.
2. Under ground 1, the Applicant disagrees with Respondent's reason for rejecting the application of Administrative review as 89 (3)(b) of the PPDA Act as amended 2021 allows an aggrieved bidder ten working days to make complaints.
3. That the complaint arises from the methodology used at, and the result of the evaluation, and not before. That they only came to know about the Respondent deviating from the evaluation criteria on 31st August 2021, when Respondent shared the detailed evaluation report for subject procurement and then within allowable timeline, on 8th September 2021 (i.e. within 6 working days) applied for an administrative review to the Accounting officer.
4. In ground 2 the Applicant complains that the Respondent didn't apply the Margin of Preference while evaluating financial comparison of bids despite it being part of the Bid Solicitation Document and following is our substantiation for the same.
5. That the pre-bid meeting minutes do not have the effect of amending the bidding document and that the only way the Respondent could be said to have amended the criteria in the bidding document would be through issuing an addendum to that effect.
6. That the Respondent wrongfully did not apply the Margin of Preference

during the financial comparison of bids despite it being part of the bid solicitation document. That the Applicant had applied for the Margin of Preference in its bid and it had fulfilled all criteria required as stipulated in the bid solicitation document.

7. The Applicant prayed that the Tribunal reviews the decision of the Respondent and find that the Respondent was wrong in law and fact for not applying the Margin of Preference. That the Tribunal finds that the Applicant would have been rightfully declared as the Best Evaluated Bidder had the Margin of Preference been applied as its adjusted bid price would have been lower than that of Reliable Engineering and Décor Ltd. & Sheeba Construction (JV), the Best Evaluated Bidder declared by the Respondent.
8. The Applicant further prayed that the Tribunal find that the Best Evaluated Bidder notification was wrong and misconceived and a nullity; that the Applicant was the Best Evaluated Bidder; and that alternatively, the Respondent re-evaluate the financial bids and apply the Margin of Preference.
9. The Applicant named Enterprise Uganda as the Respondent to the Application.

C. REPLY TO THE APPLICATION

1. The Respondent argues that it rightly did not apply the Margin of Preference as per the minutes of the pre-bid meeting held on 7th June 2021 where it communicated to the bidders that the Margin of Preference would not be applied, and that the same position was emphasised in the pre-bid meeting minutes issued on 18th June 2021.
2. The Respondent contended that it rightly rejected the Applicant's application for administrative review dated 8th September 2021. That the Applicant became aware of the circumstances giving rise to the complaint on 7th June 2021 and that its application to the Respondent dated 8th September 2021 was time barred.
3. The Respondent averred that as per the PPDA (Rules and Methods for Procurement of Supplies, Works & Non-Consultancy Services)

Regulations, 2014, the issuance of an addendum to the bidding document is discretionary and not mandatory.

4. That even if the Application had been submitted on time, the submission of a bid by the Applicant indicated willingness to be bound by the evaluation criterion and the further clarification issued which eliminated the criterion for margin of preference. That the margin of preference had been waived and thus could not have been considered by the Evaluation Committee.
5. The Respondent prayed that Tribunal uphold the decision of the Respondent in dismissing the Application and that the procurement be allowed to proceed to its logical conclusion.

D THE ORAL HEARING

The Tribunal held an oral hearing on 11th October 2021 via zoom software. The appearances were as follows:

1. Counsel Joakim Kunta-Kinte, John Jet Tumwebaze from Kampala Associated Advocates represented the Applicant. In attendance was Mr. Sarfaraz Juwani, the General Manager of Seyani Brothers & Co. (U) Ltd
2. The Respondent was represented by Prossy Oluka, a procurement consultant assisted by Tadeo Sempagama. In attendance were Mary Odongo, Ronald Mukasa and Rosemary Mutyabule; all being Directors at Enterprise Uganda.
3. The Best Evaluated Bidder was represented by Counsel Stephen Muhoozi, Simon Peter Kiribwa from CCAKS Advocates. In attendance was Mr. Mosaf Hossain.

E. SUBMISSIONS

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

Applicant

1. The Applicant argued that the Respondent erred in law and fact when it rejected its administrative review application for being filed out of

time. The Applicant cited Section 89 (3) (b) of the PPDA Act, 2003 which allows an aggrieved bidder ten working days to make complaints against an Entity.

2. The Applicant averred that its complaint arises from the methodology used during the evaluation stage and the result of the evaluation.
3. That the Applicant only came to know of the irregularities in the financial evaluation process on 31st August 2021 upon receipt of the detailed evaluation report.
4. That the pre-bid meeting minutes do not have the effect of amending the bidding document and that the only way the Respondent could be said to have amended the criteria in the bidding document would be through issuing an addendum to that effect.
5. That the Respondent wrongfully did not apply the Margin of Preference during the financial comparison of bids despite it being part of the bid solicitation document. That the Applicant had applied for the Margin of Preference in its bid and it had fulfilled all criteria required as stipulated in the bid solicitation document.
6. The Applicant prayed that the Tribunal reviews the decision of the Respondent and finds that the Respondent was wrong in law and fact for not applying the Margin of Preference. That the Tribunal finds that the Applicant would have been rightfully declared as the Best Evaluated Bidder had the Margin of Preference been applied as its adjusted bid price would have been lower than that of Reliable Engineering and Décor Ltd. & Sheeba Construction (JV), the Best Evaluated Bidder declared by the Respondent.
7. The Applicant further prayed that the Tribunal find that the Best Evaluated Bidder notification was wrong and misconceived and a nullity; that the Applicant was the Best Evaluated Bidder; and that alternatively, the Respondent re-evaluate the financial bids and apply the Margin of Preference.

Respondent

1. The Respondent argued that it rightly did not apply the Margin of Preference as per the minutes of the pre-bid meeting held on 7th June 2021 where it communicated to the bidders that the Margin of Preference would not be applied, and that the same position was emphasised in the pre-bid meeting minutes issued on 18th June 2021.
2. The Respondent contended that it rightly rejected the Applicant's application for administrative review dated 8th September 2021. That the Applicant became aware of the circumstances giving rise to the complaint on 7th June 2021 and that its application to the Respondent dated 8th September 2021 was time barred.
3. The Respondent averred that as per the PPDA (Rules and Methods for Procurement of Supplies, Works & Non-Consultancy Services) Regulations, 2014, the issuance of an addendum to the bidding document is discretionary and not mandatory.
4. That even if the Application had been submitted on time, the submission of a bid by the Applicant indicated willingness to be bound by the evaluation criterion and the further clarification issued which eliminated the criterion for margin of preference. That the margin of preference had been waived and thus could not have been considered by the Evaluation Committee.
5. The Respondent prayed that Tribunal upholds the decision of the Respondent in dismissing the Application and that the procurement be allowed to proceed to its logical conclusion.

Best Evaluated Bidder

1. The Best Evaluated Bidder submitted that the Applicant was well aware that the criterion of margin of preference would not be applied but opted to continue to bid. It therefore contended that Application for administrative review was lodged over 3 months later from the date that the applicant first became aware that the criterion of margin of preference would not be used by virtue of the pre-bid meeting clarification. That the application for administrative review was therefore time barred
2. The Best Evaluated Bidder contended that clarification was made to all bidders and communicated by virtue of the meeting held on the

7th day of July, 2021 where the Applicant was present. The clarification was binding on all the bidders and there was no addendum or need for one to be provided.

3. The Best Evaluated Bidder further contended that the respondent rightly exercised its power under S.65 (1) of the Public Procurement and Disposal of Public Assets Act, 2003 (as amended) and that there was no any form of prejudice occasioned to, and or suffered by the Applicant to justify any of the remedies sought in this Application.
4. The Best Evaluated Bidder prayed that Tribunal uphold the decision of the Respondent in dismissing the Application and that the procurement be allowed to proceed to its logical conclusion.
5. The Best Evaluated Bidder prayed for costs incurred by our client to file these submissions of the Application.

F. RESOLUTION BY THE TRIBUNAL

1. We now revert to the substantive issues in this application:

- i. *Whether the Respondent erred in law and fact when it rejected the Applicant application for administrative review on the ground that it was time-barred?*
- ii. *Whether the Respondent erred in law and fact when it did not apply the margin of preference during financial comparison of the bids?*
- iii. *What remedies are available to the Parties?*

Resolution of Issues Raised

Issue 1

Whether the Respondent erred in law and fact when it rejected the Applicant application for administrative review on the ground that it was time-barred?

1. The Applicant argued that the Respondent erred in law and fact when it rejected its administrative review application for being filed out of time. The Respondent contended that it rightly rejected the Applicant's

application for administrative review dated 8th September 2021. That the Applicant became aware of the circumstances giving rise to the complaint on 7th June 2021 and that its application to the Respondent dated 8th September 2021 was time barred.

2. **Section 89 (1) of the PPDA Act, 2003** as amended states that a bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity.
3. **Section 89 (3) (b) of the PPDA Act, 2003** as amended states that a complaint against a procuring and disposing entity shall be made within ten working days after the date the bidder first becomes aware or ought to have become aware of the circumstances that give rise to the complaint.
4. A bidder can apply for administrative review at any stage of the procurement process but in any case, within 10 working days from the date when the bidder first became aware of the circumstances giving rise to the complaint.
5. In the given instance, the crux of the issue at hand is to determine whether the ten working days in question started running from 7th June 2021 when the pre-bid meeting was held or from 31st August 2021 when the Applicant became aware of the contents of the Notice of Best Evaluated Bidder.
6. A pre-bid meeting is conducted to clear up any confusion regarding project details, scope of work, and solicitation of documents. It is during a pre-bid meeting that contractors can decide whether a project is in their company's best interest or not. Usually, pre-bid meetings are optional and not mandatory.
7. The right of a bidder to seek administrative review is found in section 89(1) and (2) of the *Public Procurement and Disposal of Public Assets as amended by Act 15 of 2021*. Section 89(1) and (2) provides as follows:

89. Administrative review by Accounting Officer

- (1) *A bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity.*
- (2) *A bidder may also seek administrative review for any omission or breach by a procuring and disposing entity, of this Act, regulations or guidelines made under this Act or any provision of the bidding documents.*
8. Under the above cited legal provisions, any decision, omission or breach by a procuring and disposing entity may give rise to a bidder's application for administrative review. The Respondent's communication in the pre-bid meeting that the margin of preference shall not apply could have been challenged through administrative review. However, the actual non-application of the margin of preference during bid evaluation, leading to the issue of a notice of best evaluated bidder, is also an impugned decision, omission or breach which is amenable to administrative review within the meaning of section 89(1) and (2) of the *Public Procurement and Disposal of Public Assets as amended by Act 15 of 2021*.
9. The Applicant became aware of the circumstances that gave rise to its complaint on 27th August 2021 when the Best Evaluated Bidder (BEB) Notice was displayed. The issuance of the detailed evaluation report on 31st August 2021 only helped to elaborate or expound on the circumstances under which the Applicant's bid was disqualified at the Financial Comparison stage.
10. Accordingly, the ten working days' time limit for lodging a complaint before the Respondent's Accounting Officer began to run from the 27th day of August 2021 and was scheduled to end on 10th September 2021. Having applied for administrative review to Accounting Officer of Respondent on 8th September 2021, the Application was lodged two days prior to the deadline and within the timeline stipulated in 89(1) and 89(3) (b) of the *Public Procurement and Disposal of Public Assets Act*.

11. **The Respondent's accounting officer therefore erred in law and fact when it rejected the Applicant's application for administrative review on the ground that it was time-barred.**
12. **The Tribunal answers issue no. 1 in the affirmative.**

Issue 2

Whether the Respondent erred in law and fact when it did not apply the margin of preference during financial comparison of the bids?

13. As far as is relevant to this application, margin of preference is provided for under section 59A of the *Public Procurement and Disposal of Public Assets Act* as amended by Act No. 11 of 2011.
14. Section 59A (1) provides that preference schemes shall be applied in two instances. The first instance is in respect of goods, works and non-consultancy services, where the open domestic or open international bidding methods are used. The second instance is in respect of consultancy services, for the quality and cost based selection method and the least cost selection method, where proposals are invited from both national and foreign consultants.
15. Section 59A(3) provides that a procuring and disposing entity shall when procuring goods, works or services under this section, grant a margin of preference of fifteen percent, in respect of goods; and seven percent, in respect of works or services.
16. Section 59A(5) provides that a contractor and a consultant qualify for preference as a Ugandan contractor or a Ugandan consultant where—
 - (a) the contractor or consultant is incorporated or registered in Uganda;
 - (b) the contractor or consultant if an individual, is a Ugandan citizen;
 - (c) the contractor or consultant if a company registered in Uganda, more than fifty percent of the capital of the contractor or consultant is owned by Ugandan citizens; and

- (d) the contractor or consultant if a legal entity, more than fifty percent of the capital of the contractor or consultant is owned by the Government or by a procuring and disposing entity.

A contractor or consultant who qualifies as such under subsection (5) (d) above shall be—

- (a) legally and financially autonomous;
- (b) established as a commercial venture; and
- (c) authorised by a competent authority or a professional body to operate as a contractor or to perform services as a consultant.

- 17. The Tribunal's reading of the above provisions is that they are mandatory and not merely directory. The legislature commanded that preference schemes shall be applied in accordance with section 59A cited above.
- 18. Accordingly, **Part 1: Section 2 Bid Data Sheet** and **ITB 38.1** of the standard bidding document states that a margin of preference shall apply.
- 19. **Part 1: Section 3 Evaluation Methodology and Criteria**, Subsection D on Financial Comparison Criteria under Item 8 on Margin of Preference provides as follows:
 - 8.1 *For margin of preference for the purpose of bid comparison, the following procedures will apply:*
 - 8.2 *The ENTERPRISE UGANDA will first review the bids that have reached financial comparison to confirm the appropriateness of the classification, and to identify the bid group classification of each based upon bidders' declaration in the Bid Submission Sheet and supporting evidence on ownership/ shareholding of the bidders in accordance with ITB 38.2.*
 - 8.3 *The ENTERPRISE UGANDA will then add the following margins to the evaluated bid price of the bid(s) which do not qualify for preference, in accordance with paragraph 8.2 above, for the purpose of further comparison only:*

A. For bids classified in Groups A and C:

A preference of 7% shall be added to the evaluated price of the bids in Group C

B. For bids classified in Groups B and D:

A preference of 4% shall be added to the evaluated price of the bids in Group C

8.4 The lowest evaluated bid shall be determined using the adjusted bid prices including added margins.

20. At a pre-bid meeting held on 7th June 2021, it was stated at Minute 004/06/2021 (xii) that *ITB 38.1 a margin of preference shall not apply*. On that basis, at the financial comparison stage, the Applicant's bid price of UGX 27,939,702,647 was assessed by the evaluation committee without application of a margin of prevalence. This the applicant claims made its bid higher than that of the Best Evaluated Bidder who quoted UGX 25,233,780,692. Indeed, the Entity's response to the application was majorly on the premise that the clarifications made at the pre-bid meeting and further communicated through the pre-bid meeting minutes that were shared with all the bidders amended the standard bidding document.
21. In view of the clear provisions of section 59A of the *Public Procurement and Disposal of Public Assets Act* cited above, the purported waiving of the margin of preference was ultra vires the powers of the Respondent.
22. Be that as it may, a related question is **whether the resolutions and clarifications made at a pre-bid meeting can amend or alter or modify the solicitation documents/bidding document without issuance of an addendum.**
23. Under **Regulation 50 of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014**, a procuring and disposing entity is given the discretion to hold pre-bid meetings so as to allow potential bidders to seek clarification or access to project sites where applicable.
24. **Item 1.2 of the Public Procurement and Disposal of Public Assets Guidelines No. 9 of 2014** on *Pre-Bid and Pre-Proposal Meetings* is

emphatic on the purpose of a pre-bid meeting and states that:

“...the essential purpose of a pre-bid meeting is to provide an opportunity for clarification, and shall not be used to introduce new requirements that were not included in the solicitation document.”

25. The clarifications or amendments to queries raised during the pre-bid meeting are always shared with all the prospective bidders who have expressed interest in accordance with the standard bidding document.

Under **ITB 9.5** of the bid solicitation document, it states as follows:

“...any modification to the bidding documents that may become necessary as a result of the pre-bid meeting shall be made by the ENTERPRISE UGANDA exclusively through the issue of an Addendum pursuant to ITB 12 and not through the minutes of the pre-bid meeting...”

26. The procedure on modification of a solicitation document is stated in **Section 65 (1) of the Public Procurement and Disposal of Public Assets Act 2003** read together with **Regulations 45(3), 45(4), 45(5), 45(8) -(11) of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014.**

27. It is our understanding that the net effect of the aforementioned provisions is that:

- (i) Modification of a solicitation document is only activated by issuance of an addendum approved by the Contracts Committee.*
- (ii) The Modification of a solicitation document can be effected at any time prior to the deadline for bid submission.*
- (iii) Clarification made by the procuring and disposing entity shall not be taken as an addendum to the bidding documents.*
- (iv) An addendum, including any extension to the bidding period, shall be issued in writing and the same information shall be provided to all the bidders.*
- (v) All clarifications and addenda to the bidding documents shall be binding on all the bidders.*
- (vi) All addenda to bidding documents shall be approved by the contracts committee before being issued to bidders and shall be numbered sequentially and lastly;*
- (vii) A procuring and disposing entity must obtain proof of receipt of the*

addendum by a bidder.

28. It therefore follows that Minute 004/06/2021 (xii) reading that “**a margin of preference shall not apply**”, was contrary to the true purpose of a pre-bid meeting since it introduced a new requirement of not applying a *margin of preference*, which was contrary to the solicitation document. This was an irregular modification of the solicitation document contrary to principles of transparency, accountability and fairness ethics stipulated in section 45 of the *Public Procurement and Disposal of Public Assets Act 2003*.
29. The Tribunal has noted that there was no Addendum accompanying the pre-bid meeting minutes with the effect of amending the bidding document that had already been approved by contracts committee and issued to the bidders. This means that the evaluation criterion in the bidding document was not altered and the evaluation of the bids submitted was to be in accordance with that bidding document.
30. Had the entity intended to modify the solicitation document as a result of the pre-bid meeting, it would have sought approval of contracts committee so that the appropriate addendum would be availed to all bidders. Such an addendum would then be binding on all bidders as envisaged under *Regulations 45(5), 45(8), 45(8) and 45(11) of the **Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014***.
31. **Section 71 (3) of the Public Procurement and Disposal of Public Assets Act, 2003** states that no evaluation criteria other than stated in the bidding documents shall be taken into account. **Regulation 7 (2) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014** states that an evaluation committee shall not, during an evaluation, make an amendment or addition to the evaluation criteria stated in the bidding document, and shall not use any other criteria other than the criteria stated in the bidding document.
32. In the Tribunal’s view, a bidding document cannot not be amended by the pre-bid meeting without issuance of an addendum. The evaluation

of the submitted bids has to be in a manner consistent with the bidding document and any amendment thereof.

33. The Tribunal noted the Respondent's averment that the issuance of an addendum to the bidding document is discretionary and not mandatory. The Tribunal disagrees with this averment in light of the law and the facts in this case. We are fortified in our disagreement by the decision of the Supreme Court in **Galleria In Africa Ltd vs. Uganda Electricity Distribution Company Ltd (Civil Appeal-2017) [2018] UGSC 19**, where it 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..."

34. In the case of **Public Procurement and Disposal of Public Assets Authority v Pawor Park Operators and Market vendors SACCO (Civil Appeal-2016/3) [2017] UGHCCD 12**, Justice Mubiru made reference to 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, which is instructive in this case. The Commission stated:

"The values underpinning administrative review are said to encompass the desire for a review system which promotes lawfulness, fairness, openness, participation and rationality."

35. The Tribunal finds that upholding the decision of the Respondent which was arrived at outside the law evaluation criteria stipulated in the bidding document would be unfair and unlawful.

36. **Section 91 I (6) of The Public Procurement and Disposal of Public Assets Act, 2003 as amended**, confers upon The 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.

37. In the case of ***Minister for Immigration and Ethnic Affairs v. Pochi (1980) 31 ALR 666 at 671***, Smithers, J stated that in reviewing a decision the Tribunal is to be considered as being in the shoes of the person whose decision is in question. This means that the Tribunal may re-make a decision, as if it were the original decision-maker.

38. Having placed itself in the shoes of the Respondent as the original decision maker in the instant case, the Tribunal hereby varies the decision of the Entity. Having concluded that the minutes of the pre-bid meeting held on 7th June 2021 did not alter the bidding document, the Tribunal answers this question in the affirmative. **The Respondent erred in law and fact by not applying the margin of preference during the financial comparison of the bids while there were express requirements in the law and in the bidding document to do so.**

39. **The Tribunal answers this issue in the affirmative.**

Issue 3

What remedies are available to the Parties?

40. Since it is not the function of the Tribunal to evaluate bids, it will suffice to remit the procurement back to the entity for financial re-evaluation of the bids.

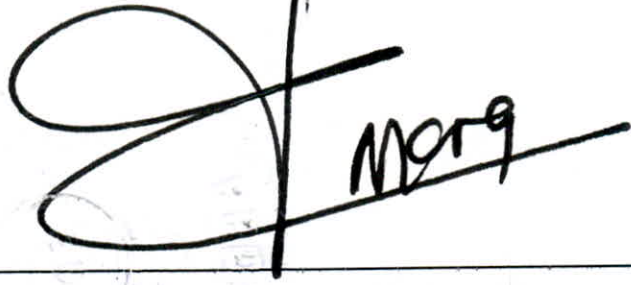
G. DISPOSITION

1. The Application is allowed.


2. The decision of the Accounting Officer dated 13th September 2021 is set aside.
3. The procurement process is returned to the Entity for re-evaluation of the bids that proceeded to the financial comparison stage in line with the *Public Procurement and Disposal of Public Assets Act 2003* as amended, the Regulations thereunder, the bidding document and this decision.
4. The Tribunal's suspension order dated 24th September 2021 is vacated.
5. The administrative review fees paid by the Applicant be refunded by the Entity.
6. Each party shall bear its own costs.



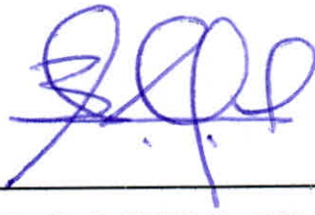
Dated at Kampala this 14th day of October 2021.



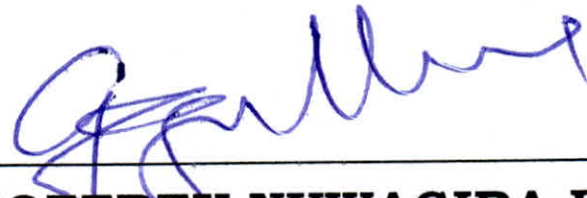
FRANCIS GIMARA S.C
CHAIRPERSON



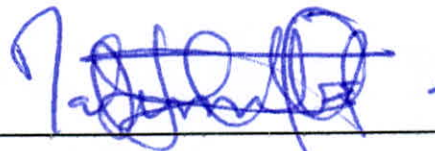
NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER