THE REPUBLIC OF UGANDA

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL

APPLICATION NO. 21 OF 2023

BETWEEN

EAA COMPANY LIMITED:: APPLICANT

AND

UGANDA NATIONAL BUREAU OF STANDARDS::::: RESPONDENT

APPLICATION FOR REVIEW OF THE DECISIONS OF UGANDA NATIONAL BUREAU OF STANDARDS IN RESPECT OF THE EXTENSION OF CONTRACT FOR PROVISION OF PRE-EXPORT VERIFICATION OF CONFORMITY TO STANDARDS SERVICE PROVIDERS FOR USED MOTOR VEHICLES UNDER PROCUREMENT REFERENCE NO. UNBS/SRVS/2019-20/00149

BEFORE: NELSON NERIMA; THOMAS BROOKES ISANGA; GEOFFREY NUWAGIRA KAKIRA; PAUL KALUMBA; AND CHARITY KYARISIIMA, MEMBERS

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On May 26, 2020, Uganda National Bureau of standards (UNBS) the Respondent executed a 3-year contract with the *EAA Company Ltd* (the Applicant) for provision of Pre-Export Verification of Conformity to Standards (PVoC) for Used Motor Vehicles under Procurement ref. UNBS/SRVCS/2019-20/00149, with the commencement date set as June 01, 2020. The 1st Respondent executed a similar contract with the *Quality Inspection Services Inc. Japan (QISJ).*

2. Cognizant of the imminent expiry of the contracts, the Respondent initiated a new procurement under Procurement ref. UNBS/NCONS/2022 – 2023/00033.

3. Pending completion of the new procurement process, the Respondent extended the duration of the contracts with both the Applicant and *Quality Inspection Services Inc. Japan (QISJ)* as follows;
(i) on May23, 2023, for a period of one month from June 1, 2023, to June 30, 2023; and

(ii) on June 27, 2023, for a period of two months from July 1, 2023, to 31 August 2023.

4. On August 8, 2023, this Tribunal in Application Nos. 15, 17 and 18 of 2023, cancelled the new procurement under Procurement ref. UNBS/NCONS/2022-2023. The Respondent was advised by the Tribunal to re-tender the procurement if it so wished.

5. In a letter dated August 23, 2023, the Respondent extended the contract of *Quality Inspection Services Inc. Japan* for 12 months to allow sufficient time to retender the procurement.

6. In a letter to the Applicant dated August 31, 2023, the Respondent cited the decision of the Tribunal in Applications No. 15, 17 and 18 regarding the responsiveness of the

Applicant's bid in the cancelled procurement. That the solicitation documents strictly prohibit fraudulent practices. That following the Respondent's and Government's unwavering commitment to maintain zero tolerance towards all forms of corruption, and considering the Tribunal's findings, the Respondent found it imperative to launch an in-depth investigation into the procurement processes concerning PVoC motor vehicle service providers spanning from 2018 to the present date, and that the Applicant would not be considered for any contract extension beyond August 31, 2023.

B. APPLICATION TO THE TRIBUNAL

1. The Applicant filed the instant Application No. 21 of 2023 with the Tribunal on September 1, 2023, seeking to review the said decision of the Respondent.

2. In the Application, the Applicant complained that:

1) The Respondent selectively and surreptitiously renewed the contract for only one company *Quality Inspection Services Inc. Japan for several months pending retender.*
2) The details of misrepresentation, misinformation, and corruption levelled against the applicant were never brought to the Applicant's attention or notice.
3) The Respondent did not at any time prior to its decision not to renew the Applicant's contract, request the Applicant to make any submissions or defend itself against the accusations levelled against it.
4) The impugned accusations levelled against the Applicant are based on a procurement that was cancelled by the Tribunal.
5) The decision not to renew the Applicant's contract and instead award a contract to *Quality Inspection Services Inc. Japan* without undertaking successive stages of procurement was illegal and contrary to the principles of public procurement.
6) The Respondent has not followed the guidance of the Public Procurement and disposal of Public Assets Authority, contained in their letter dated August 30, 2023.

7) The Applicant has a legitimate expectation of contract renewal owing to the Applicant's impeccable and commendable execution of its contract in the period 2018-2023.

3. On September 1, 2023, the Tribunal issued a suspension order of the procurement process.

4. The Respondent opposed the Application vide a reply filed on September 7, 2023.

5. *Quality Inspection Services Inc. Japan* as an interested party also opposed the Application vide a reply filed on September 8, 2023.

C. APPLICANT'S SUBMISSIONS

Locus standi

1. The Applicant brought the Application under s. 91I (1) (b) of the *Public Procurement and Disposal of Public Assets Act* as a person whose rights are adversely affected by a decision made by the Accounting Officer.

2. The allegations prima facie raise triable violations of the *Public Procurement and Disposal of Public Assets Act* relating to fairness, non-discrimination, transparency, competition, and generally compliance with procurement procedures.

Jurisdiction

3. Section 91I (1) (b) of the *Public Procurement and Disposal of Public Assets Act* empowers this Tribunal to hear the instant application.

4. The instant Application does not arise from a complaint made to the Accounting Officer. The Applicant followed a direct route to the Tribunal which is provided for under section 91I(1) (b) of the *Public Procurement and Disposal of Public Assets Act* which is not barred by rule 2 of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014.*

5. The dispute resolution clause in the contract does not oust the jurisdiction of this Tribunal as it does not make it mandatory to for an aggrieved party to first explore the option of informal negotiations. It only urges the aggrieved party to consider the option.

Whether the Respondent's decision not to extend the contract of the Applicant beyond 31st August, 2023 is just and fair

6. The respondent's Acting Executive Director/ Accounting Officer, in his letter addressed to the Applicant dated 31st August, 2023, makes reference to the recent decision of the Public Procurement and Disposal of Public Assets Appeals Tribunal in Applications 15, 17 & 18 which determined the responsiveness of the Applicant's bid to the requirements stipulated within the bid documents of 2023. However, the much cited Tribunal decision does not find the applicant guilty of the said offences.

7. The Respondent's AG, Executive Director/ Accounting Officer misinterpreted the Tribunal's finding as to affect the suit contract whereas not.

8. The decision following consolidated Applications no. 15, 17 and 18 was affecting the procurement process under UNBS/NCONS/2022-2023/00033 and it, indeed cancelled it and the Respondent was ordered to call for fresh bidding.

9. The contract, which the Respondent refused to extend, is altogether a separate contract which was awarded to the Applicant following successful bid in 2020. Since the contract had come to an end, and the Respondent had not taken steps to effectively fill the vacuum that would ensue with the contract ending without issuing a fresh one to a party that would carry out the services the Applicant was giving, the Respondent deemed it fit to extend the said contract ending 31st August, 2023.

10. Furthermore, the Respondent was wrong to determine its engagement with the Applicant in a separate contract as already admitted by the Respondent, without giving the Applicant a fear hearing.

11. The Respondent also notified *QISJ* of the extension of its Pre-Export Verification of Conformity (PVOC) for used Motor Vehicles, under the procurement reference number UNBS/SRVCS/2019-20/00149 on the 23rd day of August, 2023 but waited for the last day, 31st day of August, 2023 to communicate to *EAA Company Ltd* of its decision not to renew her contract under the procurement reference number UNBS/SRVCS/2019-20/00149. This only implies and identifies the Respondent as an architect of a plan to favour *QISJ* at the expense of the Applicant.

12. In addition to the above, the Respondent, ignored the advice of the Executive Director of the Public Procurement and Disposal of Public Assets Authority dated 30th August, 2023.

13. On the 23rd August, 2023, the Respondent granted *QISJ* a longer contract extension than the first and 2nd contract extension of one month and two months respectively running for a period of 12 (twelve months) purportedly to allow for sufficient time to retender the procurement processes for the PV0C service providers for motor vehicles. It is undisputed that the 1st and 2nd contract extensions were made for one month and two months respectively and the Respondent deemed it sufficient time within which to have the procurement processes. A sharp increase of the period within which the contract extension arises only appears as an award of a fresh contract in the guise of an extension.

14. The Respondent based on an impugned procurement process and launched an in depth investigation into the procurement processes concerning PVoC Motor vehicle service providers spanning from 2018 to the present date yet the Applicant had already undergone through a thorough process and evaluation wherein it was found to be fit and with proper infrastructure to

execute the contract beginning May 2020 and ending May 2023. Further, the Respondent carried out verification exercise in 2022 and found that the Applicant has the necessary infrastructure in Japan and UAE for execution of the contract and has been effectively executing his duties under the contract.

15. The Respondent twice extended the contract pending the completion of procurement processes for the new contractors which warranted it a further extension which was unfairly denied by respondent.

16. In this case, the Respondent acted *ultra vires* when it made a decision of not extending the contract of the Applicant beyond the 31st day of August, 2023 as the Applicant legitimately expected.

17. The Respondent usurped powers of the Authority given under s.94 of the *Public Procurement and Disposal of Public Assets Act* to suspend a provider in the form of the Applicant and thus such a decision is illegal for want of natural justice and fair hearing and unenforceable.

Whether the Respondent erred in law and fact when it singly, in a discriminatory and non-competitive manner, awarded a contract to QISJ

18. Sections 43(a), (b), and S. 44, 45 of the *Public Procurement and Disposal of Public Assets Act,* provide that all public procurement and disposal shall be conducted in accordance with the principles of non- discrimination; transparency accountability and fairness.

19. The Respondent went ahead to extend *QISJ's* contract a for a period of 12 months effective 1st September, 2023 contrary to the initial extensions of one month and two months which were shorter extensions. In granting these short extensions, the Respondent knew that these short extensions were sufficient to cover the whole procurement process.

20. Furthermore, the Respondent communicated the grant of *QISJ's* contract extension on the 23rd day of August, 2023, way before the end of the Applicant's contract which was ending on the 31st day of August, 2023. However, the respondent waited for the last day of the contract, to communicate its decision not to extend its contract with the Applicant. This can only imply a well orchestrated plan to favour *QISJ* and grant it is an award of a fresh contract exclusive to other bidders without following the proper procedures.

21. The Respondents action of not further extending the Applicant's contract is unreasonable for being against the principle of legitimate expectation.

22. In the instant case, the Respondent extended the Applicant's contract on the 23rd day of May, 2023 and 27th day of June, 2023. This Respondent's action created a legitimate expectation on the part of the Applicant that its contract would be extended which entitles them to a judicial remedy.

23. In the instant case, it is unreasonable for the [Respondent] to base on the findings of this Tribunal in consolidated Applications No. 15, 17 and 18 of 2023 [which] do not have an effect on a separate contract vide Procurement Number UNBS/SRVCS/2019-20/00149.

What remedies are available to the parties?

24. Counsel prayed that;

1) This Tribunal finds that the Respondent's decision not to consider the Applicant for any contract extensions beyond the 31st day of August, 2023 is a nullity and be set aside.

2) An order that the respondent implements and extends the contract of the applicant for the provision of PVoC Motor Vehicle Services to the Respondent for the period 2018-2023 together with QISJ.

3) This Tribunal awards the Applicant damages worth USD. 15,000,000 arising from loss of earnings.

D. SUBMISSIONS OF THE RESPONDENT

1. The Respondent filed written submissions through its Legal Department.

Jurisdiction

2. The Tribunal has no jurisdiction to hear and determine the questions arising in this matter since there is no ongoing procurement process nor was any procurement process decision as contemplated under section 91I (1) (b) of the *Public Procurement and Disposal of Public Assets Act* by the Respondent's Accounting Officer.

3. In order for this Tribunal to be clothed with jurisdiction to hear and determine this matter under the section 91I(1)(b) of the Act, it must be reviewing an Administrative Decision made by an Accounting Officer in exercise of their functions under section 89(7) of the *Public Procurement and Disposal of Public Assets Act.* Furthermore, such Administrative Decision must have adversely affected the rights of the Applicant. In this instant case, there is no such decision by the Respondent's Accounting Officer.

4. The impugned decision of 31st August 2023 was not and cannot be interpreted to be an administrative review decision as envisaged under section 89 (7) of the *Public Procurement and Disposal of Public Assets Act.* To the contrary, the decision was a management decision taken by the Respondent in exercise of its functions as a procuring and disposing entity after the expiry of the Applicant's service contract under procurement reference UNBS/SRVCS/2019-20/00149.

Locus standi

5. The Applicant has no *locus standi* before this Tribunal since all rights and obligations between the Applicant and the Respondent vide procurement reference UNBS/SRVCS/2019-20/00149 and the attendant contract dated 26th May 2020 and its extensions thereto ceased upon its expiry on the 31st August 2023.

6. By law, upon the expiry of the said contract, the Applicant's rights and obligations ceased to exist. The Applicant cannot therefore base a claim against the Respondent on an expired and concluded procurement process. No rights can accrue under an expired contract.

Whether the Respondent's Decision not to renew the Applicant's contract is lawful.

7. The Contract expired on the 31st May 2023 and contract extensions thereof were made on a temporary periodic basis of one month pending conclusion of the then ongoing procurement process.

8. The continuous use of the word 'renewal' by the Applicant is quite misleading. At no time was there ever any renewal of a contract but an extension of a contract.

9. The Applicant entered into a Contract for Provision of Pre-export Verification of Conformity (PVOC) to standard services with the Respondent. The commencement date for this contract was 27th May 2020.

10. This contract was intended to run and be completed within a period of 3 (Three) years and consequently set to expire on the 31st May 2023.

11. Upon the expiry of the Contract on the 31st May 2023, the Respondent extended the Contract of the Applicant until 31st August 2023 pending the completion of the then ongoing procurement process. This rationale was clearly stated in the extension letters, and it was at all material times within the

knowledge of the Applicant that the extensions thereto did not in any way impute an obligation on the Respondent to further extend the contract upon its expiration.

12. The doctrine of legitimate expectation does not arise in situations where there is a written contract spelling out the terms and conditions between parties. The doctrine of legitimate expectation does not arise since the relationship between the parties was governed by a Contract.

Whether the Respondent erred in law when it singly, in a discriminatory and non-competitive manner, awarded a contract to Quality Inspection Services Inc. Japan

13. Following the expiry of the Contract for PVOC Services on 31st May 2023, the Respondent opted to extend the contract of both the Applicant and QISJ on a temporary basis pending the completion of the then ongoing procurement process.

14. An extension is quite distinguishable from a contract award.

15. A procuring and disposing entity may at any time after signing the contract issue a change order to the service provider.

16. The Respondent had the authority and mandate to unilaterally extend the contract of QISJ with the aim of ensuring continuity of provision of PVOC Services pending the completion of the then ongoing procurement process.

17. This Tribunal in its decision in Consolidated Applications 15, 17, and 18 of 2023, while citing the Respondent's Due Diligence Report made between 23rd April 2023 to 5th May 2023, found that the Applicant relied on documents belonging to East Africa Auto Maint Limited as its own documentation despite no evidence that the Applicant and East Africa Auto Maint Limited were bidding as a Joint Venture or a consortium. This was a clear indication of misrepresentation of facts.

18. Upon the Tribunal's cancellation of the procurement process vide reference UNBS/NCONS/2022-2023/00033, the Respondent duly instituted an Investigation Committee to critically examine and look into all bid documents submitted by the Applicant since 2018.

19. The Respondent, as a prudent Procuring and Disposing Entity, made a management decision not to consider the extension of the contract of the Applicant pending the conclusion and recommendations of an in-depth investigation into the legal status and all earlier submitted bid documents by the Applicant for the periods between 2018 and 2023.

E. SUBMISSIONS OF THE INTERESTED PARTY (QUALITY INSPECTION SERVICES INC. JAPAN)

1. The Interested Party filed written submissions through *Okecha Baranyanga & Co. Advocates.*

Jurisdiction

2. The Tribunal has no jurisdiction to hear and determine the Applicant's administrative review application having regard to the express provisions of rule 2 of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014.*

3. The Tribunal lacks jurisdiction to hear and determine the issues arising out of the procurement contract executed between the Applicant and the Respondent herein having regard to the dispute resolution forum established under the procurement contract.

Locus standi

4. The Applicant lacks *locus standi* under section 91I(1) of the *Public Procurement and Disposal of Public Assets Act* to commence and continue the administrative review proceedings herein as the Applicant lacks any contractual rights over an expired procurement contract.

Whether the Respondent's decision not to renew the Applicant's contract is unlawful

5. The Respondent is under no obligation legal or otherwise to renew the periodic contract extension with the Applicant.

6. A fixed term contract does not create a legitimate expectation of renewal.

Whether the Respondent erred in law when it singly, in a discriminatory and non-competitive manner awarded a contract to Quality Inspection Services Inc. Japan

7. The Respondent has a statutory obligation to ensure that the used motor vehicles that are imported into the country meet a certain statutory standard. The Respondent never awarded Quality Inspection Services Inc. Japan a new contract but rather it is an interim arrangement for the affected party to in the interim provide the much-needed verification services of used vehicles to the country pending conclusion of the new procurement process.

F. ORAL HEARING

1. The Tribunal held an oral hearing on September 15, 2023. The appearances were as follows:

1) Richard Nsubuga and Monica Namuli represented the Applicant, *EAA Company. Ltd (EAA).*

2) Hassan Walusimbi and Doreen Nanvule as in-house legal counsel represented the *Respondent, Uganda National Bureau of Standards.*

3) Michael Okecha and Saad Seninde represented the interested party, *Quality Inspection Services Inc. Japan* (*QISJ*).

2. In attendance were;

1) Nangalama Daniel the Respondent's Acting Executive Director, and Babalanda Godfrey the Head Procurement and Disposal Unit.

3. The parties and their counsel provided clarifications to the Tribunal and highlighted their respective cases.

G. RESOLUTION

1. In light of the pleadings and submissions of the parties, the following issues stand for determination by the Tribunal;

1) Whether the Tribunal has jurisdiction to entertain the Application?
2) Whether the Applicant has *locus standi* before the Tribunal?
3) Whether the Respondent's decision not to extend the Applicant's contract was lawful?
4) Whether the extension of the contract of *Quality Inspection Services Inc. Japan* was lawful?
5) What remedies are available to the parties?

2. We have carefully considered the pleadings, written submissions, oral submissions, and the authorities cited.

Issue no. 1- Whether the Tribunal has jurisdiction to entertain the Application?

1. The Public Procurement and Disposal of Public Assets Tribunal is a creature of Part VIIA of the *Public Procurement and Disposal of Public Assets Act* and its jurisdiction arises out of the instances listed in section 91I (a)-(c) of the *Public Procurement and Disposal of Public Assets Act.*

2. The Tribunal must therefore inquire into the facts of whether the Tribunal is seized or clothed with Jurisdiction to interrogate the merits of Application before it. See ***Application No.11 of 2023 China Civil Engineering and Construction***

Corporation vs Uganda National Roads Authority and **Application No. 45 of 2022-*Impiger Technologies Pvt Ltd Versus Higher Education Students Financing Board***

3. The Respondent argued that the decision of August 31, 2023, was contract management decision and not a procurement process decision and as such the jurisdiction of the Tribunal does not arise.

4. Section 3 of the *Public Procurement and Disposal of Public Assets Act* defines a "*procurement process*" to mean the successive stages in the procurement cycle including planning, choice of procedure, measures to solicit offers from bidders, examination, and evaluation of those offers, award of contract, and contract management.

5. The statutory definition of a procurement process therefore includes acts and omissions made during contract management. Actions such as extension of duration of procurement contracts tritely fall within the ambit of a procurement process. The decision of August 31, 2023 was therefore a decision of a *Procuring and Disposing Entity* that can be reviewed by the Tribunal where it adversely affects a person's rights pursuant to section 91I (1)(b) of the Public Procurement and Disposal of Public Assets Act.

6. *Quality Inspection Services Inc. Japan* on the other part contended that that Tribunal lacks jurisdiction to hear and determine the issues arising out of the procurement contract executed between the Applicant and the Respondent herein having regard to the dispute resolution forum established under Clause 17 of the procurement contract in tender reference number UNBS/SRVCS/2019-20/00149.

7. Clauses 17.1 and 17.2 on page 27 of the impugned Contract are reproduced here below.

17 Settlement of Disputes

i. *17.1. The Procuring and Disposing Entity and the Provider shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with the Contract or interpretation thereof.*

ii. *17.2 If the parties fail to resolve such a dispute or difference by mutual consultation within twenty-eight days from the commencement of such consultation, either party may require that the dispute be referred for resolution in accordance with the Arbitration and Conciliation Act 2000 of Uganda or such other formal mechanism specified in the SCC.*

8. Special Conditions of Contract under GCC Clause 17.2 on page 34 of the impugned Contract states as follows

i. *Dispute Settlement: Any dispute, controversy or claim arising out of or relating to this contract, or breach, termination or invalidating thereof, shall be settled by arbitration in accordance with the Arbitration rules will be UNCITRAL Rules as at present in force and shall take place in Nairobi, Kenya.*

9. Section 9 of the *Arbitration and Conciliation Act* prohibits court from intervening in matters governed by arbitration except as provided in the Act.

10. However, Part VIIA of the *Public Procurement and Disposal of Public Assets Act* provides for a specific method of dispute resolution in public procurement and disposal i.e administrative review before the Accounting Officer and application to the Tribunal.

11. It is our finding that the general provisions of the *Arbitration and Conciliation Act*, and the Special and General Conditions of Contract of the impugned contract do not oust the specific statutory jurisdiction of the Tribunal to review the impugned decision of the Respondent dated August 31, 2023.

12. The *Arbitration and Conciliation Act Cap 4* is therefore a general statute in as far as the resolution of public procurement and disposal of public assets disputes is concerned. The common law principle of *generalia specialibus non derogant* (simply put, general laws do not prevail over specific laws) would thus apply to exclude the application of the *Arbitration and Conciliation Act* in favor of the *Public Procurement and Disposal of Public Assets Act.* See ***Application No.26 of 2021 Central Investments Agency Ltd vs Mbale City Council.***

13. Counsel for *Quality Inspection Services Inc. Japan* also submitted that the Tribunal has no jurisdiction to hear and determine the Applicant's administrative review application having regard to the provisions of regulation 2 of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014.* Regulation 2 states that *These Regulations shall not apply where a procuring and disposing entity has entered into a contract, for procurement or disposal, with a bidder.*

14. The cited regulations only apply to applications for administrative review before the Accounting Officer under section 89 of the *Public Procurement and Disposal of Public Assets Act.* Applications to the Tribunal are made under section 91I of the *Public Procurement and Disposal of Public Assets Act 2003* using the procedure prescribed in the *Public Procurement and Disposal of Public Assets (Tribunal) (Procedure) Regulations, 2016.*

15. In the instant case, the Applicant did not file any complaint before the Accounting Officer. In any case, those provisions do not have any limitation to the effect that administrative review or application to the Tribunal cannot be pursued where a procuring and disposing entity has entered into a contract, for procurement or disposal, with a bidder. The principal Act must prevail over the regulations which are subsidiary legislation.

16. The Tribunal therefore has jurisdiction to review the instant application.

17. **Issue no. 1 is answered in the affirmative.**

Issue no. 2:
Whether the Applicant has locus standi before the Tribunal?

18. The *locus standi* of the Applicant was challenged in as far as the Application was premised on a Contract that had expired and extinguished any rights of the Applicant whatsoever.

19. There is no procurement process going on and the instant Applicant is not a bidder. The Applicant did not apply as a bidder to the Accounting Officer of the Respondent for administrative review. That notwithstanding, there is a statutory right under section 91I(1)(b) of the *Public Procurement and Disposal of Public Assets Act* for any person whose rights are adversely affected by a *decision* made by the Accounting Officer to apply to the Tribunal for administrative review. An Applicant to the Tribunal need not be a bidder or a bidder who has applied for administrative review before the Accounting Officer.

20. The Tribunal has over time emphasised that applications to the Tribunal are not restricted to bidders only but also to any other persons whose rights are adversely affected by a decision of the Accounting Officer as provided for under the law See: ***Application No.14 of 2023 Globe World Engineering (U) Ltd v Mbarara City Council,*** and ***Application No. 21 of 2022***.

21. The Application is premised on the non-extension of the duration of a contract that was hitherto awarded to the Applicant on May 26, 2020. The Applicant also alleged illegal extension of the contract of *Quality Inspection Services Inc. Japan.* The Applicant has in paragraphs 1, 7-18 of the instant Application, raised allegations that demonstrate prima facie

triable violations of its rights and sections 43, 44, 45, 46, 48, and 49 of the *Public Procurement and Disposal of Public Assets Act.*

22. The allegations satisfy the conditions precedent for a direct application to the Tribunal pursuant to section 91I(1)(b) of the *Public Procurement and Disposal of Public Assets Act.*

23. The Applicant therefore has *locus standi* before the Tribunal.

24. **Issue no. 2 is answered in the affirmative.**

Issue no. 3:
Whether the Respondent's decision not to extend the Applicant's contract was lawful?

25. The Applicant claims a legitimate expectation that its contract would be "renewed", owing to the Applicant's alleged "*impeccable and commendable execution of its contract in the period 2018-2023*".

26. The use of the term contract "renewal" by the Applicant is a misnomer. The impugned decision of the Respondent concerns contract extension, not renewal.

27. A contract renewal involves renewal of an existing contract on similar terms. The renewed contract is a new contract.

28. A contract extension on the other hand is the addition of extra duration to an existing contract. A contract extension is not a new contract but is a continuation of the existing contract.

29. The contract in issue was due to expire on May 31, 2023 and the extra contract period granted by the Respondent was a purported contract extension but not renewal.

30. The Tribunal will now consider whether there was a legitimate expectation of contract extension as alleged.

31. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': *De Smith, Woolf and Jowell [Judicial Review of Administrative Action 5th ed* at 425 para 8-055).

32. In other words, there must be an express, clear and unambiguous promise given by a public authority.

33. In ***High Court Civil Division Miscellaneous Cause no. 270 of 2019-Andrew Kilama Lajul versus Uganda Coffee Development Authority & Another***, Justice Ssekaana allowed an application for judicial review premised on legitimate expectation where the contract of employment contained a renewal clause. The renewal would be based on mutual agreement *subject to satisfactory performance basing on established performance management system.* The procedure had not been followed in making the decision not to renew the Applicant's contract.

34. The learned judge held as follows:
"Legitimate expectation extends to an expectation of a benefit. This may arise from what a person has been permitted to enjoy and which he can legitimately expect to be permitted to continue to enjoy. But the same can be changed on rational grounds after giving an opportunity to comment to the affected person. It may also extend to a benefit in future which has not yet been enjoyed but has been promised".

35. The 3-year contract between the Applicant and the Respondent was a fixed term of 3 years expiring on May 31, 2023. Pending completion of the new procurement process, the Respondenton June 27, 2023 extended the duration of the Applicant's contract for a fixed period of two months from July 1, 2023, to 31 August 2023.

36. There is no renewal or extension clause in the original contract between the Applicant and the Respondent, or even in the extension letter. There was no express, clear and unambiguous

promise given by the Respondent that the Applicant's contract would be renewed or extended.

37. The Applicant might have harboured a mere hope or expectation of contract extension, but there was no basis for a **legitimate expectation** of contract renewal or extension.

38. A fair hearing before a decision not to extend the Applicant's contract would have been necessary if there existed a legitimate expectation of extension in the first place. Since there was no such legitimate expectation, the principles of fair hearing are not applicable here.

39. The Applicant's contract and extension thereof having been for a fixed duration, we are not equally persuaded that the Applicant had a legal right to receive a formal notice that there would be no further extensions. We agree that such a communication would have been courteous and advisable but it cannot be raised to the level of a legal obligation.

40. Whereas the Respondent was legally entitled not to extend the Applicant's contract upon its expiry, the reasons given for non-extension were expressed in a manner which was not legally tenable.

41. The Respondent had a discretion whether to extend the Applicant's contract. In making the decision not to extend the Applicant's contract, the Respondent could take into account the adverse findings of this Tribunal in Applications No. 15, 17 and 18 of 2023 regarding the Applicant. In particular, the Tribunal had found as a fact that *EAA Company Ltd* did not have proof of physical presence and location in UAE. That *EAA Co. Ltd* could not rely on the documents of another separate and distinct entity such as *East Africa Auto Maint*, as its own documentation, even if the shareholders of both companies are related. That the purchase of 50 % shares in *East Africa Auto Maint* by the Vice President/Director of EAA Co. Ltd does not of itself make *EAA Company Ltd* the owner of *East Africa Auto Maint* assets. We therefore did not agree with the submission of

counsel for *EAA Company. Ltd* that *EAA* Co. Ltd "indirectly" own *East Africa Auto Maint.*

42. We also noted that a provider who has not been suspended by the Authority under sections 8(1(f) and 94 of the *Public Procurement and Disposal of Public Assets* Act cannot be excluded from a procurement or disposal opportunity. The purported investigation by the Respondent was not a lawful basis for the decision not to consider the Applicant for contract extension.

43. We further noted that in making the decision not to extend the Applicant's contract, the Respondent embellished this Tribunal's decision in Applications No. 15, 17 and 18 of 2023. The Tribunal did not make any findings of fraudulent practices, misinformation, misrepresentation or corruption as insinuated by the Respondent in its August 31, 2023 decision.

44. **Issue no. 3 is resolved in the affirmative.**

Issue no. 4:
Whether the extension of the contract of Quality Inspection Services Inc. Japan was lawful?

45. It is not in dispute that the contract of *Quality Inspection Services Inc. Japan* was due to expire on May 31, 2023. By a letter dated May 23, 2023, the contract was extended by 1 month effective from June 1, 2023 up to June 30, 2023 to enable the ongoing procurement process to be concluded.

46. Following the cancellation of the said procurement process by this Tribunal, the contract was further extended to August 31, 2023 by the Respondent's letter dated August 23, 2023.

47. By its order dated September 1, 2023, the Tribunal had directed the Respondent to produce and submit the entire procurement action file.

48. However, only the old procurement file for procurement UNBS/SRVCS/2019-20/00149 was provided. The records for

the contract extensions were not provided. At the oral hearing on September 15, 2023, the Tribunal directed the Respondent's Accounting officer to provide the record for the contract extensions. The records were provided by email on September 18, 2023.

49. By an Internal Memorandum dated 22 August 2023, the Contract Manager, through the Principal Inspector Regional & International Inspection; the Manager Imports Inspection; and the Deputy Executive Director Compliance, requested the Acting Executive Director for approval of contract extension for a period of twelve (12) months to cater for the completion of the procurement processes.

50. The Principal Inspector Regional & International Inspection and the Manager Imports Inspection forwarded the Internal Memorandum as presented. The Deputy Executive Director Compliance recommended an extension of 8 months. The Acting Executive Director approved the 12 months extension as requested by the Contract Manager. The Acting Executive Director proceeded to issue a letter of contract extension dated August 31, 2023 to *Quality Inspection Services Inc. Japan.* The letter was emailed by the Executive Assistant to the Executive Director on August 31, 2023 at 5.34 p.m. The contract extension was accepted through an email from "*QSJ Administration*" on September 1, 2023 at 3.04 a.m.

51. The Tribunal has noted a number of anomalies with this contract extension as elaborated below.

52. The contract being extended was due to expire on August 31, 2023. The letter of contract extension was emailed to *Quality Inspection Services Inc. Japan* on August 31, 2023 at 5.34 p.m, just hours prior to the expiry of the contract. The purported contract extension was accepted by "*QSJ Administration*" on September 1, 2023 at 3.04 a.m, after the contract had expired.

53. At the time the recommendation for contract extension was made on August 21, 2023, there were two service providers ie. *EAA Company. Ltd* and *Quality Inspection Services Inc. Japan.* The internal memorandum from the Contract Manager did not specify whether the request was for extension of the contracts for both providers, or one of them. The approval by the Accounting Officer did not also specify which contract was approved for extension. That notwithstanding, the Accounting Officer issued a letter of contract extension dated August 31, 2023 to only *Quality Inspection Services Inc. Japan.* The contract was further extended for 12 months effective September 1, 2023.

54. We note that the previous similar requests for "contract extension" dated May 16, 2023 and June 27, 2023 did not also specify whether the requests were for extension of the contracts for both providers, or one of them. However, on the previous occasions, the Accounting Officer had issued letters of contract extension to both providers. There is no explanation on the instant Internal Memorandum as to why on this occasion the Accounting Officer acted on the recommendation for contract extension by issuing a letter of extension to only one provider.

55. We also note that there was no change order and contract amendment, contrary to the General Conditions of Contract (G.C.C). Clause 9 of the General Conditions of Contract (G.C.C) annexed to the contract dated May 26 2020 between the Respondent and *Quality Inspection Services Inc. Japan* provided as follows:

> **8. *Change Orders and Contract amendments***
>
> *9.1.1 The Procuring and Disposing Entity may at any time request the Provider through notice in accordance with GCC Clause 6, to make changes within the general scope of the Contract.*
>
> *9.1.2 If any such change causes an increase or decrease in the cost of,* ***or the time required for****, the Provider's performance of any provisions under the Contract, an equitable adjustment shall be made in the Contract Price or in the*

Completion Date, or both, and the Contract shall accordingly be amended. Any claims by the Provider for adjustment must be asserted within twenty-eight days from the date of the provider's receipt of the Procuring and Disposing Entity's change order.

56. The above provision is binding between the parties, having been incorporated in the contract signed on May 26, 2020, following all the necessary approvals by the contracts committee and the Attorney General. The above provisions on change orders and contract amendment were part of the contract duly approved by the Attorney General on May 26, 2020. The approval was specifically for a three-year contract. The time given for Provider's performance could therefore not be altered without a change order and contract amendment.

57. A change order is issued by the Contract Manager under regulation 54(3) of the *Public Procurement and Disposal of Public Assets* (Contracts) *Regulations 2014.* We have not seen any evidence of a change order issued by the Contract Manager to *Quality Inspection Services Inc. Japan.*

58. The procedure for contract amendment is governed by regulation 55 of the *Public Procurement and Disposal of Public Assets* (Contracts) *Regulations 2014.*

59. Regulation 55 (6) provides that a contract amendment shall not be issued to a provider without— (a) commitment of the full amount of funding of the amended contract price over the required period of the revised contract; (b) obtaining approval from the contracts committee; and (c) obtaining approval from other concerned bodies including the Attorney General.

60. Under regulation 55(7), the approval of the other concerned bodies including the Attorney General required under sub-regulation (6) shall be obtained after approval of the amendment by the contracts committee.

61. There was no contract amendment, or approval by the contracts committee and the Attorney General. The purported

contract extension was therefore contrary to G.C.C 9 and regulation 55 (6) and (7) of the *Public Procurement and Disposal of Public Assets* (Contracts) *Regulations 2014.*

62. We do not agree with the Respondent that an amendment was not necessary because there was no increase in price.

63. The relevant General Conditions of Contract (G.C.C) are part of the standard bidding documents issued by the *Public Procurement and Disposal of Public Assets Authority,* and are mandatory. The procedure prescribed in the relevant General Conditions of Contract (G.C.C) could not be ignored.

64. Accepting the Respondent's interpretation would mean that a Contract Manager and an Accounting Officer can indefinitely issue temporary contract extensions and avoid initiating a new procurement after expiry of an existing contract.

65. The procedure for contract amendment, contracts committee approval and Attorney General approval is a check meant to ensure that when the duration of a contract is being changed, there is adequate scrutiny to ensure compliance with the principles of public procurement and disposal.

66. It is also noteworthy that in the impugned last extension, there was only one provider as opposed to the previous two providers. In the contract management report for June 2023, it is indicated that *EAA Company. Ltd* issued 3,209 certificates of road worthiness; while *Quality Inspection Services Inc. Japan* issued 276 certificates. *EAA Company. Ltd* remitted U.S. $ 128, 200 in royalties, while *Quality Inspection Services Inc. Japan* remitted U.S. $ 11,200. By necessary implication, the volume of work and the royalties payable by one provider are bound to increase. The contracts committee might wish to be satisfied that this one provider has the personnel and infrastructure to take on the increased volume of work and achieve the objectives of the procurement/contract.

67. The Tribunal has also noted that the previous purported contract extensions dated May 23, 2023 and June 27, 2023 in favour of both E*AA Company Ltd* and *Quality Inspection Services Inc. Japan* were also effected in contravention of the G.C.C 9 and the above discussed provisions of the *Public Procurement and Disposal of Public Assets (Contracts) Regulations 2014.*

68. In conclusion, the impugned extension of the contract of *Quality Inspection Services Inc. Japan* dated August 23, 2023 was riddled with irregularities, illegalities and lack of transparency as elaborated above.

69. **Issue no. 4 is resolved in the negative**.

Issue no. 5:
What remedies are available to the parties?

70. In view of our findings under issue no. 3, the Tribunal is unable to declare, as prayed by the Applicant, that the Respondent's decision not to consider the Applicant for any contract extensions beyond the August 31, 2023 is a nullity and to set it aside. In the same vein, the Tribunal cannot order that the Respondent extends the Applicant's contract. In any case, the contract has expired and even if there was a right to have it extended, that remedy would not be possible because an expired contract cannot be extended.

71. The Applicant sought damages of worth USD. 15,000,000 arising from loss of earnings. However, no damages are awardable since there was no right of contract extension. In any case, there is no proof of the Applicant's earnings or loss thereof.

72. The extension of the contract of *Quality Inspection Services Inc. Japan* has been found to be unlawful. The contract extension did not comply with the *General Conditions of Contract*, the statutory principle of transparency, and the cited regulations.

73. In *Arua Municipal Council v Arua United Transporters' SACCO, High Court at Arua C.A 25 of 2017,* Justice Mubiru held as follows:

i. *"All public procurement must conform to the three pillars of integrity, transparency and accountability. Decision-making criteria at all stages must be clear, justifiable and objective. An obligation is imposed on every procuring and disposing entity to act in a manner compatible with the integrity and openness of the process as contained in the PPDA Act, the Regulations and applicable policies in order to prevent the procuring and disposing entity from unilaterally and unfairly departing from the procedures put in place for the attainment of the objectives of the three pillars".*

74. The Public Procurement and Disposal of Public Assets Appeals Tribunal is a merits review body and has 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 the 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.

See: ***Arua Municipal Council v Arua United Transporters' SACCO, High Court at Arua C.A 25 of 2017.***

75. Merits review 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. The merits review Tribunal, or other reviewer, considers both the lawfulness of the administrative decision it is reviewing and the facts going to the exercise of discretion. A merits review Tribunal generally has wide powers to set aside the original decision and substitute a new decision of its own.

See: ***Arua Municipal Council v Arua United Transporters' SACCO, High Court at Arua C.A 25 of 2017.***

76. 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 what is the correct and preferable decision. The review body steps into the shoes of the primary decision-maker. The result of merits review is the affirmation or variation of the original decision.

See: ***What decisions should be subject to merit review? Australia Administrative Review Council publication, 1999.***

77. In exercise of its powers as a merits review Tribunal under section 91I of the *Public Procurement and Disposal of Public Assets Act*, the Tribunal has decided to grant the remedies below.

78. The impugned contract extension to *Quality Inspection Services Inc. Japan* shall be invalidated.

79. The Respondent may procure an interim service provider(s) under emergency procurement.

80. The Tribunal is cognisant of the disruption which may result from a sudden stoppage of the provision of pre-shipment inspection. For that reason, a 30-day window period will be allowed for the Respondent to initiate and complete a procurement process for an interim service provider pending the re-tendering process. The granting of time for implementation of a judicial decision is not unprecedented.

81. In order to avoid a vacuum, the Respondent will be allowed 30 days to repeat the process of finding an interim service provider(s).

H. DISPOSITION

1. The Application is allowed in part.

2. The Respondent's impugned decision dated August 23, 2023 to extend the contract of *Quality Inspection Services Inc. Japan* to provide pre-export verification of Conformity (PVOC) for used motor vehicles for 12 months effective September 1, 2023, is invalidated, subject to order 3 below.

3. The Respondent is directed, within 30 days, to procure an interim service provider(s) to provide pre-export verification of Conformity (PVOC) for used motor vehicles pending the substantive re-tendering of the procurement.

4. The Respondent may conduct the procurement of the interim service provider(s) to provide pre-export verification of Conformity (PVOC) for used motor vehicles as an emergency procurement as provided under the applicable provisions of the *Public Procurement and Disposal of Public Assets Act*, Regulations and Guidelines.

5. The Tribunal's suspension order dated September 1, 2023 is vacated.

6. Each party to bear its own costs.

Dated at Kampala this 22nd day of September, 2023.

NELSON NERIMA
MEMBER

THOMAS BROOKES ISANGA
MEMBER

GEOFFREY NUWAGIRA KAKIRA
MEMBER

PAUL KALUMBA
MEMBER

CHARITY KYARISIIMA
MEMBER