

UGANDA / JUDGMENT

Global Paper Products Limited v Uganda National Examinations Board (Application 11 of 2024) [2024] UGPPDPAAT 15 (18 March 2024)

[2024] UGPPDPAAT 15

COURT

Public Procurement and Disposal of Public Assets
Appeals Tribunal

BEFORE

Gimara SC, Chairperson, Nerima, Panel Member,
Isanga, Nuwagira, Kalumba, Kayemba, Kyarisiima

CASE / FILE NUMBER

Application 11 of 2024

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THE REPUBLIC OF UGANDA PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL APPLICATION NO. 11 OF 2024

BETWEEN

GLOBAL PAPER PRODUCTS LIMITED ::::::::::::::::::::::::::::::

AND

UGANDA NATIONAL EXAMINATIONS BOARD::::::::::::RESPONDENT

APPLICATION FOR REVIEW IN RESPECT OF A DISPOSAL OF WASTE PAPER/OLD SCRIPTS FOR TWO (2) YEARS UNDER DISPOSAL REFERENCE NO. UNEB/DISP/23-24/00003

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

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DETAILED DECISION OF THE TRIBUNAL

\$A.\$ BRIEF FACTS

- \$1.\$ Uganda National Examinations Board (the Respondent) initiated a tender for the disposal of waste paper/old scripts for two (2) years under disposal reference no. UNEB/DISP/23- \$24/00003\$ using public bidding method on October 10, 2023.

- \$2.\$ On \$3rd\$ November 2023, the Respondent received bids from 6 bidders namely, **Global Paper Products Ltd** (the **Applicant**), Hanan Contractors (U) Ltd; Mkubwa Mixed Steel Ltd; Gwengatar Technology Ltd; and Mr. Sserwadda Samuel.
- 3. During the évaluation of bids, the Evaluation Committee requested Hanan Contractors (U) Ltd to confirm an arithmetic correction which changed bid price of Hanan Contractors (U) Ltd from UGX 1,098,000,000 to UGX 1,878,800,000.
- \$4.\$ Upon the Conclusion of the evaluation process, on November 24, 2023, the Evaluation Committee recommended Hanan Contractors (U) Ltd as the best evaluated bidder at a contract price of UGX 1,878,800,000.
- On November 24, 2023, the Applicant wrote a complaint to the 5. Public Procurement and Disposal of Public Assets Authority (the Authority) complaining about alleged tampering with the bid of *Hanan Contractors (U) Ltd* which increased its bid price from UGX 1,098,000,000 to UGX 1,878,800,000.
- 6. On December 1, 2023, the Authority in a letter addressed to the Accounting Officer of the Respondent, communicated its findings regarding the complaint from the Applicant. The Authority recommended that the Respondent carries out financial evaluation of the bids after deduction of 18% VAT from *Hanan Contractors* (*U*) *Ltd's* bid price.

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- \$7.\$ On January 16, 2024, through an internal memo, the user department (Directorate of Examinations) wrote to the Head Procurement and Disposal Unit (PDU), requesting for the "pending" of the disposal process, to allow for the digitisation of scripts since book scanners had been acquired.
- 8. On January 25, 2024, the Respondent's Head PDU requested the Contracts Committee to cancel the tender process for the disposal of waste paper/off cuts to enable the trial digitisation process to commence.
- 9. On January 25, 2024, the Contracts Committee at its 915th sitting, approved the recommendation to cancel the disposal process of waste paper/old scripts.
- 10. On January 29, 2024, the Accounting Officer of the Respondent, officially communicated the cancellation of the tender for the disposal of waste paper/old scripts for two \$(2)\$ years under disposal reference no. UNEB/DISP/23-24/00003 to all bidders.
- 11. The Applicant being dissatisfied with the procurement process, filed an administrative review complaint with the Accounting Officer of the Respondent on February 6, 2024.
- 12. The Accounting Officer dismissed the Complaint on February 9, 2024.

- 13. The Applicant being aggrieved by the decision of the Accounting Officer, filed the instant Application No. 11 of 2023 with the Tribunal on February 23, 2024 seeking review of the Accounting Officer's decision.
- 14. The Respondent filed a reply and opposed the Application.

\$\mathbf{B}\$. SUBMISSIONS

Applicant

- 1. The Applicant filed submissions through \$M/S\$ Ntambirweki, Kandeebe & Co. Advocates
- \$2.\$ Counsel submitted that the Executive Director of the Respondent erred when he sat to review his own unilateral decision to cancel the disposal process. He did not state valid reasons for his decision. The complaint was addressed to the Accounting Officer but the decision was made by the Executive Director without stating that he is the Accounting Officer.
- 3. The Entity erred when it failed to follow the order by the Authority for re-evaluation of the bids.
- \$4.\$ There was no approval of the cancellation by the Contracts Committee.
- 5. The cancellation was malicious, unfair and discriminatory.
- 6. Counsel prayed that for enforcement of the orders of the Authority; an order that the Applicant is the highest bidder; an order that the decision of the Respondent dated January 29, 2024 is a nullity; refund of administrative review fees; and costs.

Respondent

- \$7.\$ The Respondent filed submissions through \$M/S\$ MMAKS *Advocates.*
- 8. Counsel submitted that the disposal process was cancelled before award and the Application is not competently before the Tribunal.
- 9. There was no re-evaluation because the disposal process was cancelled on request by the user department.

\$\mathbf{C}\$. ORAL HEARING

- 1. The Tribunal conducted an oral hearing on March 11, 2024. The appearances were as follows:
- \$2.\$ The Tribunal made and communicated a summary decision on March 15, 2024.
- \$3.\$ The Tribunal now gives its detailed decision.

\$D.\$ RESOLUTION

- \$1.\$ The Application raised 5 issues. However, in view of the pleadings submissions of both parties, the Tribunal reframed the issues as follows:
- Whether the Application is competent? $\overline{\$1}$
- Whether the administrative review decision of the Executive \$2) Director of the Respondent was valid?
- Whether the cancellation of the disposal process was lawful? \$3)
- Whether the cancellation of the disposal process was \$4) tantamount to contempt of the Authority's orders?
- What remedies are available to the parties? \$5)

Issue No.1: Whether the Application is competent?

- \$2.\$ The Public Procurement and Disposal of Public Assets Tribunal is a creature of the Public Procurement and Disposal of Public Assets Act 2003 and its jurisdiction arises out of the instances listed in section 911 (a)-(c) of the Public Procurement and Disposal of Public Assets Act.
- 3. Under Section 91I(3)(a) of the *Public Procurement and Disposal* of Public Assets Act, the Tribunal has no jurisdiction to review a decision by a procuring and disposing entity to reject or cancel any or all bids prior to award of a contract under Section 75.
- \$4.\$ The Tribunal has to inquire into the veracity of the allegations made by both parties so as to ascertain whether the cancellation decision was made in compliance with or contrary to section 75 of the Public Procurement and Disposal of Public Assets Act. The review powers of the Tribunal include the jurisdiction to inquire into the existence or non-existence of a decision by a procuring and disposing entity to cancel the procurement. See *Mulago Hill Diagnostics Ltd v National Water and Sewerage Corporation*, Application No.13 of Preg Tech Communications v Uganda Police, *2022*; Application No. 32 of 2021; *Mugerwa Fred v Sembabule District Local Government*, Application No. 23 of 2022; and *Impiger Technologies Private Limited v Higher Education Students Financing Board*, Application No. 25 of 2022; Application 34 of 2022, *Kingdom Kampala versus Judicial Service Commission*.
- Once the Tribunal determines as a fact that there exists a 5. cancellation which was effected in accordance with section 75 of the Public Procurement and Disposal of Public Assets Act, the Tribunal would have no jurisdiction to inquire into the reasons for the said cancellation. However, if the Tribunal finds that there is in fact no cancellation or that the cancellation was not effected in accordance with section 75 of the Public Procurement and Disposal of Public Assets Act, then the Tribunal's jurisdiction is not ousted by section 91I(3) of the Public Procurement and Disposal of Public Assets Act.

- 6. The Tribunal is therefore duty bound to inquire into the veracity of the allegations made by the parties in as far as the procedural propriety of the purported cancellation of the disposal process is concerned.
- \$7.\$ Upon inquiry, once the Tribunal determines that a cancellation was effected in accordance with Section 75 of the Public Procurement and Disposal of Public Assets Act, its jurisdiction would then be ousted. However, if the cancellation was effected

outside the precincts of the law, then the Tribunal's jurisdiction would not have been ousted.

8. In the instant case, the Applicant avers that there was no valid cancellation of the disposal process. The Application was purportedly filed under section \$91I(1)(b)\$ of the Public Procurement and Disposal of Public Assets Act provides for application to the Tribunal by a person whose rights are adversely affected by a decision made by the Accounting Officer. However, the Applicant is actually a bidder and the application can only be entertained under section \$91I(1)\$ (a) which provides for an application by an aggrieved bidder against a decision of the Accounting Officer. Be that as it may, the citation of a wrong section does not oust the jurisdiction of the Tribunal. The Tribunal therefore has jurisdiction to inquire into the law and facts to determine whether or not there was a valid cancellation.

9. Issue no. 1 is resolved in the affirmative.

Issue No. 2: Whether the administrative review decision of the Executive Director of the Respondent was valid?

- 10. The Applicant's counsel submitted that the complaint was addressed to the Accounting Officer but the decision was made by the Executive Director of the Respondent. That the decision does not state that he is the Accounting Officer. That the Executive Director of the Respondent erred when he sat to review his own unilateral decision to cancel the disposal process; and he did not state valid reasons for his decision.
- The Applicant applied for administrative review to the 11. Accounting Officer of Uganda National Examinations Board vide a letter dated February 6, 2024 from \$M/S\$ Ntambirweki, Kandebe & Co. Advocates. The letter was delivered to and received by the Office of the Executive Director of Uganda National Examinations Board on February 7, 2024.

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- 12. The administrative review decision was signed and communicated by Mr. Dan N. Odongo the Executive Director of Uganda National Examinations Board vide a letter dated February 9, 2024.
- \$13.\$ The **presumption of regularity** at common law is that where it has been proved that an "official act" has been done, it will be presumed, until the contrary is proved, that the said act complied with any necessary formalities, and that the person who did it was "duly

appointed". The presumption is expressed in the Latin maxim omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium; in short form stated as omnia praesumuntur rite et solemniter esse acta or omnia praesumuntur rite esse acta. The principle has been applied in Uganda, for instance in **Court of Appeal Civil Appeal No. 088 of 2011- Jacob Mutabazi v The Seventh Day Adventist Church**.

- \$14.\$ We take it that Mr. Dan N. Odongo is the Executive Director and Accounting Officer of Uganda National Examinations Board. The Applicant has not produced evidence that the Executive Director is not authorised to perform the functions of Accounting Officer for purposes of administrative review under the Public Procurement and Disposal of Public Assets Act.

See: Applications No. 15, 17 and 18 of 2023- Quality Inspection Services Inc. Japan, EAA Co Ltd and Auto Terminal Japan Ltd v UNBS.

- 15. This Application was purportedly filed under section \$91I(1)(b)\$ of the Public Procurement and Disposal of Public Assets Act provides for application to the Tribunal by a person whose rights are adversely affected by a decision made by the Accounting Officer. The Applicant therefore recognised that the impugned decision was made by an Accounting Officer.
- \$16.\$ The Accounting Officer is empowered to adjudicate administrative review complaints under section 89 of the Page 8 of 14 Detailed decision for PPDA Appeals Tribunal Application No. 11 of 2023-Global Paper **Products Ltd v UNEB**

Public Procurement and Disposal of Public Assets Act. It does not matter that the Accounting Officer is the one who communicated the impugned cancellation decision. There is therefore legal basis for the complaint that the Executive Director of the Respondent erred when he sat to review his own unilateral decision to cancel the disposal process. Upon consideration of the complaint, the Accounting Officer gave reasons for his decision. Whether the decision was erroneous does not negate the fact that the decision was made and communicated as required.

17. Issue no. 2 is resolved in the affirmative.

Issue no. 3: Whether the cancellation of the disposal process was lawful?

- \$18\$ A procurement or disposal process can only be cancelled before contract award under section 75 of the Public Procurement and Disposal of Public Assets Act.
- 19. We examined the disposal action file and observed that the Evaluation Committee in its report of November 24, 2024, recommended contract award to Hanan Contractors (U) Ltd.

- 20. The Tribunal has noted that at the 910th meeting held on November 24, 2024, the Contracts Committee approved the evaluation report recommendations and draft contract for Disposal of Waste Paper/Offcuts under procurement reference UNEB/DISP/2023-2024/00003. The Contracts Committee decided that the contract be awarded to *Hanan Contractors (U)* Ltd at UGX 1,878,800,000 per tonne.
- 21. On January 16, 2024, through an internal memo, the user department (Directorate of Examinations) wrote to the Head Procuring and Disposing Unit, requesting for the "pending" of the disposal process, to allow for the digitisation of scripts since book scanners had been acquired.

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- On January 25, 2024, the Respondent's Head Procurement 22. and Disposal Unit (PDU) requested the Contracts Committee to cancel the tender process for the disposal of waste paper/off cuts to enable the trial digitisation process to commence.
- The Contracts Committee at its 915th sitting of January 25, 23. 2024 approved the cancellation of the disposal process.
- 24. Under Regulation 28(3) of the Public Procurement and Disposal of Public Assets (Disposal of Public Assets) Regulations, 2023, the Contracts Committee is mandated to consider the recommendation for cancellation and forward it to the Accounting Officer for a decision.
- 25. Furthermore, we did not find any record in the disposal action file to show that the Contracts Committee upon considering the cancellation request and subsequent approval, forwarded the request to the Accounting Officer for a decision.
- 26. It is however, evident that on January 29, 2024, the Accounting Officer of the Respondent in a letter addressed to all bidders, communicated the cancellation of the disposal process, and indicated that the cancellation would allow the scripts to be used in the digitisation process.
- 27. In our view, the impugned letter of the Accounting Officer amounted to a decision contemplated under section 26(1) of the Public Procurement and Disposal of Public Assets Act and regulation 28(3) of the Public Procurement and Disposal of Public Assets (Disposal of Public Assets) Regulations, 2023.
- 28. The Tribunal finds that the Respondent purported to cancel the disposal process on 29th January 2024 after the Contracts Committee had already made a contract award on 24th November, 2024. The purported cancellation was contrary to section 75(1) of the Public Procurement and Disposal of Public Assets Act and thus illegal.

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29. Issue no. 3 is resolved in the negative.

Issue no.4: Whether the cancellation of the disposal process was tantamount to contempt of the Authority's orders?

- 30. The Public Procurement and Disposal of Public Assets Act provides for the remedy of administrative review by the Accounting Officer; review by the Public Procurement and Disposal of Public Assets Tribunal; and appeal to the High Court.
- 31. The Tribunal is therefore unable to determine alleged contempt of orders which were not issued under the administrative review framework of the Public Procurement and Disposal of Public Assets Act.

32. Issue no. 4 is resolved in the negative.

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

- 33. The Tribunal has found that the impugned cancellation of the disposal process was not lawful because there was already a contract award by the Contracts Committee.
- 34. However, an award decision is not a contract. See section 76 (1) of the *Public Procurement and Disposal of Public Assets Act* and *Galleria in Africa Ltd v Uganda Electricity Distribution Company Ltd*, Supreme Court Civil Appeal No. 8 of 2017.
- 35. A valid and enforceable contract comes into force after fulfilment of the requirements in sections 76 (2) and 76 (3) of the Public Procurement and Disposal of Public Assets Act, as well as the procedures in the Public Procurement and Disposal of Public Assets (Contracts) Regulations.
- 36. The Tribunal cannot therefore compel a procuring and disposing entity to enter into a contract merely because there has been a contract award. Ordinarily, where the Tribunal finds that a cancellation is illegal, it may substitute its own cancellation or refer the matter back to the procuring and disposing entity for further proceedings not inconsistent with the decision of the Tribunal.

See: *Preg Tech Communications vs Uganda Police Force*, Application No.32 of 2021; *Kingdom Kampala Limited vs Judicial Service Commission*, Application No. 34 of 2022; and *Seyani Brothers & Co. (U) Ltd. & Parbat Siyani Construction Ltd. joint venture vs Directorate of Government Analytical Laboratory*, Application No. 40 of 2022.

- 37. However, since the Respondent is unwilling to proceed with the instant disposal process, it would be an exercise in futility to refer the matter back to the Respondent. The Tribunal cannot compel the Respondent to enter into a contract with the Applicant. The Tribunal will therefore substitute its own cancellation of the disposal.

- The impugned cancellation of the process for the disposal of 38. waste paper/old scripts for two (2) years under disposal reference no. UNEB/DISP/23-24/00003, shall be cancelled. The Tribunal shall substitute the impugned cancellation with its own cancellation of the disposal process.
- 39. Since the Application has succeeded on the substantive issue, the Respondent shall refund the Applicant's administrative review fees.
- 40. Each party shall bear its own costs of these proceedings.

\$\mathbf{E}\$. \$ DISPOSITION

- \$1.\$ The application is allowed in part.
- The decision of the Accounting Officer of the Respondent dated \$2.\$ February 9, 2024 is set aside.
- 3. The Respondent's impugned cancellation of the process for the disposal of waste paper/old scripts for two (2) years under disposal reference no. UNEB/DISP/23-24/00003, is cancelled.
- The Tribunal substitutes the impugned cancellation with its own \$4.\$ cancellation of the disposal process.
- \$5.\$ The Respondent shall refund the Applicant's administrative review fees.
- 6. Each party shall bear its own costs of the proceedings.

Dated at Kampala this 18th day of March, 2024.

FRANCIS GIMARA S. C. CHAIRPERSON

THOMAS ISANGA MEMBER

Menuvio

NELSON NERIMA MEMBER

GEOFFREY NUWAGIRA KAKIRA MEMBER

PAUL KALUMBA MEMBER

CHARITY KYARISIIMA MEMBER

KETO KAYEMBA MEMBER

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