

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

HCT -00 - CC - MC - 6 - 2011

MEDICAL EQUIPMENT CONSULT LTDAPPLICANT

VERSUS

**THE PUBLIC PROCUREMENT &
DISPOSAL OF PUBLIC ASSETS AUTHORITY RESPONDENT**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This an application by way of Notice of Motion under section 36 of the Judicature Act and Rule 6 of the Judicature Judicial Review Rules (S.I No 11 of 2009) for judicial review for Orders of prohibition and certiorari by calling for and quashing the decision of the respondent in rejecting the applicants application for administrative review for the decision of the entity in respect of procurement reference **BH/SHSSPP/2009-10/00065** being a tender for the supply of a **CT SCAN** for Mbarara Hospital.

The application is supported by the affidavit of Mr. James Segawa a consultant in Medical equipment Ltd and Ms. Lydia Wereka a customer support engineer of the applicant. The application was opposed by the affidavit of Ms Cornelia Sabiiti of the respondent Authority.

The grounds of this application are that the decision to allow the procurement of the said CT Scan by the respondent is unreasonable, unjust and improper in that it is contrary to the provisions of the Public Procurement and Disposal of Public Assets Act (No.1 of 2003) and was therefore arrived at in error.

The brief background of this application is that the applicant participated in a joint venture with Stephan Buchman Medical Care and service where the applicant offered a joint bid for the provision of a CT Scan for Mbarara Hospital (under procurement reference BH/SHSSP/SUPLS/2009-10/00065).

On the 15th December 2010, the applicant was notified that M/S Meditec Systems Ltd had been named the best evaluated bidder under the procurement. The applicant established that the decision reached at by the respondent to award the contract to M/S Meditec systems Ltd had been reached in error because the respondent ignored vital technical evidence and it was because of this that the applicant made an application to the Accounting Officer for administrative review under Section 90 of the Public Procurement and Disposal Act (hereinafter referred to as the “PPDA Act”) which was first ignored as no decision was communicated within the time stipulated under the Act.

The applicant then applied to the respondent for review on the grounds that Section 71 of the PPDA Act; Regulation 188(3) of Public Procurement and Disposal of Public Assets Regulations and the evaluation committee criteria (under section iii as stated in the bidding document) had been breached.

The application for administrative review was later heard by the respondent and a decision was passed affirming the decision of the entity.

For the respondent it is stated that the respondent’s decision confirming the procurement was based on the best evaluated bidder who had met the minimum technical requirements for the supply of the CT Scan and therefore their decision was not unreasonable.

At the Hearing the applicants were represented by Mr. Henry Kyarimpa while the respondent Authority was represented by Mr. Uthman Segawa.

Decision at Hearing

On the 9th March 2011 after hearing the parties the Court granted the Order for Certiorari as prayed pursuant to Order 21 Rule 1 and further ruled that the reasons for doing so will be contained in a detailed ruling to be given thereafter.

The basis for the Decision

The Arguments

The case for the applicant as stated in his affidavit in support of the application sworn by Mr James Segawa is that the decision made by the respondent was made in error because the respondent ignored vital technical evidence such as the expert opinion which the applicant sought from Makerere University Department of Physics Faculty of Science that the best evaluated bidder did not meet the technical specifications.

Mr Segawa further deponed that he consulted National Health Services (NHS) of United Kingdom which is a center that provides objective evidence to support the uptake of useful, safe and innovative products and related procedures in health and social care. The Technical data provided to

NHS by SIEMENS EMOTION CT Scanner showed that the CT scan offered by the best bidder was not in line with specifications set out in the bidding documents and that the generator power output does not meet the required minimum 50kw.

For the respondent Ms. Cornelia Sabiiti, the Director Legal and Compliance (as she then was) deponed that the solicitation document and bids submitted by the bidders provided that the x-ray generator should be of a high frequency of a power output of 50Kw or higher and that the respondent had reviewed the procurement and found that the best evaluated bidder met the minimum technical specifications as stated in the solicitation document. Ms Sabiiti also deponed that the solicitation document only requested for specifications in respect of x-ray tube. Further that the Public Procurement and Disposal of Public Assets Act and Regulations require that the entity during the evaluation of bids to rely on supporting documents presented with the bids and therefore the entity was not bound by the specifications in the NHS report.

Reasons for the Decision of the Court

Section 36 of the Judicature Act (Cap 13) provides that the High Court may make an order of certiorari.

The tests to be considered by courts in granting certiorari are well articulated by **Hilary Delany** in his book “**Judicial Review of Administrative Action**” at page 5 and 6. In his book **Hilary Delany** cited the case of **Chief Constable of the North Wales Police V Evans [1982]1 WLR1155, 1173** where it was held that judicial review is concerned not with the decision but with the decision making process.

The author **Hilary Delany** (Supra) on page 5 of his book further cited the case of **Devlin V Minister of Arts, Culture and Gaeltacht [1999]1 ILRM 462,474** where **Murphy J** stated,

“Judicial review is a valuable legal process. Over a number of years it has been invoked to correct some misunderstanding and occasional abuses in the exercise of statutory powers ...it must be widely appreciated that the only function of the courts in relation to the exercise of such powers is to review the procedures in which they are exercised”

Essentially judicial review involves an assessment of the manner in which an administrative decision has been made but it is not an appeal.

The author **Delany (supra)** further noted at page 6 where he writes,

*“...there are three touchstones which have in one form or the other become well established as the grounds upon which administrative action is subject to control by judicial review and **Lord Diplock** in the significant decision of **Council of Civil***

Service Union V Minister for Civil Service [1985] AC 374 referred to these grounds as “illegality”, “irrationality”, “procedural impropriety...”

With regard to the facts this case, the specification in the bidding document indicated that the scan had to have an x-ray generator of high frequency type power output of 50kW or higher. However the best evaluated bidder offered a CT Scan with a technical specification which was 44.85kw.

To my mind this was a sophisticated and technical procurement and that the procurement process required proper evaluating of these specifications as part of the procurement process.

Section 8 (c) of the PPDA Act provides that the respondent Authority provides that the Authority may

“...commission or undertake investigations and institute procurement or disposal contract and performance audits...”

Furthermore Regulation 11 (d) of the PPDA Regulations (70 of 2003) provides that the Authority may

“... undertake surveys, investigations, reviews or any other related activity nationally or internationally to meet the objectives of the Authority...”

It seems to me that the respondent as part of its procedure can look at other related reviews like the NHS Report and the report from Makerere University Physics department. However by not so doing and dismissing the said reports outright amounted to procedural impropriety.

I accordingly allow the prayer for an order of certiorari and costs are awarded to the applicant.

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Geoffrey Kiryabwire
JUDGE

Date: 28/05/13

04/06/13

9:45

- Obal h/b Segawa for Respondent
- Tumuhairwe for Applicant

In court

- C. Ahimbisibwe G/M Applicant
- Rose Emeru – Court Clerk

Court: Judgment read in Chambers but had already been signed.

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Geoffrey Kiryabwire
JUDGE
Date: 04/06/13