

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

CIVIL SUIT NO. 599 OF 2014

DOLAMITE ENGINEERING SERVICES LIMITED ::::::::::: PLAINTIFF

VERSUS

**1. ATTORNEY GENERAL
2. PUBLIC PROCUREMENT & DISPOSAL
OF PUBLIC ASSETS AUTHORITY ::::::::::: DEFENDANTS**

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Dolamite Engineering Services Ltd, a limited liability company, hereinafter called the Plaintiff sued the Attorney General in his representative capacity and Public Procurement & Disposal of Public Assets Authority (PPDA) who are referred to hereinafter as the 1st and 2nd Defendants respectively.

In this suit the Plaintiff seeks declarations;

1. That the Plaintiff's bill for the construction of Lira Central Market was unreasonably and unjustifiably rejected in breach of the guiding principles under the Public Procurement and Disposal of Public Assets Act 2003.
2. That the bidding process was illegal because it was premised on the African Development Bank's Rules and Procedure for Procurement of Goods and Works instead of the Public Procurement and Disposal of Public Assets Acts, 2003.
3. That the bidding process was infested with irregularities rendering it null and void.
4. The Plaintiff be awarded special damages of Ushs. 32,500,000/=.
5. Award of general damages.
6. Loss of expected profits of Ug. Shs.6,200,000,000/=.

7. Interest.
8. Costs.

The background to this suit discerned from the pleadings are as follows.

The government of Uganda intending to build a market in Lira advertised a Notice to bid to which the Plaintiff and other Construction Companies responded.

The Bid Notice categorically stated that the Procurement Process would be conducted in accordance with the Open International Bidding Procedures contained in the African Development Bank Rules and Procedures of Goods and Works.

The Bids were to be valid for a period of 120 days after Bid opening. Each of the Bids was to be accompanied by a bid security denominated in Uganda currency or in a convertible currency whose value would be 500 million UGX.

There was to be a Pre-Bid Conference on 18th April 2011 and Bid closing was slated for 20th May 2011.

Evaluation process was to be concluded on 3rd June 2011 and recommended Bidders would be displayed on 1st July 2011.

The Plaintiff was one of the bidders and indeed lodged her bid on 20th May 2011 accompanied by a Bid Guarantee.

The Plaintiff's Bid was however rejected on the 24th August 2011 and the Permanent Secretary communicated the decision to the Plaintiffs **Exhibit P10** in these words;

“In accordance with the African Development Bank Procurement Guidelines and ITB 36.2 and 3 of the Bid document we wish to inform you that your bid for lot 1 was not accepted.

The results of the tender were published in the United Nations Business Journal (UNBD) online and at the Bank's website (www.afdb.org) on 11th August 2011 in accordance with ITB 36.3 of the Bid Document.”

The Notification the Bid results was done on 11th August 2011 as provided for in the ITB, and a written communication to the Defendant was done on the **24th August 2011**.

Meanwhile the Plaintiffs probably unaware of the results wrote a letter to the Permanent Secretary, Ministry of Local Government, informing him of what it saw as “Irregularities Surrounding the Procurement Process for Construction of Lira Main Market (Lot 1). She wrote;

“We have got information on irregularities surrounding the procurement process for construction of Lira Main Market (Lot 1) which is under the markets and Agricultural Trade Improvement Programme (MATIP-1).

The following are a few of the irregularities:-

- *Siphoning of key bidders’ documents in and out the bidders’ submission.*
- *Pulling out and burning of bidders key documents aimed at making their bids non compliant and non responsive.*
- *Exchange of huge sums of money between the foreign contractors and your team at the Ministry responsible for this programme.*

We pray that you carry out a check on the above issues as they may cause future complications.”

Responding to the complaint the Permanent Secretary on 24.08.2011 wrote to the Plaintiff, **Exhibit P9**, advising her to seek an Administrative Review.

The letter read in part;

“The above allegations are very grave and criminal in nature and are grounds to support an application for an Administrative Review under this procurement as provided for under Section 89 of the PPDA Act.

The purpose of this letter is, therefore, to thank you for notifying us about the above issues and to advise you to formerly apply for an Administrative Review in line with the provisions of the PPDA Regulations 343, 344 and 345 to enable me investigate and take appropriate action on the allegations.”

On 31st August 2011 the Plaintiff wrote **Exhibit P11** in which she expressed her discontent on how the procurement process for the Procurement of Constitution of Lira Main Market was conducted and requested for an Administrative Review.

The Plaintiff listed what it referred to as non-compliance with the PPDA Act. She alleged that Section 224 (1), (2), (3), (4), (5), (6) and PPDA Act 2003 in regard to the display of notice of the best evaluated bidder were not followed.

She also alleged that although her bid at 24.8 UGX billion was the lowest Bid, substantially compliant and responsive to the requirements of the bidding document, it was not considered.

Thirdly that there was siphoning of documents in and out of her bid during the procurement process wherein her key documents were removed and forged ones smuggled in which rendered the bid non-compliant and non-responsive.

Fourthly, that there was bribery with huge sums of money exchanged between the foreign contractors and the ministry officials responsible for the programme.

Furthermore that it is because she had failed to raise a deposit of Ugx 500 million demanded by Yasin Sendaula and Akantambira of the Ministry and the Technical Evaluation Committee that her bid was declared non-responsive.

She therefore contended that there was a lot of corruption in the whole process. The Plaintiff therefore sought an Administrative Review.

The Plaintiff copied in the Executive Director,PPDA, who in turn wrote to the Permanent Secretary, **Exhibit P12**, and advised that;

“Under Section 26 (h) of the Public Procurement and Disposal of Public Assets Act 2003 the Accounting Officer is responsive for

investigating complaints by providers. You are advised to investigate and address the provider's complaint in accordance with Section 90 of the PPDA Act and Regulations 343-346 of the PPDA Regulations No.70, 2003."

The forgoing advise however changed on the 26th September 2011 by a letter from PPDA to the Permanent Secretary. Before this the Plaintiff on the 21st September 2011 wrote to the Executive Director PPDA detailing the complaints she had earlier raised about the procurement process. The Plaintiff contended that the guidelines in the PPDA Act were not complied with and that the Ministry of Local Government was wrong to take shelter under the African Development Bank Rules and Procedures while ignoring the guidelines in the PPDA Act. The Plaintiff therefore sought guidance on whether a bidder was allowed to officially communicate to African Development Bank.

On the 26thSeptember 2011**Exhibit P23**The Executive Director PPDA wrote to the Plaintiff and told it that the procurement for the Construction of Lira Main Market was done under the African Development Bank Rules. She wrote;

- "1. Procurement conducted under the African Development Bank rules and governed by the African Development Bank Rules of Procedure for Procurement of Goods and Works (2008), which can be accessed from the African Development Website www.afdb.org (<http://www.afdb.org/en/projects-and-operations/procurement-resources-for-borrowers/policies-procedures/>); and*
- 2. Under Rule 5.7.1 of the African Development Bank Rules of Procedure for Procurement of Goods and Works (2008) it is provided that bidders are free to send copies of their communication on issues and questions with the Borrower to the Bank or to write to the Bank directly, when Borrowers do not respond promptly, or the communication is a complaint against the Borrower; All such communication should be addressed to the Director of the Department for the relevant region for the borrowing country, with a copy to the Bank's unit in charge of procurement monitoring."*

The Authority then advised the Plaintiff to lodge its complaint with African Development Bank in line with the African Development Bank Rules of Procedure for Procurement of Goods and Works.

Since the Plaintiff had also raised issues of corruption, the Authority PPDA also advised the Plaintiff to refer those allegations to the Inspector General of Government.

In addition to the foregoing advice, the Permanent Secretary also wrote to the Plaintiff **Exhibit P24** on 26th September 2011 relaying the same advise. He wrote;

“Since the Administrative Review is not applicable under this procurement, your Bank Draft drawn by Stanbic Bank – Nakasero Branch..... herewith attached, is hereby returned...”

The return of the fees for Administrative Review meant that the Permanent Secretary was not going to entertain the Plaintiff’s complaint. It also meant that if there was to be a reversal of the award, it could only be done with the involvement of the bank.

The foregoing was even made clearer by **Exhibit P22** a letter from the Executive Director of the PPDA in which she categorically stated that she had come to the conclusion that the procurement for the construction of Lira Market was carried out in accordance with African Development Bank Rules and Procedure for Procurement of Goods and Works.

That an application for Administrative Review was not provided for under the African Development Bank Rules and Procedures because the Bank preferred the right to review bidders’ complaints after the award.

And further that in any case the Plaintiff had been informed why she had not succeeded in the Bid through a debrief.

The PPDA explained why she had earlier advised the use of the PPDA Act, namely that it was;

“based on the Accounting Officer’s advice to the bidder dated 24.08.2011, (Exhibit P9), that was copied to the Authority.

It should be noted that at this point the Authority was not aware that the procurement was governed by the African Development Bank Rules and Procedures of Procurement of Goods and Works.

This seemed to have closed the door upon the Plaintiff contending that the bidding process was premised on the African Development Bank's Rules and Procedure for Procurement of Goods instead of the Public Procurement and Disposal of Public Assets Act 2003 was illegal, the Plaintiff brought this suit.

The suit proceeded under the heads of these issues;

1. Whether the Plaintiff's Bid was unfairly rejected by the Ministry of Local Government.
2. Whether it was proper for the procurement process to be conducted solely under the African Development Bank Rules and Procedures for Procurement of Goods and Works.
3. Whether the Procurement process was conducted contrary to the Public Procurement and Disposal of Public Assets Act 2003. And if so, whether the Defendants are reliable.

On whether the bid was wrongly rejected by the Ministry, PW.1 Musinguzi Jim a Director of the Plaintiff testified that the Plaintiff's bid was unfairly and unlawfully rejected in light of grave irregularities complained of.

The Plaintiff alleged that documents had been siphoned in and out of the bid submission, pulling out and burning of her key documents and exchange of huge sums of money by way of bribes.

In the whole of PW.1's evidence, there is nothing to show that documents were siphoned out or replaced by false ones. There is no evidence to show bribery or to prove money exchanged hands. His evidence is that he was not heard under the PPDA Act. This issue shall be dealt with later in the judgment.

The ground for rejecting the Plaintiff's bid is found in the debriefing. A copy of the debriefing was passed on to the Plaintiff by letter **Exhibit P15**. It also gave the reasons in paragraph two in these words;

“As you are aware this procurement was carried out in accordance with African Development Bank’s Rules and Procedures for the Procurement of Goods and Works. In line with the Instruction to Bidders ITB 36.3, we have prepared a debriefing detailing the grounds on which your bid was not selected. You will note from the debrief that your bid did not meet the specific experience that was required under ITB 29.1 and clause 2.4 of the Evaluation and Qualification Criteria.

Accordingly your bid was failed at the detailed Technical Evaluation Stage and therefore, did not qualify for financial evaluation.”

I have gone through the complaints listed by the Plaintiff in **Exhibits P7** and **19**. No where did the Plaintiff mention the issue of experience which was the reason her bid was rejected. In my view since the finding at the Bid Evaluation remained undisturbed, I find that the bid was properly rejected.

Furthermore when the Plaintiff raised the complaints, she was advised to complain and infact her complaint was passed on to the Inspector General of Government. The investigation was conducted and the IGG in her letter **Exhibit D6** clearly stated that her office conducted the investigation and had established that there were no irregularities in the procurement process.

That as it may, there were other reasons that would have prevented the success of the Plaintiff in their bid to win the Contract.

It was a clear term that the bidder was to accompany its bids with a bond guarantee of the value of UGX Shs. 500 million.

The Plaintiff claims she applied for and obtained a bid bond guarantee from Equity Bank (U) Ltd. Then she attached to her bid.

This bid was however later disowned by Equity Bank (U) Ltd in answer to a query in its status by the Permanent Secretary, Ministry of Local Government.

The reply categorically stated thus;

“We refer to your letter ref. ADM/348/01 dated 27th September 2011 in which you sought a confirmation of the authenticity of the above bid guarantee presented by M/s Dolamite Engineering Services Limited.

We wish to confirm that the bid guarantee in question were not issued by Equity Bank (U) Limited.

We make further reference to your letter ref. ADM/348/349/01 dated 6th June 2011 and regret the erroneous confirmation given on the fraudulent bid bond EBL/1002/BB9/000/24610 for Ugx 500,000,000/=. We are investigating this matter and we are confident that we will resolve it.

Kindly disregard the bid document presented to your office and forward the originals back to us to assist us in our investigation.”

The foregoing there makes it clear that the bid guarantee was withdrawn.

In the absence of a bid guarantee the Plaintiff’s bid now lacked one of the mandatory supports.

The need for the said security was a solid requirement. The Bidding document under C11.1(c) clearly stated that the Bid was to comprise a Bid Security as under 19.1.

19.1 provided;

“The Bidder shall furnish as part of its bid, at the option of the Employer, and as stipulated in the BDS, the BDS, the original of either a Bid-Securing Declaration or a bid Security using relevant form included in Section IV Bidding Form. In the case of a bid security, the bid security amount and currency shall be as specified in the BDS.”

19.3 (a) then provided the form of Security in these words;

“.....the bid security shall be a demand guarantee in any of the following forms at the Bidder’s option;

(a) an unconditional guarantee issued by a bank or surety;

(b)

(c)

From a reputable source from an eligible country.”

The requirement of a bid security was therefore of utmost importance.

The effect of not having a bid security would lead to rejection as provided for in 19.4 in these words;

“Pursuant to the option stipulated at ITB 19.1 any bid not accompanied by a substantially responsive bid security or Bid Securing Declaration shall be rejected by the Employer as non responsive.”

In my view, once Equity Bank withdrew the Security bond, the Plaintiff’s bid became non-responsive.

Furthermore this security seems to have run into more trouble when its authenticity was put to test. After the Employer rejected the Plaintiff’s Bid, the Plaintiff sued Equity Bank (U) Ltd which had withdrawn the Security Bond. In the ***Civil Suit No.51 of 2013, Dolamite Engineering Services Ltd vs. Equity Bank (U) Ltd***, the Plaintiff sought Court to declare the withdrawn bid security as “being authentic” and therefore award it special and general damages.

The issues in that suit were;

- (a) Whether the Defendant issued Bid bond guarantee.
- (b) Whether the said Bid bond guarantee was obtained by fraud.

The learned Judge found that the purported Security bond was not obtained through lawful means.

Following the Bank’s letter **Exhibit D8** which did not only withdraw the Security Bond guarantee but also declared them fraudulently obtained coupled with the court’s finding, I find that rejection of the Plaintiff’s bid was the only available option in a bidding process such as the present one.

The second issue as whether it was proper for the procurement process to be conducted solely under the African Development Bank Rules and Procedure for Procurement of Goods and Works, in my view would dispose off the third issue of whether the Procurement was conducted contrary to the Public Procurement and Disposal of Public Assets Act 2003.

The Procedures and Rules to be applied by the parties are found in the bid documents Exhibit **P1** which was the Invitation for bids (IFB) laid down the procedure to be used, it in part reads;

“Bidding in open to all bidders and will be conducted in accordance with Open International Competitive Bidding procedures contained in the ADB “Rules of Procedure for Procurement of Goods and Works Exhibit D2.”

Counsel for the Plaintiff submitted that these were alien and where they conflicted with the PPDA Act, the later would prevail.

Section 4(1) of the PPDA Act provides;

“Where this Act conflicts with an obligation of the Republic of Uganda arising out of an Agreement with one or more states or with an international organization the provisions of the agreement shall prevail.”

In the instant case the Plaintiff being aggrieved sought an Administrative Review under Section 89 of PPDA Act.

The African Development Bank Rules and Procedure however provide for a different method from Administrative Review the Executive Director of PPDA clearly stated in **Exhibit P22** to the Permanent Secretary and to the Plaintiff **Exhibit P2** namely that under the African Development Bank Rules the bidders would send their complaints to the Bank or directly when the borrowers did not respond. This procedure differed from that of Administrative Review and under Section 89 of the PPDA Act.

In view of the Section 4 of the PPDA Act the African Development Bank rules would prevail. In my view the advise given to the Plaintiff by the Permanent Secretary and the

Executive Secretary of PPDA were well founded and in no way deprived the Plaintiff his right of being heard.

That being the case it was proper for the procurement process to be conducted under the African Development Bank Rules and Procedure for Procurement of Goods and Works only because the PPDA Act provided so in Section 4 but also because in answering the invitation to Bid that is what the Plaintiff undertook.

The sum total is that the procurement was not done in breach of the PPDA Act. On contrary it was done in compliance with Section 4 of the Act.

In conclusion, the Plaintiff fails to prove any breach occasioned by the Defendants and the suit is hereby dismissed with costs to be borne by the Plaintiffs.

Dated at Kampala this 18th day of April 2018.

**HON. JUSTICE DAVID WANGUTUSI
JUDGE**