

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

MISCELLANEOUS CAUSE NO. 301 OF 2018

VALLEY TECHNICAL SERVICES :: **APPLICANT**

VERSUS

UGANDA NATIONAL ROADS AUTHORITY :: **RESPONDENT**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

a) Introduction

1. The Applicant brought this judicial review application under sections 36 (1) (b) (c) (e) and 38 of the Judicature Act and Rules 3, 4, 5 and 8 of the Judicature (Judicial Review) Rules, 2009 seeking:

- i. Certiorari quashing the process leading to the award of lots for the procurement of mechanized maintenance of selected unpaved national roads for 22 UNRA stations for three years under procurement reference No. UNRA/WRKS/ 2016-1017/00018 to other bidders other than the Applicant who was successful.
- ii. Prohibition refraining the Respondent from awarding, implementing or executing contracts for works arising from the impugned procurement process of lots 4 & 7 with other successful bidders as published in the best evaluated bidders dated



March 2018, a decision nullified by the Public Procurement and Disposal of Public Assets Authority (herein after PPDA) which the Respondent did not comply with.

- iii. An order prohibiting the Respondent from disqualifying the Applicant from the bidding process under procurement reference No. UNRA/WRKS/2016-2017/00018 lots 4 & 7 without the publication of the due diligence report as required by the law.
- iv. A declaration that the Respondent acted irregularly, illegally, unlawfully and occasioned a miscarriage of justice to the Applicant when it failed to issue the Applicant with the due diligence report as directed by PPDA but instead excluded the Applicant from the bidding process.
- v. A declaration that the Applicant is entitled to be issued with the due diligence report as directed by the PPDA in May 2018, refusal of which is illegal, irregular, offends the rules of natural justice and deprived the Applicant of a fair hearing.
- vi. A declaration that the procurement and disposal unit of the Respondent considers the due diligence report and declares the first and second evaluated bidders for the said lots 4 & 7 as advertised.
- vii. An injunction restraining the Respondent from awarding, implementing and/or executing contracts in respect of lots 4 & 7 in exclusion of the Applicant.
- viii. An order that the Applicant is entitled to damages from the Respondent for the wrongful exclusion and unnecessary delays arising from the procurement process for the lots 4 & 7.
- ix. Costs of the application to be paid by the Respondent.



2. Ms. Faridah Ikyimana of M/s. Geoffrey Nangumya & Co. Advocates represents the Applicant and the Respondent is represented by Mr. Titus Kanya from its legal department.
3. The application is supported by the affidavits of Mr. Amos Bahumwire, and Mr. Nicholas Kabarega, the Applicant's managing director and operations manager respectively. The grounds for the application are briefly that the Applicant together with other bidders participated in bids as advertised by the Respondent in respect of lots 4 & 7 for the procurement for mechanized maintenance of selected unpaved national roads for twenty two UNRA stations under framework for three years procurement reference UNRA/WRKS/2016-

1017/00018 LOTS 4 & 7 dated 7th November 2017. On 15th January 2017, the Respondent displayed the best evaluated bidders notice in which M/s. Rodo Construction Ltd and Ms. Techno Three Uganda Ltd were displayed as the best bidders for Lot 4 and the Applicant as the unsuccessful bidder on ground that it failed due diligence. The Applicant dissatisfied with both the bid process for Lots 4 and 7 applied to the Respondent's Executive Director for administrative review which was rejected. The Applicant appealed to the PPDA which ordered the Respondent to; (a) undertake a due diligence on the Applicant's equipment and personnel in accordance with the bidding document; (b) indicate the detailed reason for the failure of the bidders in best evaluated bidder notice; (c) refund the Applicant's administrative review fees; and (d) always provide information. The Respondent only complied with order (c).

4. Further that when the Applicant applied for review to the Respondent's Executive Director on 29th November 2017, the Respondent obtained a due diligence report on the Applicant from the Chief Engineer - Ministry of Works and Transport on 18th December 2017 who confirmed and recommended the Applicant as a performer which was neither relied on to allow the appeal, consider it during the evaluation process nor given to the Applicant to date. Upon directives from PPDA, on 27th February 2018, the Respondent requested the Applicant to provide telephone contacts for the proposed staff and location of the proposed equipment which was provided on 28th February 2018 and 1st March 2018. On 13th March 2018, the Applicant's managing director was notified that the Respondent's due diligence team which went to Kasese to view some of the proposed equipment for bids were arrested by police which raised suspicion. On 19th March 2018, the Applicant filed a complaint with the office of the Director of Public Prosecutions (DPP) seeking an intervention in the malicious investigations and arrest of the Respondent staff. On 23rd March 2018, the Respondent informed the Applicant that the DPP had called for the police files under Fort Portal region HIMA SD 23/13/03/2018 and Nakawa region Mutungo SD 13/21/03/2017.
5. In addition, the Respondent did nothing about the Applicant's complaint about Kibuuka Gilbert, a member of the Respondent's old due diligence report team who was guilty of impropriety for failure to carry out proper due diligence and who turned up to inspect the



Applicant's proposed equipment at Old Portbell. On 24th July 2018, the Respondent received a report from the regional police headquarters Rwenzori East about the Hoima case showing no arrest of the Hoima officials, indicating that only police statements were recorded from them and that the DPP found no case against the managing Director of the Applicant and closed the criminal case. The Respondent's delay to give the Applicant the due diligence report is improper, unfair, irregular and unjust owing to the directives by the PPDA and the Applicant continues to suffer costs for securing bidding equipment on standby. The Applicant has suffered special damages of Ug.shs: 12,500,000,000/= (Uganda shillings twelve billion five hundred million only) for the irregular, unnecessary, unjust and unfair conduct of the Respondent.

6. The application was opposed by the Respondent through the affidavit in reply of Ms. Bamulange Lilian, a senior procurement officer at the Respondent. She averred that the application is time barred, misconceived, wrongly brought against the Respondent, lacks merit, is an abuse of court process and should be struck out. On 18th July 2016, the Respondent initiated a procurement for mechanized maintenance of unpaved national roads for 22 UNRA stations under framework contract for three years at an estimated cost of Ug.shs: 163,783,975,017/=. The Applicant bid for lot 4 - Mpigi station with a bid price of Ug.shs:13,508,661,728/= and lot 7 - Hoima station with a bid price of Ug. shs: 25,094,531,630/=-. Under lot 4, the Applicant was second at evaluation stage out of seven bidders and was eliminated after a due diligence exercise for failure to provide commitment letters hence no confirmation of availability of personnel; failure to provide original copies of completion certificates of rehabilitation works and drainage improvement in Masaka district as had been claimed in their bid document and failure to present original copies of PPDA registration certificates for 2016 and 2017.
7. Under lot 7, the Applicant was first at evaluation stage out of the evaluated five bidders. After a due diligence exercise upon all bidders that were evaluated, the Applicant was eliminated for the same reasons as for lot 4 above. On 27th October 2017, the Contracts Committee recommended the award of lot 7 to Lusa Construction and Techno Three Uganda Ltd and lot 4 to Rodo Contractors Ltd and Techno Three Uganda Ltd with the notices of best



evaluated bidders displayed on 15th November 2017. On 29th November 2017, the Applicant applied for administrative review to the accounting officers in respect of both lots which were rejected on 20th December 2017 and the Applicant was notified accordingly. The Applicant appealed to PPDA which made recommendations that the Respondent should undertake a due diligence on the Applicant's equipment and personnel in accordance with the bidding document, indicate detailed reasons for failure of the bidders in the best evaluated bidder notice, refund the Applicant's administrative review fees and always provide information to bidders under section 89(2) of the PPDA Act, 2003 using the format issued by PPDA.

8. Upon this PPDA recommendation, the Respondent undertook another due diligence exercise on the Applicant's equipment and found that; (i) the Applicant did not observe the ethical code of conduct of bidders during the procurement by misrepresenting facts in order to influence the procurement process; (ii) the Applicant presented false documents such as a lease agreement for the equipment from Nathan Mwesigye; (iii) the information given by the Applicant was meant to mislead the process; (iv) the equipment owned by the bidder was visually assessed to be in poor state; (v) some of the equipment/vehicles to be leased were found to be accident vehicles and written off meaning that the Applicant did not have capacity to carry out the work as presented in the bid. The due diligence report recommended that the Applicant lacked capacity of key equipment to undertake the project yet the project in issue required equipment in very good state. It is not true that Gilbert Kibuuka participated in the second due diligence and the Respondent has the mandate to terminate the procurement of a bidder if it fails the due diligence test. The contracts for both lots were awarded to different contractors and works are already on-going.
9. Further that the application is bad in law as it seeks orders affecting parties that are not party to the application. The application is misconceived as it seeks a vindication and enforcement of alleged rights to a contract through judicial review proceedings yet the same has been awarded to other parties who are not party to the application. Since there is no award of contract to the Applicant, it is not entitled to remedies including special and general damages.



10. In a sur rejoinder, Ms. Bamulange deponed that the Applicant raised matters not conversed in the Respondent's affidavit in reply or that need further clarity. The Respondent did not obtain a due diligence report from the Chief Engineer Ministry of Works and Transport on 18th December 2017 but a response letter confirming that the Applicant had executed a contract with them to their expectation. The letter partly accounts for the past experience of the bidder which is not the only criteria that is considered in due diligence. The Ministry did not respond within the time allotted for evaluation. When the response was later received, it was considered in the subsequent due diligence alongside the other criteria. The Respondent can independently execute its own due diligence, verify all documents and information presented before it including any reports/letters by other entities and make an independent judgment/decision. The Respondent is under no obligation to disclose to bidders the documentation it obtains during the due diligence exercise and was therefore under no obligation to hand over the letter obtained from the Ministry of Works. The Applicant presented to the Respondent false information on ownership of the lease agreement equipment of Mr. Nathan Tumwesigye, a fact he disputed during inspection of the vehicle which led to the arrest of the Respondent's officials who were compelled to make police statements at Hoima police station.

11. In response to the claim that the application is bad in law as it affects third parties who aren't party to the application, the Applicant submitted that the Respondent never applied to join the contractors as parties to the application and court cannot sanction an illegality which overrides any other questions where brought to the attention of court. The Applicant also contends that the Respondent's affidavit in sur rejoinder should be struck off the record because it was filed out of time and it did not address any new issues that required a response from the Respondent.

12. The issues proposed by the Applicant for resolution are:

- i. Whether the Respondent's act of awarding contracts for lots 4 and 7 under procurement reference UNRA/WRKS/2016-1017/00018 to other preferred bidders other than the Applicant was illegal.



- ii. Whether the delay by the Respondent to communicate to the Applicant the due diligence report and the declaration of the best evaluated bidder was irrational, unfair, discriminatory, improper and illegal.
- iii. What remedies are available to the parties.

b) Law

13. In **Rosemary Nalwadda v. Uganda Aids Commission HCMA No. 0045 of 2010** it was held that it is trite that judicial review can be granted on three grounds namely; illegality, irrationality and procedural impropriety. See also **Council of Civil Service union v. Minister for the civil Service [1885] Ac 374.**

14. In **Stream Aviation Ltd v. The Civil Aviation Authority Misc. Application No. 377 of 2008 (Arising from Misc. Cause No. 175 of 2008)** Justice V. F. Musoke Kibuuka held that the prerogative order of *certiorari* is designed to prevent the access of or the outright abuse of power by public authorities. The primary object of this prerogative order is to make the machinery of Government operate properly, according to law and in the public interest.

15. Prohibition lies to restrain authorities or bodies which are inferior to the High Court from assuming jurisdiction where there is none or from doing what they are not authorized to do. It does not correct the practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.¹

c) Analysis

16. I have considered all the pleadings and submissions of the parties. For starters, this application has been overtaken by events given the passage of time since it was filed. I doubt that the Respondent has not already executed the projects in issue with other contractors. However if the Respondent omitted execution of any part of the PPDA recommendations, it should fulfil them all.

¹ Peter Kaluma “Judicial Review Law Procedure and Practice” second edition, p.119.



17. Be that as it may, in my assessment discretion, I see no merit in the application. What I see all over this application is a disgruntled competitor for a contract. I am not sure that the court can help such a competitor. What I am sure of is that judicial review is not meant for such application.

18. Ms. Bamulinde's explanations clearly demonstrate that the applicant committed illegalities and irregularities during the procurement process which automatically disqualified it. I therefore find no merit in the application and accordingly dismiss it.

19. To avoid acrimony between the parties, each party shall bear its own costs.

I so order.



Lydia Mugambe
Judge.
29 April 2021

