

THE REPUBLIC OF UGANDA

**THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
[CADER]**

CAD/ARB/NO/16 OF 2016

**AEROPHOTO SYSTEMS
ENGINEERING CO. LTD APPLICANT**

VERSUS

- 1. FUGRO APERIO LIMITED**
- 2. KAMPALA CAPITAL CITY AUTHORITY RESPONDENTS**

Applicant counsel.

Emmanuel Baluti - Baluti & Ssozi Advocates.

First Respondent counsel.

Ernest Kalibbala - A. F. Mpanga Advocates.

Second Respondent counsel.

Dickinson L. Akena - Directorate of Legal Affairs.

RULING

1. The Applicant prays that the following Orders to be granted by CADER: -
 - a. Appointment of a Single Arbitrator to hear the dispute between the parties;
 - b. Costs of the Application.

BACKGROUND TO DISPUTE

2. In Application Affidavit in Support, Paul Nalukoola Muwanga deposes that: -
 - a. the balance sum of US\$588,139,263/= remains unpaid to date [Para.9];
 - b. in the course of service delivery, the Respondents are aware and did consent to additional expenses incurred by the Applicant, worth US\$184,900,000/= in respect of 80 traffic census points [Para.10];
 - c. the First Respondent has refused to pay all the outstanding amounts, despite the same having been raised in Project Review Meetings with the Second Respondent's officers, hence the dispute between the parties [Para.11]; and
 - d. there exists a dispute between the Parties regarding payments due to the Applicant.

APPLICANT'S CASE

3. The Applicant argues that: -
 - a. the operative arbitration clause contained in the SCC and GCC provisions, binds Aerophoto by virtue of being a permitted Provider assign; and
 - b. the respondents' refusal to cooperate in establishing the tribunal has necessitates CADER's intervention in the compulsory appointment of the arbitrator.

FIRST RESPONDENT'S CASE

4. The first respondent argues that: -

- a. there exists no dispute between the parties;
- b. the Applicant is a mere sub contractor;
- c. this is not a joint bid scenario;
- d. the contract documentation is precise and does not indicate the Applicant as a party to the contract;
- e. this explains why the sole signatory to all contract documentation is the First Respondent;
- f. the Applicant by any stretch of imagination is neither a successor nor an assign;
- g. the Applicant's attendance of negotiation meetings cannot convert it into a party to the contract;
- h. the request to refer the dispute to arbitration was uncertain, hence justifying the first respondent's passivity and in any event pre-emptive of the pre-condition amicable settlement procedures; and
- i. there exists a sub-contract No.J4104-22606, executed on 7th August 2014, between the Applicant and First Respondent, which spells out a distinct dispute resolution process, which does not designate Uganda as the seat of arbitration.

SECOND RESPONDENT'S CASE

5. The second respondent concedes that the Applicant is a mere subcontractor but not a party to the contract.

RESOLUTION

6. To begin with, we must let go of the Applicant's "permitted assigns of the Provider" submission.

The assignment clause reads as follows,

9. Assignment

The Consultant shall not assign this Contract or sub-contract any portion of it without the Procuring and Disposing Entity's prior written consent with the exception

of AeroPhoto Systems Engineering Limited and TRL who have been named as sub consultants by the consultant.

Assignment is a simple science, which involves the transfer of rights or proprietary interests from one party to another.

Neither party contends that any portion of the First Respondent's rights or proprietary interests have been transferred to the Applicant.

7. The facts and arguments raised by all parties in Paragraphs 2, 3, 4 and 5 above do not reveal anything bearing on assignments affecting either the Applicant or the First Respondent, bearing on Clause 9.

This in turn renders moot the successor in title submissions.

8. First Respondent's counsel, disagrees and submits instead that it is only the arbitration clause which can be invoked by the Applicant, is contained in the sub-contract No.J4104-22606; the clause states as follows,

“3.4 Settlement of Disputes

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

3.4.2 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. The seat of the arbitration shall be England and Wales. The Arbitration shall be governed by the Arbitration Act 1996.”

9. Does the sub-contract No.J4104-22606 Dispute Settlement clause bind the Applicant?
10. Sub-contract No.J4104-22606 Clause 3.4.2 is derived from the stipulations set out in Clause 3.3.

Clause 3.3 reads as follows,

“3.3 If either Party disputes whether **an event specified in paragraphs 3.2.1 and 3.2.2 has occurred**, such Party may, within forty-five days **after receipt of notice of termination from the other Party**, refer the matter to arbitration pursuant to **paragraph 3.4** and the Contract shall not be terminated on account of such event except in accordance with the terms of any resulting award.”

11. Paragraph 3.2 sets out circumstances under which termination of the sub-contract may be effected by either the First Respondent [Para.3.2.1] or the Applicant [Para.3.2.2].
12. It is common ground that none of the parties have pleaded any fact of a termination event having occurred under Sub-contract No.J4104-22606; in addition see Para.14. below.

With this background, in mind, I find Clause 3.4 bears no relevance to the contest between the parties.

13. The next question is whether the Applicant can rely upon the Settlement of Disputes Clause 17, in the Contract Procurement Reference number KCCA/SVRCS/2013-2014/00199.

14. From the pleadings and evidence of communication between the parties, I have derived the following relevant facts to this Application: -

- a. the balance sum of UShs.588,139,263/= remains unpaid to date [Para.9 Paul Nalukoola Muwanga Affidavit in Support];
- b. in the course of service delivery, the Respondents are aware and did consent to additional expenses incurred by the Applicant, worth UShs.184,900,000/= in respect of 80 traffic census points [Para.10 Paul Nalukoola Muwanga Affidavit in Support];
- c. the First Respondent has refused to pay all the outstanding amounts, despite the same having been raised in Project Review Meetings with the Second Respondent's officers, hence the dispute between the parties [Para.11 Paul Nalukoola Muwanga Affidavit in Support]; and
- d. there now exists a dispute between the Parties regarding payments due to the Applicant.

15. The pertinent information from the contract documentation is as follows: -

a. GCC

4.1 The documents forming the Contract shall be interpreted in the following order of priority:-

- a. Agreement,
- b. Any letter of bid acceptance,
- c. Provider's Bid as amended by clarifications,
- d. Special Conditions of Contract,
- e. General Conditions of Contract,
- f. Statement of Requirements,

- g. Any other document listed in the SCC as forming part of the Contract.
- h. All documents forming the Contract are intended to be correlative, complementary and mutually explanatory.

b. SCC

GCC 4.1(g)

Contract Documents: Other documents following part of contract are:

- o Agreement,
- o Record of negotiation
- o Providers bid
- o Special Conditions of Contract
- o General Conditions of Contract
- o Terms of Reference
- o Any other document listed in the special conditions of contract as forming part of the contract
- o All documents forming the Contract are intended to be correlative, complementary and mutually explanatory.

16. The parties are mentioned within the contract documentation as follows: -

a. ALL PARTIES

Technical Bid Submission Sheet

Date: 9, October 2013.

Contract procurement Reference number
KCCA/SVRCS/2013-2014/00199

(e) **We, including** any associates, Joint Venture partners or Sub contractors **for any part of the contract** have nationals from eligible countries.

Fugro - UK, France, Netherlands

Sub-contractors

TRL - UK

Aerophoto - Uganda

17. We learn from the above that the Technical Bid Submission Sheet required disclosure by the parties of the sub-contractors.

18. Keen study of the contract documents, indicates that the disclosure in turn obligated the Applicant and First Respondent had to agree and designate the member in Charge, within the GCC and SCC as follows:-

GCC – Definitions – Clause 1.2(j)

“member in charge” means the entity authorized **to act on all the Members behalf** in exercising all the Providers’ rights and obligations towards the Procuring and Disposing Entity under the Contract and named in the SCC.

b) Clause 35 - GCC

Joint venture, Consortium or Association

35.1 ... The joint venture, consortium, or association **shall designate one party to act as the Member in Charge** with authority to bind the joint venture, consortium, or association and to act on their behalf in exercising all the Provider’s rights and obligations

towards the Procuring and Disposing Entity under the Contract, including without limitation the receiving of instructions and payments from the Procuring and Disposing Entity.

a. SCC

GCC 1.2(J)

Member in Charge: FUGRO APERIO LTD.

19. It is clear from the above that the parties designated the First Respondent as the ***Member in Charge***.

Otherwise stated the Second Respondent was aware that the signatory Fugro is but a principal of the team listed out in the Technical Bid Submission Sheet.

20. Designating the member in charge has several implications throughout the contract on the team structure or assignments.

a) Clause 35.2 further states, “***The composition or the constitution of the joint venture, consortium, or association shall not be altered*** without the prior consent of the Procuring and Disposing Entity. Any alteration of the composition of the joint venture, consortium or association without the prior written consent of the Procuring and Disposing Entity ***shall be considered a breach of contract.***”

b) It appears to be the case then, that it is not possible to change the Member in Charge or other composition reported in the Technical Bid Submission Sheet, without first seeking the second Respondent’s prior written consent.

c) The other designation benefit serves the purpose of excluding the First Respondent from having to procure the second Respondent’s prior written

consent before sub-contracting the Applicant or TRL as envisaged by Clause 9 Contract, which reads as follows,

ASSIGNMENT

The Consultant shall not assign this Contract or sub-contract any portion of it without the Procuring and Disposing Entity's prior written consent with the exception of AeroPhoto Systems Engineering Limited and TRL who have been named as sub consultants by the consultant.

21. The next issue is to determine whether this contract structure entitles the Applicant to take benefit of the disputed arbitration provision, which reads as follows: -

GCC

17. Settlement of Disputes

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.

17.2 If the parties fail to resolve such 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 Law of Uganda or such other formal mechanism specified in the SCC.

SCC - [GCC 17.2]

Dispute settlement: Shall be in accordance with the Arbitration Law of Uganda.

22. The argument that Applicant is excluded from relying on the arbitration clause 17.2 is inadequate in so far as it presumes that the one must be a physical signatory to the dispute contract.

Section 3 ACA only requires that an arbitration agreement be in writing; it does not direct that the arbitration agreement must be signed.

23. It is also instructive to note the contract in some instances, makes provision excluding the sub contractors.

Take for instance GCC Clause 35.1, which read together with SCC Clause GCC 35.1 stipulates that notwithstanding the **joint venture** arrangement between the Applicant and First Respondent, it is the lead consultant, who shall be fully liable to the Second Respondent for fulfillment of the Contract provisions.

Clause 35 - GCC

Joint venture, Consortium or Association

35.1 *Unless otherwise specified in the SCC*, if the Provider is a joint venture, consortium, or association, all the parties *shall be jointly and severally liable* to the Procuring and Disposing Entity for the fulfillment of the provisions of the Contract.

a. SCC

GCC 35.1

Joint Venture requirements: The lead consultant shall be fully liable.

The combined reading of the GCC and SCC Clause 35.1 leaves us in no doubt the fact the Applicant and First Respondent had teamed up as a joint venture vehicle.

24. To my mind, the absence of similar delimiting stipulations within the arbitration Clause 17 GCC and SCC then renders it a generic provision, which applies to the joint venture contractor and specified sub-contractors [see Para.18. above].

25. I therefore come to the conclusion that the Applicant is part of the joint venture envisaged from the outset when the 9, October 2013 Technical Bid Submission Sheet was submitted to the Second Applicant.

26. First Respondent counsel has lastly submitted that the Applicant is estopped from resorting to arbitration because of the “mutual consultation” obligation. This view is wrong because the Settlement of Disputes clause is a mutual obligation clause unlike other contract provisions.

The First Respondent is party to the lethargy, which has afflicted the “mutual consultation” provisions under Clause GCC 17.2.

The First Respondent is then not right to avoid the “mutual consultation” process and later on turn it into a hurdle, to be surmounted by the Applicant alone.

27. In any event the First Respondent has not provided the calibrated steps, which can be readily audited to prove non-compliance on the Applicant’s part e.g. the process requires the Applicant to issue a notice specifically titled “mutual consultation” or set up scheduled telephone conference call, etc.

28. It is against this background that I now hold that the Applicant is party to the joint venture contract.

As such the Applicant is right to base this Application on the arbitration clause GCC 17.2.

29. I award only half of the costs of the Application to the Applicant owing to the very poor nature of copies, which were annexed, to the Application. This made perusal of the documents very tedious and made the process most exhaustive.

30. The arbitrator shall be appointed pursuant to Section 10(2) ACA.

31. I shall issue the list of arbitrator's in the consequential ruling.

Dated at Kampala on the 11th day of July 2016.

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EXECUTIVE DIRECTOR