

UGANDA / JUDGMENT

ATHWAX Consultatants Limited v Mbarara City Council and Another (Miscellaneous Application 5 of 2024) [2024] UGPPDPAAT 47 (19 December 2024)

[2024] UGPPDPAAT 47

COURT

Public Procurement and Disposal of Public Assets
Appeals Tribunal

BEFORE

Gimara SC, Chairperson, Nerima, Panel Member,
Nuwagira, Kalumba, cyrus Titus Aomu, penal
member

CASE / FILE NUMBER

Miscellaneous Application 5 of 2024

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THE REPUBLIC OF UGANDA

PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS TRIBUNAL

MISCELLANEOUS APPLICATION NO. 5 OF 2024

ARISING FROM REGISTRY APPLICATION NO. 37 OF 2024

BETWEEN

ATHWAX CONSULTANTS LIMITED ::::::::::::::::::::::::::::::::::

AND

- 1. MBARARA CITY COUNCIL
- 2. ABIREBE ASSY TUMWESIGYE (The City Town Clerk and Accounting Officer of Mbarara City Council) ::::::::::::::::::::::::::::::::::

BEFORE: FRANCIS GIMARA \$S. C.\$ CHAIRPERSON; NELSON NERIMA; GEOFFREY NUWAGIRA
KAKIRA; PAUL KALUMBA; AND ENG. CYRUS TITUS AOMU, MEMBERS

Representation:

Mr. Blair Atwebembeire of Blair & Co. Advocates, counsel for the Applicant Mr. Alauterio Ntegyereize, senior legal officer, counsel for the Respondent

RULING**Background**

Mbarara City Council (1st Respondent) received funds from the \$1.5 World Bank and the Government of Uganda under USMID for the

Page 1 of 9

Ruling of the PPDA Appeals Tribunal in Misc. Appl. No. 5 of 2024-Athwax Consultants Ltd v Mbarara City Council

design review (1.99km) and construction supervision of civil works for the rehabilitation of Buremba Road (1km) in Mbarara City during the financial year 2023/2024.

- The Respondent invited bids under Restricted Domestic Bidding \$2.5 procurement method in respect of the procurement of Consultancy Services for the supervision of the completion of Buremba-Bishop Stuart University (BSU) Road (0.99km) and upgrading of Mackhan Sign-Victor Bwana Links (0.16km) under USMID-AF infrastructure program in Mbarara City under Procurement Ref: Mbar 609/USMID/SRVCS/2023-2024/00013.
- 3. The Request for Proposal dated June 17, 2024, was issued to 8 (eight) shortlisted consultants, namely; *Centre for Infrastructure* Consulting Limited, UB Consulting Engineers, Adriax Consults SMC Limited, Westlands Engineering Associates (WEA) Ltd. Athwax Consultants SMC Limited, KKAT Consult Limited, Footnote *Consult Ltd and MBJ Technologies Limited.*
- \$4.5 Only two firms, *Athwax Consultants Limited* and \$MBI\$ Technologies Limited, submitted proposals on June 21, 2024.
- \$5.5 On July 29, 2024, the 1st Respondent's Contracts Committee approved the technical evaluation report for the impugned procurement and authorized the issuance of invitation letters to Athwax Consultants Limited and MBJ Technologies Limited on July 30, 2024, for the opening of financial bids that was scheduled for August 2, 2024.
- 6. On August 13, 2024, the Applicant received an invitation letter from the \$1st Respondent to the opening of financial proposals on August 16, 2024.
- On August 13, 2024, MBJ Technologies Limited, in a letter 7. addressed to the Head Procurement and Disposal Unit of the 1st Respondent, requested the 1st Respondent to furnish them with the technical scores of bids and also requested that the \$1st Respondent

Respondent display these technical scores on the 1st Respondent's noticeboard.

- On August 15, 2024, MJB Technologies Limited filed an 8. administrative review complaint to the 1st Respondent's Accounting Officer, challenging the omission to share the technical scores of bids with the Applicant and to display the said scores on the noticeboard.
- On August 17, 2024, 1st, the Respondent opened the financial 9. bids of Athwax Consultants Limited and MJB Technologies Limited and displayed the details of the financial opening on the notice board of its Procurement and Disposal Unit.
- The details of the financial opening displayed on the notice board 10. of its Procurement and Disposal Unit indicated that Athwax *Consultants Limited* (the Applicant) had a technical score of 93% with a bid price of Uganda Shillings 498,212,500 and that MJB Technologies Limited had a technical score of 80% with a bid price of Uganda Shillings 319,020,000.
- On August 21, 2024, the Respondent displayed the Notice of Best 11. Evaluated Bidder in the impugned procurement. The Notice stated that Athwax Consultants Limited (the Applicant) was the Best Evaluated Bidder at a Contract Price of Uganda Shillings 498,212,500 with a combined technical and financial score of 87.2%.
- On August 23, 2024, the 1st Respondent's Accounting Officer 12. made and communicated his administrative review decision on the complaint filed by MJB Technologies Limited on August 15, 2024. The Accounting Officer did not find merit and, therefore, dismissed the complaint.
- 13. MJB *Technologies* Limited, dissatisfied being with the procurement process, alleged the Respondents' lack of impartiality and applied directly to the Tribunal on August 27, 2024, vide Registry Application No. 37 of 2024. MJB Technologies

Limited sought review of the actions, omissions, or breaches of the bidding document and the law.

- 14. The Tribunal rendered its decision on September 16, 2024. The Tribunal found that MJB Technologies Limited had not adduced cogent and reasonable evidence that there was, partiality or a real likelihood of partiality on the Accounting Officer's part. The Tribunal, therefore, held that it had no jurisdiction to hear the Application brought directly without a prior complaint to the Accounting Officer.
- 15. The Tribunal made the following orders:
 - 1. *The Application is struck out.*
 - 2. \$ The Respondent may continue with the procurement to its logical conclusion.
 - 3. The Tribunal's suspension order dated August 28, 2024, is *vacated.*
 - 4. \$ *Each Party to bear its own costs.*

- On September 16, 2024, the 1st Respondent issued a letter of bid acceptance/award to the Applicant, which was followed by a letter of acceptance of the award by the Applicant, dated September 17, 2024.
- 17. On September 17, 2024, the Respondents wrote to the Solicitor General seeking clearance of the contract, which the Solicitor General gave in a letter dated October 2, 2024. The Applicant signed the contract, but the Respondents did not.
- 18. MBJ Technologies purportedly lodged a second administrative review complaint with the Respondents alleging that the Applicant committed acts of forgery, did not have the required specific experience, and did not have an electrical engineer and an environmental specialist. The Respondents constituted an

Page 4 of 9

Ruling of the PPDA Appeals Tribunal in Misc. Appl. No. 5 of 2024-Athwax Consultants Ltd v Mbarara City Council

administrative review committee that issued a report dated September 25, 2024, concluding that the Applicant's grounds linked to allegations that the Best Evaluated bidder had committed irregularities and acts of forgery were serious and escalated the matter to PPDA for findings on the allegations

- On September 26, 2024, the 1st Respondent's Accounting Officer 19. purported to suspend the procurement process pending a Public Procurement and Disposal of Public Assets Authority (PPDA) investigation into allegations of forgery against the Applicant.
- The PPDA's Executive Director, in a letter dated October 16, 20. 2024, advised among others; that the procurement process should continue as guided by this Tribunal in its ruling in application no 37 of 2024 and that any evidence the entity has to support the allegations raised should be forwarded to the Authority.
- 21. The Respondents also allegedly received a letter from the Criminal Investigations Directorate and State House Anti-Corruption Unit halting the procurement process.
- The Applicant has filed the instant miscellaneous application 22. praying that the Respondent be cited for contempt of the Tribunal's orders in Registry Application No. 37 of 2024.
- 23. The Applicant alleges that it has received information that the 2nd Respondent directed that the Deputy Town Clerk or any other officer should not sign any other document regarding the subject matter herein except on his instructions. The Applicant alleges that it wrote to the 2nd Respondent seeking an update on the status of the contract signature and an explanation as to why the contract signature has been delayed. That to-date, the Applicant has not been informed why the contract has not been signed.

- 24. The Applicant avers that the Respondent has displayed utter disrespect and contempt of this Tribunal's mandate, for which the Respondent should be punished personally.
- 25. The Applicant alleges the following particulars of contempt:
 - Conducting a second administrative review investigation after the Tribunal had heard and determined the matter.
 - Defying this Tribunal orders through adamant refusal to implement the Tribunal's orders and the PPDA Executive Director's orders to proceed with the procurement process.
 - Adamant refusal to sign the contract between the Applicant and the Respondent despite clearance from the Solicitor General.
- 26. The Applicant seeks the following orders:
 - A declaration that Respondents (jointly and severally) are in contempt of this Tribunal orders in Application no.37 of 2024.
 - An order compelling the Respondents to sign the contract.
 - General damages against the Respondents jointly and severally.
 - Punitive Damages against the Respondents jointly and severally.
 - Costs of the Application against the Respondents jointly and severally.
 - Fine against the Respondents jointly and severally.
 - Interest.
 - The Respondent contends that the Tribunal's order was discretionary and not mandatory; the procurement process is a subject of investigations by the Criminal Investigations Directorate and State House Anti-Corruption Unit; and that the letter from PPDA was not a directive but guidance. The Respondents deny that they are in contempt of the Tribunal's orders.

Resolution

We have carefully studied the application and the response and also considered the submissions of counsel and authorities cited.

- To succeed in a civil contempt application, the following have to be proved;
- That Court issued an order.
- That the order was served or brought to the notice of the alleged contemnor.
- That there was non-compliance with the order by the Respondent.

- That the non-compliance was wilful or mala fide. \$d\$

See: Obon Infrastructure Development Ltd v Mbarara City and MJB Technologies Limited, Misc Application No.1 of 2022, arising out of Tribunal Registry Application No.20 of 2021; and K-Solutions Limited v Ministry of Water and Environment, Miscellaneous Application No. 1 of 2024.

- 30. In the instant case, the Tribunal did not determine the application's merits but merely struck it out. It is not disputed that this Tribunal ordered that The Respondent may continue with the procurement to its logical conclusion. The Respondents were served with the Tribunal decision and do not deny it.
- The use of the word 'may' prima facie conveys that the authority 31. which has power to do such an act has an option to do it or not to do it. 'May' unlike 'shall', is not a mandatory but a permissive word although it may acquire a mandatory meaning from the context in which it is used, just as 'shall' which is a mandatory word may be deprived of the obligatory force and become permissive in the context in which it appears. See: **Foundation for Human Rights Initiative Vs the Attorney General**, Supreme Court Constitutional Appeal No. 03/2009.
- The words of the Tribunal order are clear and must be given their 32. plain ordinary meaning. The Tribunal did not order that the Respondent shall continue with the procurement to its logical *conclusion.* The use of the word *may*, indicates that the Tribunal left the Respondents with the discretion on whether to proceed with the procurement. The word "may" instead of "shall"

indicates discretion or choice between two or more alternatives. See Black's Law Dictionary.

- 33. A valid and enforceable contract comes into force after fulfilling the requirements in section 82 of the Public Procurement and Disposal of Public Assets Act and the procedures in the Public *Procurement* and Disposal of Public Assets (Contracts) *Regulations.*
- The Tribunal shall not compel a procuring and disposing entity 34. to enter into a contract merely because there has been a contract award.
- 35. The Applicant had the option to lodge a fresh administrative review complaint if it was aggrieved by the impugned suspension of the procurement process on September 26, 2024, because the said suspension was a new act or omission which could have given rise to a new complaint. The Applicant did not pursue that remedy.
- As a result, we cannot find that there was contempt of the 36. Tribunal's orders.
- 37. This application is therefore dismissed with no order as to costs.

Dated at Kampala this 19th day of December, 2024.

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FRANCIS GIMARA S. C CHAIRPERSON

GEOFFREY NUWAGIRA KAKIRA MEMBER

muce

CHARITY KYARISIIMA MEMBER

Mennio

NELSON NERIMA MEMBER

PAUL KALUMBA MEMBER

ENG. CYKUS TITUS AOMU MEMBER

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