**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**MISC APPLICATION NO. 43 OF 2011**

**SGS SOCIETE GENERALE DE SURVEILLANCE SA ::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**1. PUBLIC PROCUREMENT AND DISPOSAL OF**

 **PUBLIC ASSETS AUTHORITY**

**2. ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::::::::::::::::::: DEFENDANTS**

**BEFORE: HON. JUSTICE ELDAD MWANGUSYA**

**RULING**

This is an application for judicial review brought by Notice of Motion under section 36 of the Judicature Act Cap 13, the Public procurement and Disposal of Public Assets Act, 2003 and Rules 3 (1) (a), (2), 6 and 8 of the (Judicature Judicial Review) Rules, 2009 for orders that an order of certiorari be granted quashing the report made by the 1st respondent made in November 2010 citing unethical conduct and interference in the bidding process by the applicant and cancelling the procurement process in respect of the tender for the provision of mandatory motor vehicle inspection by Ministry of Works and Transport; an order of prohibition restraining the 2nd respondent from taking the threatened disciplinary action against the applicant and from cancelling the procurement process in respect of the tender for the provision of mandatory motor vehicle inspection by the Ministry of Works and Transport on the basis of the 1st respondent’s report; an injunction stopping the re-tendering for the provision of mandatory motor vehicle inspection by the MOWT and costs to the applicant.

**Background to the application**

On 7th February, 2008 the Ministry of Works and Transport (MOWT) requested for expression of interest for pre- qualification of motor vehicle inspection service provider in the New Vision and Monitor Newspapers. The deadline for submission of bids was 20th March 2008. On 18th March 2008, MOWT issued an addendum to all bidders in the Monitor Newspaper and the deadline for submission of bids was extended to 3rd April 2008. On 4th April 2008, bid opening was held for the above tender and 17 firms submitted their bids.

On 18th April 2008, M/s Great Pools EA Limited on behalf of M/s Workshop Electronics, SA communicated to PPDA requesting for its intervention since they had submitted an electronic mail as per the Standard Bidding Document but it had not been received by MOWT. On 12th June 2008, the contracts committee approved the evaluation report and on the 25th June 2008, the MOWT displayed the Best Evaluated Bidder Notice with a removal date of 9th July 2008. On the 10th September 2008, PPDA communicated to MOWT advising the Entity to evaluate the electronic bid since this mode of submission was indicated in the standard bidding document, MOWT responded to PPDA’s letter on 4th December 2008.

The bid for M/s Workshop Electronics SA was evaluated on 30th October 2008 and found to be none responsive and on the 6th November2008, the contracts committee considered the evaluation report. A capability statement on the 8 firms was submitted to the contracts committee on 10th September 2008 and it was resolved that two firms; Coin Limited & Dalei Group and Bisons Consult International Ltd & Applus Technical Inc & MSG Int. Ltd be removed from the pre-qualification list since they had submitted bid securities from Insurance Companies and not financial Institutions.

On the 16th January 2009, the contracts committee in its 374th meeting approved cancellation of the above procurement process citing use of wrong procurement method i.e. pre-qualification/short listing of providers instead of open/ restricted international bidding and lack of proof of access to credit by some of the prequalified firms. The PPDA and the Solicitor General approved a draft standard bidding document on the 8th of April 2009and 21st May respectively. Accordingly on 24th July 2009, a new procurement process for provision of motor vehicle inspection services was advertised in the Monitor Newspaper, in the New vision on the 27th July 2009 and in the East African Business Week, 27th July-2nd August 2009 with the required bid security being US$250.000 and a performance security of 10% of the estimated annual turnover of US$1,25 million. On 20th August 2009, a pre-bidding meeting was held and pre- bid minutes issued to all bidders on 25th August 2009.

On 18th September 2009, PPDA communicated to MOWT advising the Entity of complaints from local bidders against the above procurement process and invited the Entity for a meeting o n 23rd September 2009 to discuss the matter. The said meeting was accordingly held and MOWT advised PPDA to proceed with the bid receipt and opening which was scheduled on the same date at 11:20am wherein 6 firms submitted their bids.

The contracts committee in its 407th meeting approved the Evaluation Committee with 5 members and on the 26th January 2010, SGS submitted an application for administrative review to the Accounting Officer, MOWT alleging breach of sections 45, 49, 72 of the PPDA Act and Regulations 87,172 and 177. Bidders were on 4th February requested by MOWT to extend their bid validity and bid security periods for 100 working days, and this was done by all bidders. On 19th February 2010, PPDA advised MOWT to disregard the application for administrative review by SGS since it was legally flawed as the complainant had illegally accessed information during the evaluation process contrary to sec 4 of the PPDA Act. The authority advised the Entity to proceed with the procurement process. The contracts committee in its 423rd meeting of 12th March 2010 approved the Technical Evaluation report and it resolved that the financial bids for the two highest bidders i.e. ESP 92.67% and SGS-86.29% should be opened. The financial bid opening of these two firms was thus held on the 29th March 2010 and on the 15th of April 2010, the financial evaluation was concluded and SGS scored 90.40% while ESP scored 72.79%. On 2nd September 2010, a Best Evaluated Bidder Notice was issued with SGS as the Best Evaluated Bidder. On 7th September 2010, ESP submitted an Application for Administrative Review to the Accounting Officer of MOWT who rejected it as being a nullity and merits no action. ESP being dissatisfied by the decision of the Accounting Officer, appealed to PPDA on 7th October 2011. On 11th October 2010, PPDA communicated to the Accounting officer, MOWT and informed him of the application for administrative review, requested him to suspend the procurement process and submit the procurement action file to PPDA by 15th October 2010, although it was submitted on 18th October 2010. On 29th October 2010, M/s Kiwanuka Karugire Advocates submitted a representation on the matter on behalf of their client, SGS for the hearing which had been re-scheduled for 1st November 2010.

At the hearing SGS was found to have peddled influence and interfered in the procurement process quoting a newspaper article published by the Monitor Newspaper on 1st November, 2010 alleging that Engineer Denis Sabiiti, the Assistant Commissioner, Roads and pipeline Transport in the MOWT, received an e-mail from the former country manager at SGS Mr. Ferdinand Bitanihirwe proposing that for any company to qualify, they should have operated in at least three continents and must have capital investment worth 12 million Euros and operation for vehicle inspection in three continents. The Authority noted that Eng. Sabiiti did not disclose to the Accounting Officer that he had been contacted by the bidder SGS during preparatory process. The applicant is now threatened with Disciplinary action due to these allegations including being blacklisted by MOWT. It contends that the issues upon which the decision of the 1st respondent was based was never part of the administrative review and had not been put to the applicant to enable the applicant defend itself. It also contends that the decision of the 1st respondent was reached in breach of the principles of natural justice and the law as the applicant was not notified of the case against it and was condemned unheard contrary to the provisions of the law. It seeks the prerogative writs of certiorari for this court to quash the findings of the report of 4th November 2010; prohibition to restrain the 2nd respondent from taking the threatened disciplinary action and costs for the application

At the hearing of the application, the parties agreed to file written submissions. Mr Kiwanuka Kiryowa, counsel for the applicant in his written submissions formulated the issues that were adopted by the respondents. They are:

1. ***Whether the respondent conducted the administrative appeal in accordance with principles of natural justice and the law***
2. ***Whether the applicant is entitled to the remedies against the 1st and 2nd respondent***

The general rule as regards natural justice is that a party must be given an opportunity to be heard before his/ her rights are prejudiced of affected by a decision.

In an affidavit in support of the application by Ferdinand Bitanihirwe, it is stated in paragraph 8 that before reaching this decision, the 1st respondent held a hearing on the 1st of November 2010 in which the complainant was represented and heard but from which the applicant was excluded.

The finding by the first respondent against the applicant is two- fold:-

1. Influence peddling by SGS as stated in the following excerpt;

***On page 1 of the Monitor Newspaper dated 1st November 2010, it was alleged that Mr. Ferdinand Bitanirirwe a former Manager of SGS at the time was in collusion with Eng. Denis Sabiiti of MOWT and that he had sent him an email proposing that for any companies to qualify, they should have operated in at least 3 continents and must have at least capital investment worth 12 million Euros and operating for vehicle inspection in 3 continents****....* ***the Authority noted that Eng. Sabiiti did not disclose to the Accounting Officer that he had been contacted by the bidder M/s SGS during the preparatory process…”***

1. ***That the applicant obtained confidential information leaked by the evaluation report; the applicant received a letter from a one Sekitoleko regarding irregularities in the procurement process , the 1st respondent advised MOWT to ignore the applicant’s letter because it contained illegally accessed information contrary to section 47 of the PPDA and to proceed with the procurement process.***

The above does not indicate that the applicant was given an opportunity to be heard. It merely quotes the contents of the article and comes to a conclusion that the applicant did not notify the Accounting Officer about the contact made by the bidder M/s SGS. This is not proof of a fair hearing. Article 44 (c) of the Constitution provides that:

“**Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-**

**(a)-----------------------------------------------------------**

**(b)----------------------------------------------------------**

**( c) the right to fair hearing**”.

**TWINOMUGISHA PASTORI VS KABALE DISTRICT LOCAL GOVERNMENT COUNSIL & ORS (2006) HCB pg 130-132** , Hon. Kasule Ag. J (as he then was) held that in order to succeed in an application for judicial review, the application has to show that the decision or act complained of is tainted with **illegality** i.e. where the decision making authority commits an error of law in the process of taking the decision; **irrationality** i.e. where there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before it would have made such a decision and **procedural impropriety** i.e. where there is failure to act fairly on the part of the decision making authority in the process of taking the decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural unfairness towards one to be affected by the decision.

This allegation was picked by the 1st respondent from the Monitor Newspaper of 1st November 2010, the very day of the hearing. It did not form part of ESP complaint and was never put to the applicant to enable it defend itself. The attendance list shows that the applicant was not present when the allegation was made and therefore had no opportunity to defend itself before the decision was made. The implication is that it was condemned unheard since due to the contents of the report it is threatened with Disciplinary Action from the Ministry. The report is concluded thus,

***“The decision of the authority is that the application for Administrative Review by M/s Environmental Systems Products Holdings Inc is rejected. However, in light of the unethical conduct by both the bidders and the entity, which was evidenced by interference in the procurement process by the bidders and apparent fraudulent practices noted in the above procurement process contrary to sections 45 and 47 of the PPDA Act and Guideline no. 4/2003, the entity should cancel and re-tender the above procurement process. The decision of the finding is based on the findings of the Authority in 5.0 above.”***

The 1st respondent however maintained that this finding was derived from statements made at the administrative review hearing. In paragraphs 9 and 10 of the affidavit in reply, the deponent Cornelia Sabiiti states that she chaired the meeting wherein Eng. Sabiiti acknowledged receipt of the said email from Ferdinand Bitanihirwe although the same has been denied by him.

Having found no merit in the application for Administrative Review by ESP, the respondent without according several persons including the applicant an opportunity to be heard concluded that there had been unethical conduct by both the bidders and the entity. The report does not indicate how the ‘unethical conduct’ came about except at pg. 27-28 where a newspaper article mentions the applicant to have received an e-mail from one Ferdinand Bitanihirwe proposing what to include for qualification of the procurement services. The report is therefore based on findings that affect the applicant who was never given an opportunity to be heard. Section 91 (3) of the PPDA Act and Regulation 347 (4) of the PPDA Regulations require that a hearing be made before the respondent makes its decision. The Authority did not comply with the requirements of the law. The applicant has proved the pre-requisites required before grant of judicial review as stated in **Twinomuhangi Pastori** (supra). The findings of the report on the applicant’s unethical conduct and influence peddling should therefore be quashed.

As regards the 2nd issue, counsel for the applicant submitted judicial review can be granted in cases of illegality, irrationality and procedural impropriety. Counsel cited a number of cases for this preposition; **Council *of Civil Service Unions V Minister for the Civil Service (1985) 1 AC 374, Rose Nalwadda V Uganda Aids Commission Misc. Cause No. 45/2010****.* It was his contention that by making the decision that the applicant was guilty of unethical conduct and interference in the bidding process without any legal basis and by failing to comply with the principals of natural justice, the 1st respondent stepped outside its jurisdiction.

In **General Medical Council v Spackman [1943] AC 627 at 644,** Lord Wright held ‘***that if the principles of natural justice are violated in respect of any decision, it is indeed, immaterial whether the same decision would have been arrived at in the absence of departure from essential principles of natural justice. The decision must be declared to be no decision’***

It should be noted Engineer Dennis Sabiiti himself filed a Misc. Application No. 36 of 2011 against the Public Procurement and Disposal of Public Assets Authority and the finding of this court was that he himself had been condemned unheard and the part of the report relating to his alleged unethical conduct could not be allowed to stand and it was quashed. It is in the same vein that the same report against the applicants in this application should be quashed because if this court quashed the report in respect of an individual the same report cannot be allowed to stand against a company that has a reputation to protect when it was accused of unethical conduct and fraudulent dealings without being heard.

Mr. Kiwanuka thus invited this court to grant an order of certiorari quashing the decision of the 1st respondent while an order prohibiting the MOWT from taking a disciplinary action against the applicant and cancelling the procurement process in respect of the tender for the provision of mandatory motor vehicle inspection basing on the 1st respondents report should be granted and an injunction stopping the retendering for the provision of mandatory motor vehicle inspection by MOWT since the basis for retender is the illegal, irrational, procedurally defective decision of the 1st respondent.

In the circumstance, given the fact that rules of natural justice were flouted, it is in order that the applicant is awarded the remedies sought as this was a proper case for judicial review.

The applicant also prays for costs. Section 27 of Civil Procedure Act Cap 71 provides for costs and it is to the effect that the court has discretion to award costs and that costs follow the event. Having found that the respondent caused inconvenience as a result of the report that condemned it unheard, the applicant is granted costs of the application.

**Eldad Mwangusya**

**J U D G E**

**22.06.2012**