

THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
[CADER]

CAD/ARB/63/2017

PLINTH TECHNICAL WORKS LTD ----- APPLICANT

VERSUS

HOIMA MUNICIPAL
LOCAL GOVERNMENT COUNCIL ----- RESPONDENT

Applicant Counsel

Kagoro Friday Roberts
Muwema & Co. Advocates.

Respondent Counsel

Philip Mwaka Principal State Attorney
Attorney General's Chambers.

RULING

1. The parties executed an Agreement for construction of the Rukurato Road, Main Street, Old Toro Road, Coronation Road, Persy Road, Government Road and Kabalega Road on 13th December 2015.
2. Following mutual disengagement, a dispute has arisen regarding outstanding payments owed to the Applicant.

See Ground 4 in support of the Application, Para.5 Babiha Richardson Affidavit in Support of the Application, Para.3 Luyimbazi James Respondent Reply Affidavit deposed on 7th November 2017.

3. The Applicant, on 11th August 2017, requested the President Uganda Institute of Professional Engineers to appoint an adjudicator.
4. UIPE appointed the Adjudicator on 16th August 2017 on the basis of GCC Clause 24.1, which was cited to state as follows,

“The Contract under GCC Clause 24.1 provides that ‘If the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any Adjudicator appointed under the contract within 14 days of the notification of the Project Manager’s decision.’ ”

5. The Applicant confirmed that there was no objection to the appointed Adjudicator.

6. The deposition in the Town Clerk's Reply Affidavit informs us as follows,

Deposed on 6th November 2017

5. That in reply to paragraph 7, 8, 9, 10 and 11 of the Applicant's affidavit on 24th October 2017 I collected a letter regarding Adjudication Proceedings from the Uganda Institute of Professional Engineers which I duly signed for

6. That I only learnt about the existence of the said letter of 24th October, 2017 regarding Adjudication Proceedings when I was served with process in this matter on the 18th October, 2017

7. That the Uganda Institution of Professional Engineers did not serve the said letter of 17th August 2017 on Hoima Municipal Council.

Deposed on 9th November 2017

5. That Hoima Municipal Council has written to the President, Uganda Institution of Professional Engineers stipulating that it accepts appointment of [name omitted] as Adjudicator and is fully prepared to proceed with the Adjudication proceedings.

9. That I know it is premature for the Applicant to submit this matter to CADER without exhausting the Adjudication Process under the contract.

7. The Applicant, by the date of filing this Application, was aggrieved that the appointed adjudicator has hitherto never presided over the dispute.

8. The Respondent confirmed acceptance of the adjudicator on 8th November 2017.

9. The dispute resolution clause states as follows,

“General Conditions of Contract for the Procurement of Works

24. Disputes

24.1

If the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any Adjudicator appointed under the contract within 14 days of the notification of the Project Manager's decision.

25. Procedure for Disputes.

25.1

Unless otherwise specified in the SCC, the procedure for disputes shall be as specified in GCC 25.2 to 25.4.

25.2

Any Adjudicator appointed under the contract shall give a decision in writing within 28 days of receipt of a notification of a dispute, providing that he is in receipt of all the information required to give a decision.

25.3

Any Adjudicator appointed under the contract shall be paid by the hour at the rate specified in the SCC, together with reimbursable expenses of the types specified in the SCC, and the cost shall be divided equally between the Employer and Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.4

Any arbitration shall be conducted in accordance with the Arbitration law of Uganda, or such other formal mechanism specified in the SCC, and in the place shown in the SCC.

Special Conditions of Contract

GCC

Clause Reference Special Conditions

GCC 25.1 The procedure for disputes shall be as specified in GCC 25.2 to 25.4.

GCC 25.4 The arbitration shall be conducted in accordance with the Arbitration Law of Uganda.

Arbitration shall take place at:
Kampala, Uganda

10. Exhaustive review of the evidence presented, informs us that both parties,

a. are agreed there is no Project Manager decision being contested,

- b. had never chiseled out any basic framework on how to proceed with the adjudication proceedings, and
 - c. have not expressed knowledge of the Uganda Institute of Professional Engineers adjudication framework.
11. We are dealing with a situation where to my mind the parties to my mind have applied the wrong interpretation to the same dispute resolution clause.

12. In *Phillips versus Copping*, [1935] I K.B. 15, 21 Lord Scrutton L.J. held that,

“But it is the duty of the Court when asked to give a judgment which contrary to a statute to take the point although the litigants may not take it.”

13. When a similar provision was under consideration in *Plinth Technical Works Ltd versus Fort Portal Municipal Council*, CAD/ARB/62/2017, I held as follows,

“Para.9

The common position of the mutual disengagement has not been attributed in particular to the Project Manager’s decision.

Para.10

This of necessity renders consideration of appointment of an adjudicator a moot point, and settles the objection in Para. Error: Reference source not found) above.

Para.11

Clause 25 GCC sets out two types of arbitration.

The first is the GCC Clause 25.3 arbitration, which is the result of the agreed appeal forum from the adjudicator’s decision.

The second is “**any arbitration**” in GCC Clause 25.4, which applies to other disputes, which arise between the parties.”

To my mind the post mutual disengagement dispute fits within the “**any arbitration**” envisaged by Clause 25.4 GCC.

It is upon this basis that I find merit in the Application and will proceed to appoint the arbitrator.

14. Each party to bear its own costs.

Dated at Kampala on **16th March 2018**.

JIMMY .M. MUYANJA
EXECUTIVE DIRECTOR