IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA
ON MONDAY 24THOCTOBER 2022
BEFORE HIS LORDSHIP: HON. JUSTICE O. A. ADENIYI
SITTING AT COURT NO. 8, MAITAMA, ABUJA

SUIT NO: FCT/HC/CV/1591/2020

BETWEEN:

SUSTAINABLE ENTREPRENEURSHIP AND ECONOMIC DEVELOPMENT INITIATIVE (SEEDI) CLAIMANT

AND

CREATIVE ASSOCIATES INT'L INC. … … … … … DEFENDANT

JUDGMENT

1. The Claimant is a limited liability company. The brief summary of her grouse against the Defendant, as gathered from processes filed to commence this suit, is that sometime in 2019, she responded to Concept Note and Request for Application (**RFA**) for a grant

to execute a project called Basic Business and Financial Skills for Women for Peace Platform programme of the United States Aid (USAID)/Nigeria Lake Chad Basic Programme(NLCB), of which the Defendant was the implementation outfit. Long and short, after meeting all the criteria set by the Defendant for the award of the contract, including budget negotiations, cost implementation, as set by the Defendant, the Defendant, sometime in March, 2020, abruptly terminated the project. In the process, the Claimant purported to have sustained financial and image losses and setbacks. As a result, the Claimant took out *Writ of Summons and Statement of Claim* on 03/08/2020, whereby she claimed against the Defendant the reliefs set out as follows:

i. ***A declaration that there is a binding contract between the Claimant and the Defendant upon approval of the Project basic Business and Financial Skills for Women for Peace***

Platform of USAID/Nigeria Lake Chad Basic Program (NBLCB) and the NLCB 154 Activity Budget.

ii. *A declaration that the termination of the project Basic Business and Financial Skills for Women for Peace Platform Program of USAID/Nigeria Lake Chad Basic Program (NLCB) by the Defendant is wrongful, unlawful, illegal and amounts to a breach of contract.*

iii. *An order of Specific Performance directing the Defendant to give effect to the project Basic Business and Financial Skills for Women for Peace Platform Program of USAID/Nigeria Lake Chad Basic Program (NLCB) and to give effect to the NLCB154 Activity Budget by the immediate release of*

funds in line with the timeline agreed by the parties.

OR IN THE ALTERNATIVE:

iv. A declaration that there is a binding contract between the Claimant and the Defendant upon approval for the project Basic Business and Financial Skills for Women for Peace Platform Program of USAID/Nigeria Lake Chad Basic Program (NLCB) and the NLCB154 Activity Budget.

v. A declaration that the termination of the project Basic Business and Financial Skills for Women for Peace Platform Program of USAID/Nigeria Lake Chad Basic Program (NLCB) by the Defendant is unlawful, illegal and amounts to a breach of contract.

vi. An order that the Defendant pay to the Claimant forthwith the sum of

₦20,000,000.00 (Twenty Million Naira only) as general damages suffered by the Claimants from the act of the Defendant breach of its contract with the Claimant.

vii. The sum of ₦500,000.00 as cost of this suit.

2. In the *Statement of Defence* filed on 17/09/2020, the Defendant denied the Claimant's case in its entirety. She maintained that whilst the Claimant's application to undertake the project was evaluated and successfully undergone technical evaluation and adjudged to be compliant with all requirements as indicated in the **RFA**; it had not gone through the cost/financial evaluation stage when the Defendant was constrained to terminate the grant application process, which according to her, was due to unanticipated budget constraints. According to the Defendant, all the steps purported to have been taken by the Claimant were preparatory to approval

of the Claimant's proposal and that the project cost evaluation process was yet to be finalized between the parties when the Defendant was constrained to terminate the contract in 2020 due to unanticipated occurrences escalated by the Covid-19 pandemic which had taken a toll on the anticipated revenues and project-funds of the Defendant and her funders. According to the Defendant, all the activities undertaken by the Claimant were preliminary to the Defendant taking a decision as to whether or not to award a contract and that in the instant case, the processes were not concluded before she was constrained to terminate the process.

3. The Claimant filed a *Reply* to the Defendant's *Statement of Defence* on 07/10/2020.

4. At the plenary trial, both parties fielded one witness apiece. The Claimant's witness, **Clement Okeke,** upon adopting his *Statement on Oath,* tendered a total of

10 (ten) sets of documents in evidence as exhibits. The Defendant's witness, **AderemiAjidahun**, staff of the Defendant, in turn adopted his *Statement on Oath* and tendered only two (2) documents in evidence as exhibits. The two witnesses were subjected to cross-examination by learned counsel on either side.

5. Upon conclusion of plenary trial, learned counsel on both sides filed written final addresses on behalf of the parties as prescribed by the **Rules** of this Court. The Defendant filed her final address on 05/11/2021, whereby her learned counsel, **Ogechi Abu, Esq.**, formulated a sole issue for determination, set out as follows:

> ***Whether the Claimant has established the formation of a binding and enforceable contract between the Claimant and the Defendant herein capable of being breached?***

6. The Claimant in turn filed her final address on 14/12/2021, whereby her learned counsel, **EzenwaAnumnu, Esq.,** equally formulated a sole issue as arising for determination in this suit, set out as follows:

> ***Whether the combined effect of the successful completion of Solicitation for Concept Note/Request for Application for a grant to execute the project, Selection of Claimant as the sole participant, Cost Implication and Budget negotiations, do not amount to a binding contract between the parties and the breach of which entitles the Claimant to damages.***

7. For purposes of determining the instant suit, I proceed to adopt the issue as succinctly formulated by the Defendant's learned counsel. I should equally state that I had also carefully considered and taken due benefit of the totality of the arguments canvassed by learned counsel on either side in their respective final

address which formed part of the record in this suit. I shall only endeavor to make specific reference to learned counsel's arguments as I consider needful in the course of this judgment.

DETERMINATION OF SOLE ISSUE

8. I must first remark that the claim of the Claimant is predominantly documentary in nature. I had set out in brief the essence of the claim in the foregoing. By my understanding, the foundation of the engagement between the two parties centred round the document tendered by the Claimant's witness as **Exhibit C3**. It is captioned **"REQUEST FOR APPLICATIONS (RFA) for Basic Business and Financial Skills for Women for Peace Platforms."** The document is akin to what is referred to in project bidding parlance as invitation to tender (ITT). **Exhibit C3** outlines the information required for developing and submitting an

application for consideration for the project in context.

9. It is stated on the face of **Exhibit C3**, page 1, paragraph 2 thereof, as follows:

> ***"Applications will be evaluated based on the "Evaluation Criteria" in Attachment 3. NLCB will make award(s) to responsible applicant(s) submitting an offer which provides best value to the project: technical merit and price will be both considered."***

10. A fundamental clause in **Exhibit C3**, pages 1-2 thereof, further states as follows:

> ***"Issuance of this RFA does not constitute an award commitment, nor does it commit NLCB to pay for costs incurred in the preparation and submission of an application. All preparation and submission costs are at the applicant's expense and the***

application is submitted at the risk of the applicant."

11. **Exhibit C3** then goes further to outline the project description; the scope and the details of the different stages of pre-contract implementation. It is equally stated explicitly at *page 7* of **Exhibit C3** that the award of the project is **"subject to availability of funds."**

12. As also seen in the enumerations of each stage of the project planning at*page 6* of **Exhibit C3,** the contemplation is that the Defendant shall only sign a contract with the successful applicant who meets all the criteria enumerated in **Exhibit C3**.

13. Now, I had examined the totality of all the documents tendered in evidence by the Claimant, including **Exhibit C3** and all electronic mail communication between her representative and the Defendant's

representatives. By my understanding, all of these documents and mail exchanges between the parties merely indicated nothing beyond the variousmilestones the Claimant had reached in response to the **RFA** and in ensuring that she met all the requirements that will qualify her to be awarded the contract at the end of the day. It is also correct that the Claimant, in scaling these milestones, incurred expenses in the process. However, there is no evidence before the Court that the Defendant eventually awarded the contract to the Claimant.

14. **Exhibit C3**, already referred to in the foregoing, is the working document between the parties. It is clearly stated therein, as I had reproduced in the foregoing, that the NLCB is not committed to paying any costs incurred by any of the applicants in the process of preparing and submission of their application; and that whatever happens at the end of

the day, whether an applicant is selected or not, all preparation and submission costs are at the applicant's expense and that the application is submitted at the risk of the applicant.

15. Again, an examination of the column on **Exhibit C3** titled **"Award information"**, it is clearly stated as follows:

> ***"Subject to the availability of funds, NERI expects to award a fixed Amount Award or Simplified Grant. The expected duration of NERI's support for the period of the project is three (3) months from signing of the award. The Location for this activity is Borno (Maiduguri, Monguno, Damasak and Gubio) and Yobe (Geidam)"***

(Underlined portions for emphasis)

16. Now, the reasons that led to the Defendant's termination of the process was communicated to the Claimant by the Defendant's representative's mail of

17 March, 2020, admitted in evidence as **Exhibit C6B**. The electronic mail communication states, in part, as follows:

> ***"Dear Potential Grantee,***
>
> ***We would like to thank you for your interest in receiving NLCB grant for Basic Business and Financial Skills for Women for Peace Platforms.***
>
> ***We regret to inform you that due to budget constraints and strategic shift of our program we are unable to continue with this activity and consequently, not award it to any organization.***
>
> …
>
> ***Thank you,***
>
> ***NLCB Grant Team."***

17. The question therefore is whether the Defendant, by informing the Claimant of her inability to proceed with the project pre-qualification processes, is liable to the Claimant in damages for whatever expenses

the Claimant had incurred for participating in the bidding process, up to the stage the process was terminated?

18. The **CW1** enumerated in *paragraphs 11, 15 and 16* of his *Statement on Oath*, the losses purportedly suffered by the Claimant due to the cancellation of the project; and as a result of which the Claimant claims specific performance of the project or in the alternative, the sum of **₦20,000,000.00(Twenty Million Naira)** only, as general damages for breach of contract from the Defendant.

19. But then, as I had noted earlier on, it is stated clearly in **Exhibit C3** that the **RFA** does not constitute an award commitment and that the Defendant is not committed to pay for costs incurred by applicants in the preparation and submission of the application. More specifically, it is further stated in **ExhbitC3** as follows:

"All preparation and submission costs are at the applicant's expense and the application is submitted at the risk of the applicant."

20. In the present case, the Claimant, as an applicant, was yet to conclude the process of application when the project was withdrawn. I must therefore agree with the Defendant's learned counsel, in holding that the relationship between the Defendant and the Claimant, at the point when the Defendant called off the project bid, amounted merely to invitation to treat. The authorities of *BFI Group Corporation vs B. P. E [2012] LPELR-9339(SC); Amana Suites Hotels Ltd. vs PDP [2006] LPELR-11675(CA)* cited by the Defendant's learned counsel, appositely captured the essence of invitation to treat, which is held to be the first step in negotiations between the parties to a contract; that the negotiations may or may not lead to a definite offer being made by one of the parties

to the negotiation; and that invitation to treat is not an offer that can be accepted to lead to an agreement or contract.

21. The Supreme Court, in the recent decision of *Prof. Ango Abdullahi &Ors. Vs Mallam Nasir El Rufa'I&Ors*. *[2021] LPELR-55627(SC)*, elaborated on the concept of invitation to treat, which is akin to the circumstances in the instant case, when it held, *per***OsejiJSC**, as follows:

> ***"...In my view, and to all intents and purposes, the aforementioned documents relied upon by the Appellants do not, by a stretch of imagination create any valid contractual relationship that will move this Court to grant the reliefs as sought by the Appellants. At best, the said documents constitute nothing more than an invitation to treat as rightly found by the trial Court and affirmed by the lower Court. And as correctly held by this Court in B.F.I. GROUP CORPORATION VS BUREAU OF PUBLIC***

ENTERPRISES (2012) 18 NWLR (P 11322) 209, an offer must be distinguished from an invitation to treat. An invitation to treat is the first step in negotiations between the parties to a possible contract. It is not enforceable by way of an order for specific performance as being sought by the Appellants. It is more like asking this Court to embark on a mission impossible. An invitation to treat may or may not lead to a definite offer being made by one of the parties to the negotiation. It is not an offer that can be accepted to lead to an agreement or contract. See BPS CONSTRUCTION AND ENGINEERING CO. LTD VS FEDERAL CAPITAL DEVELOPMENT AUTHORITY. (2017) LPELR-42516 (SC). An invitation to treat is merely a communication by which a party is invited to make an offer. It is therefore different from an offer mainly on the ground that it is made with the intention that it will create a binding relationship as soon as the person to whom it is addressed responds

to the invitation as in the instant case where the Appellants in response to Exhibits B, B1 to B95 and C took steps to purchase the forms for the sale of the houses. The said procurement, filling and return of the forms as shown in Exhibits F, F1 to F97 does not unfortunately create any legal relationship or a binding contract between the parties that will justify an order for specific performance by this Court as sought by the Appellants. This can only be possible when there exists a valid contract between the parties and such valid contract can only emerge where all the elements constituting such are put in place. That is to say, there must be an offer, acceptance, consideration, and an intention to create a legal relationship. It follows therefore that, there can be no order for specific performances as sought by the Appellants unless there is a definite and certain contract between the parties. See BEST (NIG) LTD VS BLACKWOOD HODGE (NIG) LTD & 2 ORS (2011) 1-2 SC (PT.I) 55; NLEWEDIM VS

UDUMA (1995) 6 SCNJ 72 and HELP (NIG) LTD VS SILVER ANCHOR (NIG) LTD (2006) 2 SCNJ 178. To constitute a valid contract, there must be an agreement in which the parties are ad idem on essential terms and conditions thereof and the promise of each party must be supported by consideration."

See also *Nwabueze vs FCMB Plc [2013] LPELR-21266(CA)*, cited by the Claimant's learned counsel.

22. In the present case therefore, as I had noted earlier on, all the documents tendered by the Claimant merely pointed to the fact that all that the Defendant extended to the Claimant was an invitation to treat, to which she responded. Parties were yet to reach the stage of formulating a concrete contract which would ordinarily reflect all the elements constituting a valid contract before the Defendant retracted on the invitation. Unless it is established that a valid contract

crystallized between the parties, there is nothing for the Court to enforce in the circumstances. I so hold.

23. At the risk of being repetitive, the finding of the Court is that the Claimant did not adduce any evidence suggesting that there was a validly executed contract between her and the Defendant; as such, there is no such contract before this Court to be enforced. A fortiori, the issue of a claim for damages for breach of contract obviously cannot arise, as claimed by the Claimant. I so hold.

24. Again, with respect to the issue of specific performance/damages, my view is that the portions of **Exhibit C3**, referred to in the *paragraphs 10 and 15* of this judgment, are in the nature of exemption from liability clauses inserted by the Defendant in **RFA**. This is to the effect that the Claimant proceeded with the application and submission at her own expense and risk; and that the contract shall be

awarded at the end of the day, subject to availability of funds. The Claimant is deemed to be aware and comfortable with these clauses or conditions, before proceeding to commence the project application process and as such is bound by the same. I so hold.

25. For the nature of an exemption clause, I refer to the authority *Max-Clean Becal Ventures Ltd. & Anor vs Abuja Environmental Protection Board [2016] LPELR-41204(CA)*.

26. I further agree with the Defendant's learned counsel that the insertion of the clause that the contract award shall be made **"subject to availability of funds"** makes the contract award conditional and that since the contract was not eventually awarded for the same reason of non-availability of the budgeted sum, the Defendant is not liable to the Claimant for

damages. The authorities of *Jumbo United Co. Ltd. vs Leadway Assurance Co. Ltd. [2016] 15 NWLR (Pt. 1536) 468*; and *Tsokwa Oil Marketing Co. (Nig.) Ltd. vs Bank of the North Ltd. [2002] LPELR-3268(SC)*, cited by the Defendant's learned counsel, are apposite on the principle of condition precedent/conditional contract.

27. I must also add that the scenario between the Defendant and the Claimant in the instant case admits of the maxim of ***volenti non fit injuria*** which is that the Claimant voluntarily and freely, with full knowledge of the knowledge of the risk he ran, impliedly agreed to incur the risk. The risks the Claimant voluntarily ran in the present case are clearly embedded in the **RFA, Exhibit C3,** which are to the effect that the all the costs and expenses she may incur in the course of processing the application for the contract award shall be solely borne by her, whether or not she

eventually scaled through with the process; and that at the end of the day, the award of the contract shall be subject to availability of funds.

28. For the principles of ***volenti non fit injuria***, see *Dare & Anor. Vs Fagbamila [2009] LPELR-8281(CA)*.

29. The **CW1**, Managing Director of the Claimant, confirmed under cross-examination by the Defendant's learned counsel, as follows:

> ***"I am aware that the RFA defined the scope and all the terms and conditions surrounding the project."***

30. By this confirmation, the Claimant is deemed to understand and accepted all the clauses of the **RFA**, **Exhibit C3**, which included the exemption from liability clause as well as the condition subject to availability of funds clause. She cannot therefore be heard to contend that she should be rewarded in

damages for the expenses she incurred in the process of submitting a bid for the project. I so hold.

31. The conclusion of the Court, on the basis of the assessment of the totality of the evidence adduced on the record and upon application of the position of the law, is that the Claimant's case is devoid of any merits or substance whatsoever. It is ill-conceived. It must be and it is hereby accordingly dismissed. I award costs of the action, in the sum of **₦250,000.00 (Two Hundred and Fifty Thousand Naira)** only, in favour of the Defendant, against the Claimant.

OLUKAYODE A. ADENIYI
(Hon. Judge)
24/10/2022

Legal Representation:

EzenwaAlumnu, Esq. – (with **Chika Igwe, Esq. &Chikwendu Onuoha, Esq.**) – *for the Claimant*

Ogechi Abu, Esq. – *for the Defendant*