REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. JUDICIAL REVIEW APPLICATION NO. E167 OF 2021

REPUBLIC...APPLICANT

-VERSUS-

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD..1ST RESPONDENT

KENYA AIRPORTS AUTHORITY...2ND RESPONDENT

THE CHIEF EXECUTIVE OFFICER

KENYA AIRPORTS AUTHORITY...3RD RESPONDENT

CONTRALINKS SOLUTIONS &

SERVICES LIMITED..INTERESTED PARTY

ex parte:

RAYS STIMA SERVICES LIMITED

JUDGMENT

Before court is the applicant's motion dated 18 November 2021. It is made under Section 175 of the Public Procurement & Disposal Act, 2015, Section 8 & 9 of the Law Reforms Act and Order 53 Rule 3 of the Civil Procedure Rules. The prayers have been famed in the following terms:

> ***"1. An order for certiorari to call into court and be quashed the order of the 1st Respondent made on 21st October, 2021 dismissing the ex- parte Applicant's request for review.***
>
> ***2.An order of mandamus directed at the 2nd Respondent & 3rd Respondents to conduct due diligence and to re-evaluate the tender No. KAA/OT/ES/JKIA/0108/2020-2021 for supply and installation of 11kv cable serving Substation 1B at Jomo Kenyatta International Airport.***
>
> ***3. Cost of the Judicial review proceedings be awarded to the Ex-Parte Applicant."***

The application is based on a statement of facts verified by an affidavit sworn by Kaari Mbijiwe Janet on 3 November 2021.

According to the verifying affidavit, the deponent is a director of the applicant company. She has sworn that sometimes in June, 2021 the 3rd respondent, which I will also refer to as 'the procuring entity' advertised a tender through its online portal being tender No. KAA/OT/ES/JKIA/0108/2020-2021 for Retender- Supply and Installation of 11kv cable serving Substation 1B at Jomo Kenyatta International Airport. I will refer to the tender simply as 'the tender' or 'the subject tender'. Three (3) firms participated in the tender and the firms have been named as follows:

a) Burhani Engineers Limited

b) Contralinks Solutions and Services Limited

c) Rays Stima Services Limited

The last two are, of course, the interested party and the *ex parte* applicant respectively, in these proceedings.

At the conclusion of the tender process, the tender was awarded to the interested party on account of it being the lowest evaluated bidder.

Vide a letter dated 16 September, 2021, the 2nd respondent notified the applicant that its bid for the tender was unsuccessful for the reason that it quoted a higher tender price than the interested party.

It is the applicant's deposition that though it was awarded the tender, the interested party did not qualify for such an award for the reason that it did not meet the technical qualifications outlined in the tender document. Apparently in support of this deposition, the applicant contended that:

> "***. . .by virtue of the applicant's practical experiment and market knowledge spanning over 12 years, it is the applicant averment that the 3 rd Respondent could not have complied with the above requirements for the following reasons;***
>
> > a) ***Knowing its market share and competitors, the Applicant strongly believes the 3 rd Respondents is yet to have carried out and/or participated in at least three (3) electrical medium voltage electrical installations and cable terminations contracts within the abovementioned years.***
> >
> > b) ***Secondly, it is industry knowledge that only 2 entities in the country own, operate and/or have the equipment listed in "b" above, which entities the 3rd Respondents is not amongst."***

The party the applicant mistakenly refers to as the 3rd respondent is, of course, the interested party which, as noted, was the winning bidder.

It was also the applicant's case that since the tender was a retender, it "*strongly believed*" that the interested party was part of the bidders in the initial tender. Again, in what appears to be speculation on the applicant's part, the applicant contended that "*the respondents must have colluded and/or connived in approving the technical evaluation of the 3 rd. Respondent's bid without carrying out proper due diligence and verifying that the 3rd Respondent was qualified to undertake the tender awarded.*"

The applicant contends that "if proper due diligence" is undertaken, the interested party will certainly be found to be unqualified. It is deposed that the applicant asked the procuring entity to undertake the due diligence pursuant to section 83 of the Public Procurement & Disposal Act, 2015 through a letter dated 23 September 2021 and, in particular, to investigate the authenticity of receipts and invoices attached to the interested party's documents but that the procuring entity declined to do so.

The applicant contended further that if the procuring entity and its Chief Executive had undertaken due diligence, they would have discovered that the price given by the interested party was too low and, in any event, they would have found out that the equipment referred to as "Surgeflex 32" is not manufactured in the United States of America (USA) as claimed by the interested party but it is made in Germany by a company known as Megger (Seba KMT) and also that HDE (USA), the company said to have issued an invoice and sold the equipment to the interested party, does not deal with cable joint location equipment.

Being dissatisfied with the award of the tender, the applicant filed a Request for Review before the 1st respondent; this was Review No. 12 of 2021. The application was dismissed on 21 October 2021, hence the present application.

Looking at the pleadings and affidavits filed in the Request for Review, the applicant's case in this Honourable Court is no different from what was presented before the 1st respondent. The applicant, however, reiterates that the 1st respondent's decision was contrary to Article 47 of the Constitution of Kenya, 2010 since it did not interrogate the authenticity of the documents in support of the ownership of a particular equipment owned by the interested party, more precisely the invoice and receipt produced by the interested party. According to the applicant, it 'believes' the quotation, the invoice and the receipt were 'a forgery.'

Patrick K. Wanjuki swore a replying affidavit on behalf of the 2nd and 3rd respondents. Wanjuki described himself as the General Manager-Procurement and Logistics of the 2nd Respondent.

He swore that the 3rd respondent is a state agency established under Section 3 of the Kenya Airports Authority Act, Act No. 3 of 1991 with its mandate and powers set forth in Section 12 thereof.

He swore further that on 29 June, 2021, the 2nd respondent advertised for the Supply and Installation of 11 kv Cable Serving Substation 1B at JKIA through Open Tender. The tender was also published on the 2nd respondent's website in accordance with the provisions of the Public Procurement and Asset Disposal Act. Three firms, including the applicant firm, submitted their bids.

The firms were subjected to preliminary, technical and financial evaluations. All the bidders met the requirements for the preliminary evaluation and qualified for the technical evaluation. At the technical evaluation stage, only the applicant and the interested party met the requirements. And when the two bidders were subjected to financial evaluation the interested party met the qualifications in accordance with section 86(1) of the Public Procurement and Asset Disposal Act in that it was found to be the lowest evaluated bidder. The interested party's

tender price was Kshs. 10,355,465.00 while that of the applicant was Kshs. 11,521700.00.

On the question of due diligence, the 2nd and 3rd respondents conceded that according to section 83(1) of the Act, post-qualification due diligence of the lowest evaluated tenderer is necessary prior to issuance of an award. It is i n accordance with this provision of the law that the 2nd respondent undertook the due diligence on the interested party and, in particular, it conducted three different entities where the interested party had undertaken works similar to those that were subject to the procurement in the subject tender. The exercise yielded positive results and therefore the interested party was recommended for the award of the tender as the lowest evaluated bidder.

Subsequently, the 2nd respondent issued a Notification of Intention to Enter into Contract, for the subject tender, dated 16 September, 2021 to the interested party.

In the same vein and, in accordance with section 87(3) of the Public Procurement and Asset Disposal Act, the 2nd respondent notified the applicant that its bid was unsuccessful at the financial evaluation stage on the account of a higher quoted contract price than that quoted by the interested party.

It was deposed on behalf of the 2nd and 3rd respondents that on the whole, the 2nd respondent conducted the tendering process in compliance with the provisions of the Act and the Constitution of Kenya and, in particular, in accordance with Article 227 thereof.

The interested party opposed the motion and to this end Pamela Chemelil swore a replying affidavit on its behalf. She described herself in the affidavit as a director of the interested party. The deponent, by and large, reiterated the facts as deposed Patrick Wanjuki in his replying affidavit on behalf of the 2nd and 3rd respondents.

She added that the applicant's assertion that the interested party did not meet the qualifications of the subject tender is not only subjective but it is unfounded as well and that, in any case, it is not within the applicant's domain to determine whether the interested party met the qualifications of the bid; that is the responsibility of the 2nd respondent which, in this regard, appointed an evaluation committee pursuant to Section 46 and 80 (1) and (2) of the Act and regulations 28 (2) and 30 of the regulations 2020. In exercise of its mandate pursuant to these provisions of the law, the evaluation committee adjudged the interested party to have met the criteria set forth in the bid document.

I have considered the parties' submissions in support of and in opposition to the applicant's motion. Besides the submissions, I have perused and given due attention to the 1st respondent's impugned decision.

The facts out of which the motion has been conceived are not in dispute.

By way of summary, the procuring entity invited sealed bids for the subject tender through an advertisement in the MyGov newspaper publication on 29 June 2021.

A total of three (3) tenders were received by the revised tender submission deadline of 29 July 2021 at 11.00 A.M. The tenders were then opened by a Tender Opening Committee shortly in the presence of tenderers' representatives. As noted earlier, the applicant, the interested party and Burhani Engineers Limited were the only entities that submitted their bids.

The applicant and the interested party surmounted the hurdles of the preliminary and the technical evaluation stages but it is only the interested party that surmounted the ultimate financial evaluation hurdle and was subsequently awarded the tender.

In the Request for Review presented before the 1st respondent, the applicant sought for the following orders:

> ***1) THAT the Board be pleased to order an investigation into the technical claims of the 3rd respondent as refers the instant tender;***
>
> ***2)THAT upon its findings of 1 above, the Board does make a declaration that the conduct of the respondents is fraudulent, illegal and unlawful.***
>
> ***3)THAT the Board be pleased to disqualify the respondent from executing or entering into a contract with the 2nd respondent in Tender No-KAA/OT/ES/JKIA/0108/2020-2021 for Supply and Installation of 11KV cable Serving Substation 1B at Join Kenyatta International Airport,***
>
> ***4) THAT the Board be pleased to award the tender to the second most responsive bidder.***
>
> ***5) THAT the Board be pleased to order the 1st, 2nd and 3rd respondents to meet the costs of these proceedings***
>
> ***IN THEALTERNATIVE,***
>
> ***6) THAT the Respondents be compelled to pay damages in the sum of KES 11,521,700 being the bid offered by the Applicant.***
>
> ***7) THA T the Honorable Board be pleased to make any or such further Orders as the ends of justice may require."***

My reading of the 1st respondent's decision impresses upon be to conclude that the 1st respondent considered adequately the Request for

Review, the responses thereto and the submissions filed by the respective parties in support of the positions they had adopted. It then framed the issues for determination as follows:

> ***"I. Whether the procuring entity evaluated the 3rd respondent's bid in accordance with the Tender Document as read with Section 80(2) of the Act.***
>
> ***11. Whether the respondents connived and colluded in the award of the tender to the 3rd respondent.***
>
> ***111. What are the appropriate orders to grant in the circumstances?"***

In considering these issues, the 1st respondent applied its mind to the applicant's case and responses by the respondents and came to the conclusion that the evaluation report showed that the procuring entity found that the interested party provided the necessary documentation in support of the tender requirements. It was able to pick out from the confidential documents the interested party's evidence or proof of the technical requirements in question. These supporting documents were found to have been duly exhibited to the 1st interested party's bid.

With these evidence, the 1st respondent concluded that the procuring entity properly evaluated the interested party's bid in accordance with the tender document. It agreed with the procuring entity and the interested party that the applicant did not proffer any evidence to support the allegations that the interested party's bid was technically unresponsive.

The 1st respondent also held that the applicant did not provide any evidence to support the assertion that, as the accounting officer, the 2nd respondent erred in failing to establish a credible technical evaluation committee and that it awarded the tender to an unqualified entity.

To quote the 1st respondent's holding on the first issue for determination, the 1st respondent held as follows:

> ***"In totality, the Applicant's assertions are speculative and are not substantiated.***
>
> ***The Board cannot base its decisions as speculations and conjecture.***
>
> ***Considering the foregoing the Applicant fails on the first issue for determination."***

The 2nd issue the 1st respondent grappled with had to do with the allegations of collusion or connivance on the technical evaluation of the interested party. It had also to do with the issue of due diligence and more particularly, whether due diligence was undertaken on the winning bidder.

It was the applicant's case that the respondents must have colluded or connived in approving the technical evaluation of the interested party's bid without carrying out a proper due diligence and without verifying that the interested party was qualified to undertake the tender.

The 1st respondent considered the provisions of section 83 of the Public Procurement and Asset Disposal Act and noted that according to the confidential documents, the interested party was subjected to a due diligence process and a report to that effect was produced showing that it was signed by all the evaluation committee members; they were all unanimous that the interested party had the capacity to perform the contract.

The 1st respondent also came to the conclusion that there was no evidence to support the alleged connivance and collusion and therefore there was no basis of faulting the procuring entity on the manner it conducted the due diligence.

On the third issue, the 1st respondent tersely concluded that the Request for Review was not merited. It was thus dismissed with each party ordered to bear its own costs.

The traditional grounds upon which a judicial review court may intervene to disturb decisions by administrative bodies, tribunals or subordinate courts were enunciated in **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410**. In this case Lord Diplock outlined three heads which he referred to as *"the grounds upon which administrative action is subject to control by judicial review*". These grounds are illegality, irrationality and procedural impropriety which the learned judge defined as follows:

> ***"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.***
>
> ***By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.***

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

The list of grounds is by no means exhaustive and Lord Diplock himself was quick to point out that "that is not to say that further development on a case by case basis may not in course of time add further grounds". The "principle of proportionality" which he suggested as a further ground has gained sufficient notoriety over time that today it is now acknowledged as one of the grounds upon which one may seek judicial review orders. At the local level it is has been codified in section 7 (2) (l) of the Fair Administrative Action Act No. 4 of 2015 as one of the grounds upon which the court may review an administrative action.

The grounds upon which the application for judicial review is sought would, by law, be incorporated in the statement filed together with the summons seeking leave to lodge the substantive motion for judicial review. To this end Order 53 Rule 1 (2) of the Civil Procedure Rules states as follows:

An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, <u>and the grounds on which it is sought,</u> and by affidavits verifying the facts relied on. (Emphasis added).

The statement is a mandatory requirement and the statement is not complete without the grounds on which relief is sought. And to demonstrate further the importance of the statement and the grounds upon which the application is based, the law states that the statement must be served together with the substantive motion once leave has been granted and, crucially, no grounds can be relied upon except those set out in the statement. This is captured in Order 53 Rule 4 (1) which states as follows:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and <u>no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement</u>. (Emphasis added)

The applicant filed a statement dated 3 November 2021 together with the summons and the affidavit verifying the statement; however, the statement does not contain the grounds upon which the application is made or relief sought. All that it has are names and description of the parties; "facts to be agreed upon", and the relief sought.

Considering that the grounds upon which relief is sought are a mandatory requirement, the applicant's application is incurably defective and the applicant ought to consider itself lucky to have even obtained leave to file the substantive motion for judicial review orders.

In the absence of the grounds the court need not bother itself with whether any of the grounds for judicial review as enunciated in **Council of Civil Service Unions versus Minister for the Civil Service** have been proved to exist.

Be that as it may, it is apparent from the 1st respondent's decision that all the issues of concern raised by the applicant in its Request for Review were addressed and conclusively so in my humble view. These are the same issues which the applicant has purported to pick up in the present application more or less as an appeal but disguised as a judicial review application.

But even if it was open to this Court to interrogate these issues afresh, there is no evidence, for instance, that, first, the interested party did not meet the technical qualifications outlined in the tender document. I would agree with the 2nd and 3rd respondents together with the interested party that what the applicant has presented as evidence in support of its allegations is no more than insinuations and speculations. A sample of the applicant's depositions or contentions show this to be the case; it has stated as follows:

a) "…by virtue of the applicant's practical experiment and market knowledge spanning over 12 years, it is the applicant averment that the 3rd respondent could not have complied with the above requirements…"

b) "Knowing its market share and competitors, the applicant strongly believes the 3rd respondents (sic) is yet to have carried out and/or participated in at least three (3) electrical medium voltage electrical installations and cable terminations contracts within the abovementioned years.

c) "…it is industry knowledge that only 2 entities in the country own, operate and/or have the equipment listed in "b" above, which entities the 3rd Respondents (sic) is not amongst."

These broad and rather hollow statements cannot be said to be proof that the winning bidder did not meet the technical requirements or any other requirement in the tender document for that matter.

To be precise, and turning back to the grounds for judicial review, assuming the applicant had spelt out any, I am not satisfied that the 1st respondent's decision was illegal because there is no evidence that the 1st respondent did not understand correctly the law that regulates its decision-making power and failed give effect to it.

Again, there is no proof of irrationality or "Wednesbury unreasonableness". There is no material before me to hold that the 1st respondent's decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Finally, it has not even been suggested, let alone proved, that there was any hint of procedural impropriety in the conduct of the proceedings that culminated in the impugned decision. I am satisfied that the 1st respondent observed the basic rules of natural justice and acted with procedural fairness towards the applicant. The 1st respondent observed the procedural rules in its proceedings and, in coming to its decision, it acted within the confines of its jurisdiction as stipulated in section 173 of the Public Procurement and Asset Disposal Act.

On the whole no reason has been given to persuade this Honourable Court to disturb the 1st respondent's decision. The applicant's motion dated 18 November 2021 is not only incompetent but I also hold that it lacks merit in any event. It is dismissed with costs.

SIGNED, DATED AND DELIVERED ON 3RD JANUARY 2022

NGAAH JAIRUS

JUDGE