



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E006 OF 2021

REPUBLIC..... APPLICANT

-VERSUS-

PUBLIC PROCUREMENT ADMINISTRATIVE BOARD...1ST RESPONDENT

KENYA AIRPORTS AUTHORITY.....2ND RESPONDENT

EX PARTE: WILLIS PROTOCOL & CONCIERGE SERVICES LIMITED

JUDGMENT

The judgment in this case was initially reserved for 26 May 2021; however, soon after the case was reserved for judgment, a judgment was delivered by Court of Appeal whose import is that according to section 175 (3) of the Public Procurement and Asset Disposal Act, 2015, judgments arising out of applications for judicial review filed under section 175 (1) of the Act must be delivered within 45 days of the date of filing the application failure of which they are rendered a nullity. The decision was made in Civil Appeal No. E039 of 2021, Aprin Consultants vs Public Service Commission. It is for this reason that the date for judgment was varied, on the application of the ex parte applicant whose counsel informed the Court that the 45 days in this matter would lapse on 18 March 2021.

The application before court is the *ex parte* applicant's motion dated 2 February 2021 seeking the order of certiorari against the 1st respondent; the prayer for this order is couched as follows:

“1. THAT an order of CERTIORARI be directed to the 1st Respondent, by itself, its servants and/or agents or any other officer acting under its authority to bring to the court for the purpose of quashing the decision made by it on or about 19/1/2021 dismissing the Applicant's Application for Review of Tender No. KAA/OT/JKIA/MBD/0042020-2021 to offer the 'meet and assist service' at the Jomo Kenyatta International Airport' which tender the 2nd Respondent awarded the 1st and 2nd Interested Parties.”

The application is brought under Articles 10, 23 and 47 of the Constitution of Kenya, 2010, Section 7,8,9,10,11 and 12 of the Fair Administration Act, 2015 and Order 53 Rule 3 and 4 of the Civil Procedure Rules and Sections section 175 of the Public Procurement and Asset Disposal Act 2015.

The background of the applicant's motion is apparent from the affidavit sworn in support of the motion by Willis Otieno Ochola, the applicant's managing director.

According to that affidavit, sometimes in the year 2020 the 2nd Respondent (which I will henceforth also refer to as “the procuring entity” invited tenders from eligible bidders in relation to a tender described as “TENDER FOR PROVISION OF MEET AND ASSIST SERVICE AT JOMO KENYATTA INTERNATIONAL AIRPOR TENDER NO. KAA/OT/JKIA/MBD/002V2020-2021. The tenders, according to the tender document, were to be submitted online on or before 9 September 2020 at 11.00 AM. This deadline was extended to 16 September 2020 through Addendum Number 1 and Addendum Number 2 dated 11 September 2020.

The applicant had, for a while, been providing the services which the procuring entity was procuring for, more particular since the year 2013; it thus applied and sought for log in credentials to access the tender. The procuring entity registration portal was such that the applicant was required to upload a copy of its registration certificate; a copy of the valid tax compliance certificate; valid business permit for the year 2020; a copy of the applicant's CR-12 listing its directors and shareholding and a bank statement in proof of access to liquid assets or cash of Kshs. 2,000,000/=.

The Applicant successfully submitted the required documents as a result of which it received a registration identification and a login password. The documents were submitted at least on three different occasions the first of which was before the applicant obtained the log-in credentials; the second occasion is when he submitted what Ochola described as the “Technical Folder” and the third occasion is when he submitted the documents as the “Vendor Additional Documents”.

The bidders were invited for tender opening exercise on 16 September 2020 at 11 A.M.: however, the exercise was not conducted due to the Covid-19 pandemic situation. This information was given to Ochola by an officer from the 2nd respondent’s procurement office who also told him that the opening exercise would be done ‘internally’.

On the material day, at 16.07 PM, the applicant received an email from the 2nd respondent forwarding a tender register of even date signed by certain individuals; these particular individuals did not indicate who they represented and neither was it indicated in the register when they signed the register. On 21 December, 2020 the applicant received an email forwarding a letter from the 2nd respondent dated 18 December 2020 notifying the applicant that its bid was unsuccessful because he had not provided the following documents:

1. A copy of the Registration certificate
2. Valid Tax Compliance Certificate
3. Valid business permit 2020
4. Copy of CR-12 and,
5. Proof of access to liquid assets or cash of Kshs. 5,000,000/=

The applicant challenged the decision of the procuring entity before the 1st respondent on 29 December 2020 and on 19 January 2021 the applicant delivered its ruling dismissing the applicant’s application. The pertinent parts of the decision read as follows:

“In light of the foregoing and in the absence of any evidence to the contrary, the Board finds that the applicant did not provide the following five (5) mandatory documents in response to the subject tender in accordance with Clause 1.3 of Section I Invitation to Tender on page 3 of the Tender Document read together with Clause 2.15 of the Appendix to Instructions to Tenderers on page 18 of the Tender Document: -

- a. A copy of Registration Certificate/incorporation Certificate;**
- b. Copy of Valid Tax Compliance Certificate;**
- c. Valid Business Permit for 2020;**
- d. Copy of CR 12 and copies of Identification Cards of the list of Directors of the Firm;**
- e. Proof of access to liquid assets or capacity to have a minimum cash flow of Kshs. 5,000,000/=.**

Further the Board finds the Procuring Entity evaluated the Applicant’s bid in accordance with the provisions of the Tender Document read together with section 80(2) of the Act and rightfully found the Applicant’s bid non-responsive in accordance with section 79(1) of the Act.

Accordingly, the Board finds that the Request for Review lacks merit and the same is hereby dismissed.”

It is as a result of this dismissal that the applicant took up the matter in this court seeking to invoke this court’s jurisdiction of judicial review to quash the 1st respondent’s decision.

Neither of the respondents filed any response to the applicant’s application.

On its part, the 1st interested party filed grounds of objection in which it was averred that the applicant’s application is incompetent, vexatious, frivolous, fatally defective and lacks any merits. It also contended that the applicant offered the least competitive bid such that if it was considered, it would result into unfairness and a breach of the express provisions of the Public Procurement and Asset Disposal Act, 2015 and the Constitution of Kenya. The 2nd respondent further averred that the 1st respondent duly considered each of the parties’ cases and the documents filed before it in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 and judiciously, fairly and justly arrived at the decision being challenged in this suit.

Further, that 1st interested party was the most competitive bidder and was duly and legally awarded the said contract having met all the requirements; contrary to the applicant’s allegations, the 1st interested party has rendered the services for which it bid for more than 10 years. Again, the respondents duly complied with the provisions of the Act and, in particular, they duly issued bidders with letters of notification of the unsuccessful bid in accordance with section 87 (3) of the Act and that the respondents duly conducted evaluation of bids within the statutory period stipulated in section 80 (6) of the Act. According to the 1st interested party, there is no evidence of breach of section 44 of the Act or any other procurement laws. The Applicant is alleged to have come to Court with unclean hands.

Lucy Kamau swore a replying affidavit on behalf of the 2nd interested party; she swore that she was the manager or director of this company and she was aware of the tender in question.

According to her, the tender was two-fold; Lot 1 reserved for special groups while Lot 2 was for special category. The second interested party submitted the tender in respect of Lot. 1

Like the applicant, she swore that the tender was opened on 16 September 2020; she, however, added that due to COVID-19 protocols, the bidders were not allowed to participate in the opening of the tenders. The 2nd interested party, nevertheless, received an email from the 2nd respondent forwarding a copy of Tender Opening Register pursuant to Section 78 (8) of the Public Procurement and Asset Disposal Act, 2015.

After being subjected to preliminary, technical and financial evaluation processes, the 2nd interested party's bid was evaluated as the most responsive, successful and appropriate bid with a financial concession of Kshs. 2,000,000.00 exclusive of all applicable taxes. In short, the 2nd interested party's bid was found to be competitive and compliant with the mandatory requirements spelt out in the Tender Documents; accordingly, it was responsive and thus in accordance with Section 79 of the Act. On 18 December 2020 the 2nd respondent notified the 2nd interested party of its intention to enter into a contract with it. Ms Kamau swore that since the Applicant did not submit any bid in relation to Lot I, it could not have been an aggrieved party or tenderer capable of challenging the 2nd respondent's award in Lot I.

Only the applicant and the 2nd interested party filed written submissions.

On behalf of the applicant it was submitted that judicial review proceedings are meant to curb and regulate public officers or institutions where and when they act irrationally, unreasonably, illegally and contravene the cardinal principles of natural justice. For this proposition the Ugandan case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** was cited. The decisions in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** were also cited for the proposition that in granting reliefs in judicial review proceedings, the court is not to substitute its decision with that of the decision-making authority.

On the question whether the 1st respondent's decision was illegal, procedurally unfair and violated the applicant's legitimate expectation and the principles of natural justice, the applicant submitted that the 1st respondent ought to have considered the fact that the 2nd respondent failed to open the tender in the presence of the bidders as a result of which it was not possible to ascertain whether or not the documents in issue were uploaded in the correct folder. According to the applicant, it is for this particular reason that tenders are ordinarily opened in the presence of bidders; for transparency which, among other things, would involve ascertainment of the documents submitted by respective bidders.

It was also submitted on its behalf that it is true that on 27 March 2020, the Public Procurement Regulatory Authority issued a circular: Ref PPRA/6/5 vol. 1(1), PPRA Circular No. 02/2020 on preventive measures in procurement activities for procuring entities due to corona pandemic and that this circular affected, in some way the opening of tenders; on the particular question of opening of bids the circular stated as follows:

“The Procuring entity shall ensure that no two or more tenders are opened concurrently to limit the number of the bidders witnessing the exercise. Where bidders or their representatives chose to attend the bid opening, the procuring entity shall ensure that the venue where opening is conducted is spacious and observe a social distance of at least 1.5 metres away from each other. Screening of attendees should take place and sanitary facilities must be provided at all opening sessions. If possible, bids may be opened with electronic attendance through conferencing facilities with the concurrence of all the bidders. Failure by bidders to attend any bid opening will not invalidate the process. The results of the bid opening shall be communicated by the respective procuring entities to the bidders by email; or any other acceptable electronic means of communication.”

It is the applicant's case that contrary to this circular, the 2nd respondent disregarded the directives on the opening of tenders when it dismissed the applicant's representative who was present physically for the tender opening exercise.

And, assuming the tender was to be opened electronically, the 2nd respondent did not provide any link for this purpose and, most importantly, to enable the bidders, in particular, the applicant, to attend and observe the tender opening exercise. This was in contravention of regulation 57(8) of the Public Procurement and Asset Disposal Regulations, 2020 which provides that a procuring entity may allow for online viewing of the tender opening proceedings by the tenderers. It is the applicant's case that this opportunity was never accorded to the representative of the applicant who had appeared physically for the exercise.

In a nutshell, the 2nd respondent was in breach of Regulation 57(7) of the Public Procurement and Asset Disposal Regulations, 2020 to the effect that the opening of the tenders should be done in the presence of all invited bidders who choose to attend and sign a record of attendance.

That notwithstanding, all the bidders had to submit the mandatory documents before obtaining the login credentials; the applicant would not have obtained these credentials before submitting the mandatory documents. As a matter of fact, to date, those documents are on the 2nd respondent's online portal.

Even if the applicant's bid would have been found wanting, for whatever reason, it was urged that the 1st respondent did not meet the mandatory requirement of five years' experience in provision of the services that were being procured; according to the available information which the applicant's representative attached to his affidavit the purported successful bidder had only been in existence since July 2017 and

was therefore barely three years old in the field.

And while the 2nd interested party had been awarded the tender in a separate category, it also had not offered the ‘meet and assist service’ for the past five years prior to the tender.

According to the applicant, all these matters were relevant to the 1st respondent’s decision but that the 1st respondent did not consider them. The applicant urged that it was its legitimate expectation that the 1st respondent would give them due consideration and in doing so act fairly in arriving at its decision.

The learned counsel for the applicant cited this court’s decision in **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ, [2006] 2 KLR 553** where the learned judges held that an essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice.

Counsel also invoked Article 227 (1) of the Constitution of Kenya which is to the effect that a procurement process should be fair, equitable, transparent, competitive and cost effective. The respondents had not demonstrated that this had been done. It was also urged on behalf of the applicant that it had demonstrated that the 1st respondent had failed to uphold the applicant’s right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair contrary to Article 47 of the Constitution of Kenya.

Accordingly, the 1st respondent’s decision was tainted with an illegality, procedural unfairness, unreasonableness and unfairness and was short of the applicant’s legitimate expectation.

On the part of the 2nd interested party, it was submitted that the applicant did not bid for the tender in what was described as ‘Lot 1’ which was reserved for special groups; accordingly, it could not be described as an applicant for purposes of instituting or participating in the Review Board proceedings with respect to Lot I. It was urged that a person seeking administrative review before the court under Public Procurement and Asset Disposal Act, 2015, in particular section 167 (1) as read with section 2 thereof, should either be candidate or a tenderer and ought to demonstrate that it suffered or risks suffering loss or damages due to breach of duty imposed on a procuring entity. Accordingly, a party who is neither a candidate nor a tenderer cannot challenge the award of tender which it did not bid for. These provision had been applied in **Republic vs Independent Electoral & Boundaries Commission & 2 Others (2017) eKLR** where it was held that persons who do not fall in the category of persons contemplated in section 167 (1) have no locus standi to commence review proceedings. This was also stated in **Philip Nyandieka (Suing on own behalf and on behalf of the general public) v National Government CDF-Bomaçhoge Borabu constituency (2019) eKLR** and also in the Court of Appeal decision in **Al Ghurair Printing and Publishing LLC vs Coalition for Reform & Democracy (2017) eKLR**.

The 2nd interested party also urged that according to section 175 of the Act, an application for judicial review can only be accepted if a percentage of the contract price has been paid as security; that section reads as follows:

“(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board’s decision failure to which the decision of the Review board shall be final and binding on both parties.

(2) the application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fees as shall be prescribed by the regulations.”

According to the 2nd interested party, the applicant was neither a ‘tenderer’ nor a ‘candidate’ as contemplated under section 167 (1) and (2) of the Act and thus could not be an aggrieved person as understood in section 175(1) of the Act. For the same reason, it could not institute these proceedings.

The decision in **Kenya National Examination Council vs Republic ex parte Geoffrey Githinji & 9 Othes (1997) eKLR** was relied on for the proposition that certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.

On the question whether the 1st respondent’s decision was rational or lawful, the learned counsel for the 2nd interested party relied on **Associated Provincial Pictures House Ltd vs Wednesbury Corporation (1945) 1KB 223** which case was cited in **Republic vs Public Procurement Administrative Review Board ex parte Meru University of Science & Technology (2019) eKLR**; according to this latter decision, in determining whether a decision is rational, the following factors must be considered:

- i. The decision maker has not considered matters that lawfully must be considered;
- ii. The decision maker has considered matters that are not relevant; or
- iii. The decision was so unreasonable that no reasonable person could have made it.

It was urged that the 1st respondent considered matters that ought to have been considered and that it rightfully interpreted and applied section 167 (1) of the Act by holding that the administrative review process is only available to tenderers and candidates in procurement process; since the applicant was not a tenderer in lot I category, it was incapable of challenging the 2nd respondent’s award of lot I of the subject tender. The 2nd interested party also urged that the 1st respondent correctly applied section 167(1) of the Act by holding that the 2nd respondent did not breach any duty by not allowing the applicant’s representative to participate in the tender opening exercise. The 1st

respondent rightfully concluded that since the alleged breach occurred on 16th September 2019, the applicant ought to have challenged it on or before 30th September 2020 which was 14 days from the date of occurrence of the alleged breach, and having been filed three months after, the 1st respondent had no jurisdiction to entertain the request for review. In this regard, counsel for the 2nd interested party relied on the decision in **Kenya Pipeline Company vs Hyosung Ebara Company Limited & 2 Others (2012) eKLR** where it was held that decisions made by the 1st respondent and which are within its jurisdiction should not be interfered with.

The applicant's bid, according to the 2nd interested party, was properly evaluated and, in any event, the evaluation was in accordance with section 79 (1) of the Act.

As far as the questions of fair hearing and the right to a fair administrative action is concerned, it was submitted that the applicant was given the opportunity to present its case before the 1st respondent and indeed it did file its submissions that were duly considered by the 1st respondent. The decision of the 1st respondent complies with requirements of Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act and that no material has been placed before court to prove otherwise.

It was also urged that this Court's Jurisdiction of judicial review is limited to the process by which the respondent arrived at its decision; it cannot venture beyond the process and question or interrogate the merits of the said decision. In this regard counsel relied on the decision of **Autoports Freight Terminals Limited vs. Kenya Ports Authority (2018) eKLR** where it was held that for an applicant to obtain the remedies of judicial review, he must demonstrate that the act complained of was done pursuant to public duty bestowed upon the respondent; the *ex parte* applicant, has to demonstrate that in reaching the decision it did reach, the 1st respondent acted without jurisdiction or acted in violation of the law or rules of natural justice. The decision must, in short, be shown to be bad for illegality, irrationality or procedural impropriety.

On whether the applicant is entitled to the judicial review orders, the learned counsel for the applicant cited **Republic V Commission for Higher Education ex parte Peter Shoita Shitanda [20131 eKLR** and the Ugandan case of **Pastoli vs. Kabale District Local Government Council and Others (2008) 2 EA 300** where it was held that for an applicant to succeed in seeking judicial review orders, the applicant must prove illegality, irrationality and procedural impropriety. This the applicant has not done.

Section 175 (1) of the Public Procurement and Asset Disposal Act, 2015 gives a person aggrieved by a decision of the Review Board the right to question that decision by way of judicial review; it states as follows:

175. Right to judicial review to procurement

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

I am minded from the very outset that in determining the applicant's application, this court is not invoking its appellate jurisdiction; rather has to invoke its judicial review jurisdiction which, for all intents and purposes, is supervisory in nature.

At the heart of the 1st respondent's decision which decision is the subject of this application, is the question whether the applicant submitted all the mandatory bid documents. As a matter of fact, the applicant's request for review was dismissed for no other reason than the finding that the applicant did not submit these particular documents.

However, when I consider the material before court, I am inclined to conclude that there is sufficient evidence that the applicant not only submitted the mandatory documents but also that the procuring entity acknowledged having received these documents. This fact was even acknowledged by the 1st respondent in its decision. This is how it captured it:

“The Procuring Entity contends, although the applicant attached the necessary mandatory documents during registration, this did not amount to submission of its bid as specified under Clause 1.3 of Section I Invitation to Tender, as registration by bidders was for purposes of enabling new bidders obtain login credentials to participate in the procurement proceedings. It is therefore the Procuring Entity's submission that the Applicant did not follow the instructions for submission of bids as specified in the Tender Document or seek clarification on the same from the Procuring Entity. Thus its bid was rightfully found non-responsive.” (Emphasis added).

It is clear here that the 1st respondent accepted this fact that indeed the documents were submitted; it noted further as follows:

“It is not disputed that the applicant submitted the necessary documents at the point of registration in the Procuring Entity's system, which the Board has established is clearly distinguishable from the process of submission of bids by bidders and further, does not amount to submission of bid documents in response to the subject tender.”

I would suppose that the procuring entity wanted particular documents in order to satisfy itself of the status of the bidder in certain respects that it considered material to the performance of the contract that would eventually be entered into by the successful bidder and the procuring entity. For instance, if the list of the documents in question here is anything to go by, it is reasonable to assume that before awarding the tender, the procuring entity had to be satisfied that the bidders, including the applicant, were legal entities, duly registered or incorporated; that they paid government taxes; that they were licensed to operate as business entities at the material time; that they had identifiable personalities running them as directors; and, that their business had a financial base strong enough for them to discharge their obligations under the contract.

The respondents did not file any replying affidavit and respond to the question whether the procuring entity could not consider this information and evaluate the applicant's bid merely because the material documents upon which it was based were submitted as part of the applicant's registration documents only when the same set of documents ought also to have been submitted in accordance with a particular clause in the tender documents.

My understanding of the applicant's case is that the evaluation of the responsiveness of applicant's bid would also include assessment of its status based on the registration information which would, of necessity, include the documents in issue. In the absence of a replying affidavit by the 2nd respondent to controvert this fact, it would be assumed that what the applicant has stated is the correct position.

And if this is correct, it follows that the procuring entity had access to these documents at the material time and therefore was capable of ascertaining the information the objective for which these documents were meant to achieve. The applicant's bid could not therefore be declared non-responsive for want of these documents when it is clear that the procuring entity had access to them all along.

It is for this reason that I have come to the conclusion that the reason given for non-responsiveness of the applicant's bid to be irrational. From what I gather, this was an e-procurement and all the necessary documents, irrespective of whether they were registration documents or bid documents, were all uploaded on the same portal and on a particular bidder's account. I suppose these accounts would be accessible to the procuring entity, at least for purposes of ascertaining whether any particular bidder had not only opened an account but whether also the necessary documents have been submitted, for whatever purpose. It has not been suggested that in undertaking this task, the procuring entity would be restricted to accessing one set of documents submitted, for instance, for bids to the exclusion of those submitted for registration purposes.

To dismiss the applicant's bid as non-responsive on the pretext that the documents were submitted other than as directed would be, as I have noted, irrational. This ground, amongst other grounds for judicial review, was explained by Lord Diplock in **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410**; the learned judge explained it this way:

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... "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I would not go as far as describing the decision of the Review Board as "outrageous" but based on the evidence presented by the applicant before it, it is certainly a decision that one would properly regard as unreasonable as understood in **Associated Provincial Picture House Ltd. Versus Wednesbury Corporation (1948) 1.K.B.223**.

Be that as it may, I would humbly opine that if there was any error in the submission of these documents it was not such a fundamental error that would disqualify the applicant's bid as non-responsive particularly when it is clear that the procuring entity could easily assess the same documents though submitted as registration documents. In any event, section 79(2)(b) of the Act would excuse such an error; that section reads as follows:

79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

(Emphasis added).

The essence of this section is to give some provision for minor errors on the part of the bidders in the submission of bids or, generally in conformation to eligibility or other mandatory requirements set out in the tender documents. Assuming that the applicant erred in submission of the documents, I would regard such an error as an error or oversight that could be corrected without affecting the substance of the tender as contemplated under section 79(2) (b).

I note that in its ruling, the 1st respondent only considered section 79(1) of the Act; it did not address itself to section 79(2).

One other issue which the procuring entity has not responded to but which I find to have been, or ought to have been crucial in deciding

whether the applicant provided the mandatory documents, is the process of opening the tender. The procedure for opening of tenders is meticulously set out in section 78 of the Act and owing to its importance to the applicant's case, it is necessary that I reproduce the entire section here; it states as follows:

78. Opening of tenders

(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—

(a) the committee shall have at least three members; and

(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.

(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.

(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(4) Those submitting tenders or their representatives may attend the opening of tenders.

(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.

(6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and (c) if applicable, what has been given as tender security.

(7) No tenderer shall be disqualified by the procuring entity during opening of tenders.

(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(9) Each member of the tender opening committee shall—

(a) sign each tender on one or more pages as determined by the tender opening committee; and

(b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.

(10) The tender opening committee shall prepare tender opening minutes which shall set out—

a) a record of the procedure followed in opening the tenders; and

(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

(11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—

(a) initial each page of the minutes;

(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.

(12) A person who causes the physical loss of tender documents provided for under this section commits an offence. (Emphasis added).

According to subsection (4) the tenderers may attend the opening of the tenders if they so wish; but they certainly cannot exercise their discretion either way unless they have been given the opportunity to attend. The obligation to avail this opportunity and invite the tenderers lies on the procuring entity leaving the tenderers with the choice of whether or not to attend the tender opening.

Granted, there is evidence that both the submission and the opening of tenders was done online. This has been alluded to by the applicant and the interested parties. The same fact was also alluded to by the 2nd respondent in its response to the applicant's request for review before the 1st respondent. But even where the opening of the tender is online, it must be demonstrated that the provisions of section 78 of the Act have

been complied with to the fullest extent possible. To be more precise, online opening of the tender does not suspend the provisions of section 78 of the Act.

And this provision cannot be suspended because, in many ways, it resonates with Article 227(1) of the Constitution with particular emphasis on the need for transparency in procurement of public goods and services; this Article reads as follows:

227. (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

In any event, if the procurement is an e-procurement, it must be shown that the regulations on the opening of tenders of this nature have been followed and in this regard I have in mind regulation 57 of the Public Procurement and Asset Disposal Regulations, 2020. That regulation states as follows:

57. (1) Where submission of tenders are done online, such submissions shall be received into an electronic tender box and maintained to high standards of security and the e-tender box shall remain closed until the time of tender opening.

(2) The electronic tender box referred to under paragraph (1) shall have three passwords that are simultaneously time-activated and each password shall be issued to different officers who are members of the tender opening committee.

(3) Without limiting the generality of the foregoing, the tenderer submitting a bid or proposal may encrypt their bid as long as their respective passwords are availed at the tender opening.

(4) A tenderer who submits an encrypted tender and fails to provide their respective password or other means of access to the document at the tender opening shall be deemed not to have submitted their bid.

(5) A record of the bid opening shall be kept in print copy and signed by the tender opening committee appointed in accordance with section 78(1) of the Act.

(6) A procuring entity shall ensure that the date and time of an automated closure of an electronic bid deadline is indicated in the invitation notice or tender document in accordance with the local time zones.

(7) All tenders shall be opened in the presence of all invited bidders who choose to attend and sign a record of attendance.

(8) Despite paragraph (7), a procuring entity may allow for online viewing of tender opening proceedings by tenderers.

(9) All e-tenders shall be readable through open standard interfaces and formats as specified in the tender documents.

(10) Information read at the bid opening shall include where applicable and practicable, the name of the tenderer, the absolute and final price, offered discount, tender security and any other pertinent information that may be deemed necessary. (11) The procuring entity shall on request provide a copy of the tender opening register to a tenderer.

(12) Bids or proposals in electronic format shall be protected against access by unauthorized persons until the publication of the contract award.

(13) A procuring entity shall open bids or proposals in electronic format.

(14) A procuring entity shall ensure that financial proposals in electronic format shall only be accessed and opened after the technical evaluation of the proposals where so required in the e-tender documents.

(15) Until the price bids are opened, the bid-offers shall be kept confidential.

(16) Financial bids for unsuccessful bidders at the technical stage shall not be opened. (Emphasis added).

There is no evidence that the procuring entity complied with this specific regulation and in particular whether it exercised its discretion and allowed the tenderers including the applicant, to view online the tender opening proceedings as required under regulation 57(7) and (8).

All that the 2nd respondent said in respect of these provisions in response to the applicant's request for review is this:

“7. In response to paragraph 15,16, 17 and 18, the tender was opened online by the procuring entity staff on 16th September 2020 at 11. Am as per the appointment by the Accounting Officer in accordance with section 78(1) of the PPADA. Due to COVID 19 protocols, bidders were not allowed to participate in the opening due to social distance guidelines issued in line with the PPRA circular dated 27th March 2020. The tender opening register, was shared with all the bidders through the online platform as per section 78(8) of the PPDA 2015 which register bears the names of the Procuring Entity's staff who were appointed to open the tender, their designations and their signatures.

8. In addition to the above, the Tender Opening Committee prepared the opening minutes in compliance with section 78 (10) PPADA 2015”

The 1st respondent acknowledged in its decision that the subject tender was an e-procurement but fell short of considering whether the procuring entity fully complied with the law on opening of the tender particularly the regulations that guide the opening of the tenders online. In short, the 1st respondent did not consider whether section 78 of the Act and regulation 57 of the regulations made under the Act had been complied with.

Had the 1st respondent considered these aspects of the applicant's request for review, it would certainly have come to the conclusion that no dispute would have arisen on whether the applicant had availed the material documents.

Besides the ground of irrationality which I have already alluded to, I am persuaded that the 1st respondent's decision is tainted on grounds of illegality and procedural impropriety; illegality because it ignored the 2nd respondent's breach of the law on procurement and in doing so, the 1st respondent Board misapprehended certain crucial aspects of the law applicable to the procurement process. Procedural impropriety is apparent because the 1st respondent took into account matters that it ought not to have taken into account and ignored those matters that it ought to have taken into account. Had it considered the applicant's evidence and the law applicable to the facts as presented, it may have found that the procurement process in respect of the tender in question fell short of the procedural requirements to the detriment of the applicant.

One final question to be determined is whether the applicant could possibly contest the award made to the 2nd interested party. My short answer to this question is that as far as I can gather, there was only one tender though made up of two lots. However, it does not appear to me that the tender is severable to the extent that one part of the tender can be declared valid and other invalid. The two lots were subjected to the same procurement process and therefore any breach of the law during this process would certainly affect the award of the tender irrespective of the lot.

In conclusion, I am satisfied that the applicant has made out a case for a judicial review order of certiorari. Accordingly, I find and hold that the applicant's application dated 2 February 2021 is merited and it is hereby allowed in terms of prayer 1. The applicant shall also have the costs of the application. Orders accordingly.

DATED, SIGNED AND DELIVERED ON 18TH MARCH 2021

NGAAH JAIRUS

JUDGE