



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 32 OF 2020

GUARDFORCE GROUP LIMITED.....EX PARTE APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

1. PWANI UNIVERSITY

2. THE ACCOUNTING OFFICER, PWANI UNIVERSITY

3. CATCH SECURITY LINKS LIMITED.....INTERESTED PARTIES

RULING

1. The Ex parte Applicant's case for Judicial Review orders is contained in the Notice of Motion dated 18/09/2020 and filed in court on the same day pursuant to leave granted by the court on 11/09/2020. The motion prays for the following orders:

i. That an order of certiorari to quash the decision made on 7th September 2020 by the Respondent in Public Procurement Administrative Review Application No. 117 of 2020 between the Ex-parte Applicant herein versus the Interested Parties herein whereby the Respondent dismissed the Ex-parte Applicant's Request for Review filed on 17th August 2020 with regard to Tender No. PU/OT/2020-2021- Provision of security services and in lieu thereof, the 1st and 2nd Interested Parties be directed to undertake a fresh tendering process with respect to the provision of security at the 1st Interested Party.

ii. That the costs of this application be provided for.

2. The motion is premised on the grounds set out therein and is supported by other documents as follows:

a. Supporting Affidavit deponed on 10/09/2020

b. Statutory statement dated 10/09/2020

3. The Ex parte Applicants' case is that on 6/07/2020 the 1st Interested Party advertised Tender No. PU/OT/O4/2020/2021 (hereinafter "the tender") on its portal, www.pu.ac.ke, in the Public Procurement Information Portal (PIIP) and on the website www.tenders.go.ke, inviting all eligible candidates to tender for provision of security services. The tender was opened on 20/07/2020, and a total of 15 firms submitted their bid proposals. However, on 3/08/2020, the 1st Interested Party informed the Exparte Applicant (Hereinafter "Applicant") that its tender submission was non-responsive as it did not meet the mandatory requirement No. 5 of the tender document, to the effect that the bidders must submit a copy of the current NHIF Compliance Certificate. The tender was subsequently awarded to the 3rd Interested Party.

4. The Applicant being aggrieved by the decision of the 1st Interested Party, filed Application for Request for review before the Public Procurement Administrative Review Board (the Respondent herein) being Public Procurement Administrative Review Board Application No. 117 of 2020 filed on 17/08/2020. On 7/09/2020. After hearing the parties, the Respondent delivered its decision, whereby it dismissed the Applicant's request for review by finding that the Applicant's bid was rightfully and fairly found non-responsive at the preliminary

evaluation stage, and that there was no need for the 1st and 2nd Interested Parties to conduct due diligence contrary to the provisions of Section 3, 79 and 80 of the Public Procurement and Asset Disposal Act 2015 (Hereinafter “the Act”) which requires equal treatment to all bidders and paragraph 2, 24 of the Appendix to the Instructions to Tender Evaluation Criteria.

5. It is the Applicant’s case that the Respondent’s decision violates the provisions of Article 27 and 227 of the Constitution as the Respondent upheld the decision of the 1st and 2nd Interested Parties and failed to be guided by the values of fairness, accountability, transparency, competitiveness and being cost effective, which are to be adhered to in a procurement process. It is therefore wrong for the Respondent to hold that the mandatory requirement No. 5 in the tender document requiring the provision of a current NHIF Compliance certificate by the bidders was used to declare the Applicant’s bid non-responsive yet the Applicant was fully compliant having provided a Compliance Certificate on page 36 of its tender document and since salaries in the security industry are usually paid in arrears, the Applicant pursuant to the N.H.I.F Compliance Certificate dated 2/07/2020 duly complied in its remittances. Therefore, the award of the tender to the 3rd Interested Party was untenable, flawed, lacked logic and violated the law. Consequently, the 1st Interested Party should be directed to re-tender the said services afresh.

6. It is the Applicant’s case that it has provided security services to the 1st Interested Party for the last two years, being the period starting 1/08/2018 to the date of the instant application, and it has diligently executed all its contracts during the said period, having been in compliant with all the requirements laid out by the 1st Interested Party, including NHIF remittance. Therefore, the Applicant will be prejudiced if it loses its business based on an unprocedural and unfair process.

The Response

7. The 1st and 2nd Interested Parties opposed the application vide Replying Affidavit sworn on 1/10/2020 by **Prof. Mohamed S. Rajab** who is the Vice Chancellor of the 1st Interested Party. The deponent avers that the Respondent’s decision was correct and in line with Articles 27 and 227 (1) of the Constitution, since the NHIF Compliance Certificate submitted by the Applicant was for “the period up to and including June 2020 and failed to conform to the terms and conditions of the tender which was invited on 6/07/2020 and closed on 20/07/2020 and required a current NHIF Compliance Certificate.

8. It is the 1st and 2nd Interested Parties’ case that the Applicant’s motive is to stall the tender process in order to benefit from the continued extension of their lapsed contract.

9. The 3rd Interested Party opposed the application vide grounds of opposition dated 16/06/2021, as follows.

i. The ex-parte Applicant application is belated, an afterthought and is solely calculated at delaying determination of the substantive judicial Review Notice of Motion dated 18th September, 2020.

ii. The ex-parte Applicant application is frivolous and a gross abuse of the court process.

iii. The ex-parte Applicant’s application seeks orders that are not within the purview of Judicial Review.

10. The Respondent opposed the instant application vide grounds of opposition dated 12/11/2020, as follows.

1. That the Applicant is estopped from feigning innocence and compliance with the law yet they have come to court with unclean hands. The Applicant admits that it did not attach the document in question in its bid documents: failure to attach an updated NHIF certificate consequently amounted to a failure to meet the mandatory requirement at the Technical stage.

2. That the application fundamentally fails the Wednesbury’s test of unreasonableness as the tribunal/Respondent relied on the evidence before it to arrive at the impugned decision hence the decision should not be interfered with.

3. That the application in its entirety is fatally defective null and void ab initio.

Submissions

11. The application was canvassed through written submissions. The Ex parte Applicants filed submissions on 21/07/2021; the 1st and 2nd Interested Party filed submissions on 23/07/2021; while the Respondent filed submissions on 23/07/2021.

Determination

12. I have carefully read the entire tender document, the **Ruling** of the Review Board delivered on 7/09/2020, the Applicant’s application and affidavits in support as well as the statement and submissions. I find that the issues that commend themselves for determination are as follows:

1. Whether the Court has jurisdiction to entertain the instant Application.

2. Whether the Respondent’s decision made on 7/09/2020 was unreasonable, irrational, and unlawful.

3. Whether there is Room for the exercise of discretion by the Respondent on compliance with Mandatory Requirements in a

Tender Document.

1. Whether the Court has jurisdiction to entertain the instant Application.

13. It is trite law that Parties are bound by their pleadings. The 3rd Interested Party never raised the issue of jurisdiction of the Court in its Ground of Opposition dated 16/06/2021. Consequently, raising the issue of jurisdiction of the Court by way of written submissions amount to ambush, since the Applicant is deprived of an opportunity to adequately respond to the issue of jurisdiction raised by the 3rd Interested Party and as a result the Applicant's right to be heard will be curtailed. Be that as it may, Section 175 of the Public Procurement and Asset Disposal Act, 2015 states:

175. (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.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty-five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subSection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

14. Aburili J in **Republic v Public Procurement Administrative Review Board & another Ex parte Kleen Homes Security Services Limited [2017] eKLR** held as follows:

“In the same vein, I have no hesitation in invoking Article 23 of the Constitution and holding that Section 175(3) and (5) of the Public Procurement and Asset Disposal Act No. 33 of 2015 is inconsistent with the values purposes, values and principles of the Constitution and therefore unconstitutional and inconsequential to these proceedings.”

15. From the foregoing, I find that this court has jurisdiction to determine the instant application.

2. Whether the Respondent's decision made on 7/09/2020 was unreasonable, irrational, and unlawful.

16. In the case of **Republic v Public Procurement and Administrative Review Board & another; Dochar Construction and Trade Inc Ltd (Interested Party) Ex Parte Xtream Engineering Services Limited [2019] eKLR** the court observed that:

“I'm alive to the fact that the purpose of the remedy of judicial review has long been settled. Going by the decision of the House of Lords in R v Chief Constable of North Wales, ex p. Evans [1982] UKHL 10 (22 July 1982), the remedy of judicial review was said to be available for the purposes of preventing excessive exercise of power by administrative bodies or officials; to ensure that an individual is given fair treatment by administrative authorities; to keep administrative excesses in check, that is to check maladministration; and to provide remedy to those aggrieved as a result of excessive exercise of power by administrative bodies. (See Republic vs Public Procurement Administrative Review Board & 2 Others (2015) eKLR JR Case No. 21 of 2015.)”

17. The Respondent, 1st 2nd and 3rd Interested Parties contend that the Applicant's application does not meet the threshold of a judicial review application since the Respondent decision was proper, and in line with Article 27 and 227(1) of the Constitution. Consequently, the same should not be disturbed, since the Applicant failed to comply with a mandatory requirement no. 5 of the Tender document which stated ***“must submit a copy of the current NHIF Compliance Certificate”***, yet the Applicant submitted a NHIF Compliance Certificate dated **2nd July 2020** which on the face of it in very clear unambiguous terms stated that the Applicant ***“is compliant ...for the period up to and including June ,2020.”***

18. **Ms. Mureithi** learned counsel for the 1st and 2nd Interested Parties submitted that there was absolutely no reason to seek clarification from the Applicant on the issue of the NHIF Compliance Certificate, since the other tenders had been found responsive, had met the mandatory requirements and noting that the tender was advertised on 6/07/2020 and that an examination of the 3rd Interested Party's bid showed that the 3rd Interested Party had annexed and submitted a NHIF Compliance Certificate dated 6/07/2020 that read ***“ is compliant...for the period up to and including July 2020.”*** Counsel further submitted that the due diligence envisaged in Section 83 of the Act applies to the lowest evaluated responsive tender where the procuring entity may choose to conduct the exercise to confirm and verify the qualification of the tenderer. Therefore, there is no provision of the law that required the 1st and 2nd Interested Parties to conduct due diligence at the preliminary evaluation stage especially on a tenderer that did not meet the mandatory requirements.

19. **Ms. Barasa** learned counsel for the Applicant submitted that the Respondent's decision was irrational and unlawful because, it was discriminatory by holding that there was no need of conducting due diligence since the Applicant's tender was unresponsive, and that due diligence was only possible for the lowest evaluated responsive tender. Further, counsel submitted that the 1st Interested Party was under a duty to ensure that the tender document was drafted in clear terms. Therefore, the Respondent was wrong to hold that the Applicant had not complied with mandatory provisions by failing to provide a current NHIF Compliance Certificate, yet the Applicant had fully complied by submitting a Compliance Certificate at page 36 of its tender document. Counsel cited the finding in **Republic vs The Commissioner of Lands Ex-parte Lake Flowers Ltd**, where the court held that courts must resist being rigidly chained to the past-defined situations in determining availability of judicial review remedies.

20. **Mr. Ondiek** learned counsel for the 3rd Interested Party submitted that under Section 175(3) and 175(5) of the Act, the instant judicial review proceedings are time barred by virtue of statute and thus the Court is deprived of jurisdiction to proceed further.

21. Counsel further submitted that orders of certiorari are not available to the Applicant since the Respondent's decision was not made in excess jurisdiction, and that all the rules of natural justice were adhered to the later.

22. Judicial Review, as is well established, does not delve into the correctness of a decision. That should be the function of an appellate body. Judicial Review intervenes in the following circumstances;

- (a) **Illegality or unlawfulness;**
- (b) **Irrationality or unreasonableness;**
- (c) **Procedural impropriety or unfairness.**

23. **Illegality** may arise when the body lacks either jurisdiction or acts in excess of jurisdiction. It may also arise where there was an error of law or an error of fact. **Irrationality** may arise when the decision is so outrageous in its defiance of logic or of standards that no sensible person who applied his mind to the question decided could have arrived at it. In such a situation, the decision-maker may have abused his power or may have taken into account irrelevant considerations when making the decision. **Procedural impropriety** is the failure to observe procedural rules laid out in the legislative instrument. Such failure bespeaks lack of fairness.

24. With the ratification of the Constitution of Kenya in the year 2010, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that Article 47 of the Constitution as read with the grounds for review provided by Section 7 of the Fair Administrative Action Act brings forth new jurisprudence in judicial review in that judicial review henceforth included aspects of merit review of administrative action. However, the reviewing court has no authority to substitute its own decision for that of the administrator.

25. Section 7 of the the Fair Administrative Action Act provides:

(1) **Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—**

- (a) **a court in accordance with Section 8; or**
- (b) **a tribunal in exercise of its jurisdiction conferred in that regard under any written law.**

(2) **A court or tribunal under subSection (1) may review an administrative action or decision, if—**

- (a) **the person who made the decision—**
 - (i) **was not authorized to do so by the empowering provision;**
 - (ii) **acted in excess of jurisdiction or power conferred under any written law;**
 - (iii) **acted pursuant to delegated power in contravention of any law prohibiting such delegation;**
 - (iv) **was biased or may reasonably be suspected of bias; or**
 - (v) **denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**
- (b) **a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**
- (c) **the action or decision was procedurally unfair;**
- (d) **the action or decision was materially influenced by an error of law;**

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to—

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that—

(a) the administrator is under duty to act in relation to the matter in issue;

(b) the action is required to be undertaken within a period specified under such law;

(c) the administrator has refused, failed or neglected to take action within the prescribed period.

26. I find that Section 7 of the Fair Administration Act provides for other grounds for judicial review other than the jurisdictional and procedural aspects of decision-making.

27. In this case, the Applicant appears to suggest that the Respondent is guilty of irrationality, unreasonableness and that its decision was unlawful.

28. From the record, it is clear that the Applicant's bid was found to be non-responsive at the preliminary stage by failing to meet the mandatory requirement no. 5 of the tender documents. I have looked at the Applicant's tender document annexed as "POO" in the Supporting Affidavit sworn by **Polycap Okumu Ochola** and particularly at page 36 Mandatory Requirement 5. I find and hold that it is clearly stated that the bidders "**must submit copy of current NHIF Compliance Certificate**" as alluded to by the 1st and 2nd Interested Parties. However, the Applicant in its defence submitted that it was the duty of the 1st Interested Party to carry out due diligence in order to establish the validity of the Applicant current NHIF Compliance Certificate. Therefore, failure by the 1st Interested Party to conduct due diligence was an error of interpretation on the part of the Respondent, which resulted to the dismissal of the Applicant's review that was before it.

29. Having considered the provisions of Section 83 of the Act, I find and hold that there was no error of interpretation or application of the law by the Respondent, in light of the requirements of Section 83 of the Act, as it is clear from the said Section, the stage at which due diligence is to be undertaken in a procurement process and the manner of doing so. Section 83 provides as follows:

“(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subSection (1) may include obtaining confidential references from persons with whom

the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.”

30. Due diligence is in this regard defined in Black’s Law Dictionary , Ninth Edition at page 523 as “*the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or discharge an obligation*” Diligence on the other hand is defined as “*the attention and care required from a person in a given situation*”.

31. From the above Section, I find that due diligence is to be carried out after tender evaluation but prior to award of the tender. Therefore, the Applicant’s tender never met that threshold.

3. Whether there is Room for the exercise of discretion by the Respondent on compliance with Mandatory Requirements in a Tender Document

32. Section 79 of the Act provides:-

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.

33. In **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** the Court stated:

“In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

34. In light of the foregoing, it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities.

35. I therefore find nothing to suggest that the impugned decision was unlawful with regard to the known grounds for judicial review remedies. Judicial Review is concerned with testing the legality of the administrative decisions. Consequently, the Applicant’s case fails this test and the writ of certiorari is not available to the Applicant.

36. Accordingly, I dismiss the Applicant’s substantive Notice of Motion dated **18/09/2020** with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Weloba for Ex parte Applicant

Ms. Muriithi for 1st and 2nd Interested Parties

Mr. Ondieki for 3rd Interested Party

Ns, njau for Respondent

Ms. Peris Court Assistant