



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 46 OF 2017

IN THE MATTER OF: THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSETS DISPOSALS ACT NO. 33 OF 2015

AND

IN THE MATTER OF: AN APPLICATION BY KENYA PORTS AUTHORITY FOR JUDICIAL REVIEW ORDERS OF CERTIORARY AGAINST THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RENDERED ON 18TH JULY, 2017

BETWEEN

KENYA PORTS AUTHORITY.....EX PARTE APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

MANTRAD ENTERPRISES LIMITED.....INTERESTED PARTY

RULING

The Application

1. The Notice of Motion dated 4th August, 2017 before the court filed by the Ex parte Applicant prays for the following orders:

(i) There be an order of certiorari to remove to this Honourable Court for purposes of quashing the decision of the Respondent made on 18th July, 2017 in Public Procurement Administrative Review Board Application No. 59 of 2017; Mantrad Enterprises Limited vs. Kenya Ports Authority concerning Tender No. KPA/118/2016-17/CCE for the supply of one New Self-Propelled Boom Man lift.

(ii) Each party be ordered to bear its own costs of the motion.

2. The motion is premised on the grounds set out therein and is supported by the Statutory Statement and Verifying Affidavit of Wamuyu Waikwa Ikegu both filed in support of the Chamber Summons for leave herein dated 1st August, 2017.

The Response

3. The motion is opposed by the Respondent and the Interested Party. The Interested Party filed a Replying Affidavit sworn by Harrison Mbugua on 17th September, 2017. The Respondent, represented by the Attorney General, did not file any submissions and neither did they participate herein.

The Background

4. The Ex parte Applicant is the procuring entity in Tender No. KPA/118/2016-17/CCE for the supply of one New Self-Propelled Boom Manlift. The Ex parte Applicant declared **Eazy Sales & Services (PTY) Limited** as the lowest evaluated bidder and consequently awarded the tender to it at a total sum of USD 485,801.43 (United States Dollars Four Hundred Eighty-Five Thousand Eight Hundred and One and Forty-Three Cents). Eazy Sales & Services (PTY) Limited was notified of the award vide a letter dated 16th June, 2017. The Interested Party (**Mantrad Enterprises Limited**) aggrieved by the award of the tender to Eazy Sales & Services (PTY) Limited filed a Request for Review with the Respondent pursuant to Section 167 of the Public Procurement and Asset Disposal Act 2015 being public **Procurement Administrative Review Board Application No. 59 of 2017; Mantrad Enterprises Limited vs. Kenya Ports Authority** filed on 29th June, 2017. The Respondent after hearing all parties rendered its award on 18th July, 2017 the gist of which was as follows:

(a) The review was allowed

(b) The tender which was awarded to M/s Easy Sales and Services (PTY) limited by the Ex-parte applicant was annulled and set aside. The Ex parte Applicant was directed to award the subject tender to the Interested Party (Mantrad Enterprises Limited) and to complete the entire procurement process including the signing of the contract within fourteen (14) days from 18th July, 2017.

(c) Each party was to bear own costs

5. The Respondent released a copy of the Award to the Ex parte Applicant on 25th July, 2017.

The Applicant's Case

6. The Ex-Parte Applicant's case is founded on principles of ultra-vires, illegality, and unreasonableness. The Ex parte Applicant's case having reviewed the award, is that the Respondent acted in excess of jurisdiction, irrationally, illegally and considered irrelevant factors in reaching the decision it did. The Ex parte Applicant's case is that the Respondent has reviewed and substituted the professional opinion issued by the Applicant's Head of Procurement pursuant to section 84 of the Public Procurement and Assets Disposals Act 2015 with its own decision. In so far as the Respondent has substituted the Head of Procurement's decision with its own, the Ex-parte Applicant states that it has usurped the powers of the Head of Procurement. In so far as the Respondent held that faults with the tender evaluation report that had been noted by the Head of Procurement ought to have been referred back to the tender evaluation committee, it then exceeded jurisdiction when it purported to address and rectify those faults instead of returning the faults to be addressed by the Tender Evaluation Committee. In so far as the Respondent purported to interpret the meaning of "authorized agent" as used in the tender document and reached a different conclusion to that reached by the Ex-Parte Applicant, it acted in excess of jurisdiction by awarding the tender to the Interested Party based on an interpretation which totally deviated from the idea conceived by the Applicant as the procuring entity.

7. As for illegality, the Ex-parte Applicant's case is that in directing that the Applicant awards the tender to the Interested Party and enters into a contract within fourteen (14) days, the Respondent was directing the Applicant to take an action which is in clear violation of section 135(3) of the Public Procurement and Assets Disposals Act 2015 which prohibits the entering into a contract unless fourteen (14) days after the award of the tender have elapsed.

8. Further, the Applicant states that in awarding the tender to the Interested Party when the Interested Party's authority was not in existence, the Respondent was directing the Applicant to accept a bid from a tenderer who had no legal authority to supply the goods required.

9. And in directing the Applicant to award the tender to the Interested Party at the cost of USD 647,428.00 (approximately Kshs. 67,267,769.20) when the approved budget was only Kshs. 52,000,000.00, the Ex-parte Applicant states that the Respondent was directing the Applicant's Accounting Officer to undertake an action contrary to section 53(8) of the Public Procurement and Assets Disposals Act 2015 which prohibits procurement unless sufficient funds are available to meet the contractual obligations. The Ex-parte Applicant further contends that in directing the Applicant to award the tender to the Interested Party at the cost of USD 647,428.00 when the Applicant had awarded the tender to Eazy Sales & Services (PTY) Limited at a cost of USD 485,801, the Respondent was in violation of Article 201(d) of the Constitution of Kenya which requires that "public money shall be used in a prudent and responsible way".

10. As for unreasonableness the Ex-parte Applicant's case is that in directing the Applicant to award the tender to the Interested Party at the cost of USD 647,428.00 when the approved budget was only Kshs. 52,000,000.00, the direction was unreasonable and failed to consider that there was no guarantee that additional funding would be availed by the Applicant. And in directing the Applicant to award the tender to the Interested Party at the cost of USD 647,428.00 when the Applicant had awarded the tender to Eazy Sales & Services (PTY) Limited at a cost of USD 485,801.43 the Respondent acted unreasonably in requiring the Applicant to spend more public funds to acquire the same goods it would acquire at a lesser cost.

The Interested Party's Case

11. The Interested Party was one of the bidders in Tender No. KPA/118/2016-17/CCE for the supply and commissioning of 1 No. New Self Propelled Boom Man Lift. The Interested Party states that it successfully moved through all stages of evaluation including technical and financial stages. The Interested party was the lowest bidder at USD 647,428 while its competitor Ms. Eazy Sales & Services (PTY) Limited

had quoted a sum of USD 732,341.21. However, the Interested Party was disqualified at this stage on the grounds of a defective authorization, and its above said competitor was awarded the tender at a revised sum of USD 485,801.43. It is as a result of above that the Interested Party appealed to the Respondent herein, who upheld the said appeal and directed that the tender be awarded to the Interested Party as it was the lowest bidder. It emerged at the hearing of the appeal before the Respondent that the reason the Ex parte Applicant disqualified the Interested Party was on the basis of a professional opinion given to the accounting officer of the Ex parte Applicant by the Head of Procurement to the effect that the authorization submitted by the Interested Party was not valid and current as at the time of tender and not relevant to the Kenya region. It also emerged from the above referred professional opinion that “**secretariat**” having reviewed the evaluation report recommended award of the tender to M/S Eazy Sales and Services (PTY) Limited at USD 732,340.91 and that it is apparent that it is after the stated recommendation that the Ex parte Applicant applied clause 2.26.6 of the tender document to vary quantities thus revising the bid by Eazy Sales and Services (PTY) Limited to USD 485,801.43 and issued the Notification. The Interested Party’s case is that the Respondent’s decision was correct and not excessive and that this court should not interfere with it.

Submissions

12. With the leave of the Court parties filed submissions which I have carefully considered. The issues raised for determination are as follows:

- (i) Whether the Board acted ultra vires and in excess of jurisdiction;
- (ii) Whether the Board acted unlawfully or illegally;
- (iii) Whether the Board acted unreasonably.

Analysis of the Issues

13. Probably being aware of the Limitation of a Judicial Review Court with respect to considering issues of merit in judicial Review applications, Mr. Kongere, the Ex-Parte applicant’s Counsel, by way of curtain raiser submissions, urged the court to note that the ex parte Applicant’s Motion is brought under section 8 & 9 of the Law Reform Act Cap 26 and sections 7 (a) & 9 (1) of the Fair Administrative Action Act No. 4 of 2015 (the FAAA 2015). Mr. Kongere submitted that the FAAA 2015 has revolutionized or expanded the scope and extent of the powers of the judicial review court. Counsel cited the Court of Appeal in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR** where it was stated:

Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action....In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review.

14. Counsel accordingly invited this Court not to be shackled to the “**procedure not merit**” crusade that has held sway in Judicial Review proceedings for long. Times have changed, so too must the court’s attitude, submitted Mr. Kongere. That is submission which the Court will have in mind. I will now address issues raised herein.

a. Did the Board act in excess of jurisdiction?

Mr. Mbindyo Counsel for the Interested Party submitted that the Respondent was within its powers and mandate as enshrined under section 28 and incidental regulations to the Act to hear and determine the dispute lodged before it by the Interested Party. Counsel submitted that the wording of Section 28 will lead one to imply that the Review Board has the jurisdiction to review, hear and determine tendering and asset disposal disputes and perform any other function conferred to it by the Act, Regulations or any other written law. Counsel submitted that the Act under Section 173 gives the Review Board powers in relation to the orders that it can give. The Board for instance has the power to:

- (a) Annul anything the accounting officer of a procuring entity has done in the procurement proceedings like it did in the case under review;
- (b) Give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- (c) Substitute the decision of the review Board for any decision of the accounting officer of a procuring entity;
- (d) Order payment of costs as between the parties to the Review in accordance with the scale as prescribed; and
- (e) Order termination of the procurement process and commencement of a new procurement process.

Mr. Mbindyo submitted that the Board was well within its power to hear and determine Public Procurement Administrative Review Board Application No. 59 of 2017 lodged by the Interested Party on the 29th June 2017 for review. The dispute concerned public procurement and was filed within the legally prescribed period.

15. Mr. Kongere submitted in agreement that the jurisdiction of the Review Board under section 173 of the PPDA 2015 is quite wide. But, added Counsel, being wide is not the same thing as being unfettered. That discretion, Counsel submitted, does not allow the Review Board to effectively become the procuring entity. The discretion does not allow the Review Board to interpret tender documents contrary to the intentions of the procuring entity. The discretion does not allow the Review Board to interpret tender documents contrary to the intentions of the procuring entity.

16. This issue was addressed in **Republic v Public Procurement Administrative Review Board & 2 others Ex- Parte Akamai Creative Limited [2016] eKLR** where it was said;

Whereas we appreciate that the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE.

17. From the proceedings before the Board it is notable that the main point of contestation before the Review Board was whether Mantrad fit into the definition of a "Manufacturer" or "Manufacturer's Duly Authorized Agent" as defined in the Tender document. The Tender Evaluation Committee had not given any interpretation to those words even though they had recommended award of the tender to Mantrad. The Head of Procurement had interpreted the Tender Documents and found that Mantrad does not fit into the definition of a "duly authorized agent".

1. The Board then found (pg. 531) that;

...if an error was discovered in the evaluation process as had been alleged by the Head of Procurement, the tender evaluation report ought to have been referred back to the evaluation committee for consideration and correction if any.

18. Despite its own finding, the Review Board failed to heed its own advice and instead decided to resolve those errors itself. It started resolving the errors by first finding that the Tender Evaluation Committee "considered all the relevant factors before making the recommendation of award including the issue of whether the Applicant had provided a Manufacturer's Authorization" (pg. 532). In my view, however, this was a matter to be referred to the Tender Evaluation Committee for resolution. This is so because under section 85 of PPDA Act only evaluation Committee of the procuring entity can recommend to the accounting officer an award of contract of Tender.

It was necessary that the Tender Evaluation Committee be given an opportunity to have some input on the issue. This was in fact admitted to by Mantrad before the Review Board (pg. 521). The Board could not substitute its own input for that of the Tender Evaluation Committee as it sought to do. In *ex parte Akamai (supra)* it was reiterated that;

...where the Board finds that a particular clause in the tender document is vague, it is not for the Board to substitute that clause with its own view of what ought to have been contained in the tender document. The best option is for the Board to remit the tender back to the procuring entity with appropriate directions.

a. Is the Board's decision unlawful or illegal?

19. The next issue is whether the Board's decision was unlawful or illegal. First, the Review Board found that it was unlawful for the Accounting Officer to rely on the professional opinion in awarding the tenders (pg. 534). However, this may not be true. Section 84 of the PPDA 2015 is as follows:

(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).

20. Section 84(1) imposes a mandatory obligation on the Head of Procurement to deliver a professional opinion on each and every procurement. That professional opinion must go together with the tender committee evaluation report. So once this mandatory professional opinion has been issued, what does the law require next? The answer is in section 84(3) of PPDA 2015. That section makes it mandatory for the Accounting Officer to consider the views in the signed professional opinion. We agree with the Review Board that the opinion is not binding on the Accounting Officer but he must consider that professional opinion. This position was restated in **Republic -v- Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd [2017] eKLR** where the court said;

It is therefore clear that the accounting officer is duty bound to consider the said opinion. He however is at liberty not to follow it after considering the same. He however cannot just disregard it on the ground that there were no dissenting opinions.

21. If section 84(3) of PPDA 2015 mandates the Accounting Officer to take into account the views of the Head of Procurement, is it lawful to say, as the Review Board said, that the Accounting Officer cannot award a tender on the basis of the professional opinion? In the opinion of this, Court, the approach advocated for by the Review Board violates section 84 of the PPDA 2015. The Accounting Officer must be allowed to consider the two reports and reach a lawful decision.

22. The next alleged illegality is in what the Review Board ordered the ex parte Applicant to do. The Board directed the ex parte Applicant to award Mantrad the tender at its bid price of USD 647,428.00. The uncontroverted evidence before the Board was that the budgetary allocation was equivalent of Kshs. 52 million. Mantrad's bid therefore overshot the budgetary allocation by equivalent of Kshs. 15,332,512.00.

23. Section 53(8) of the PPDA 2015 is in the following words;

Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

24. In section 53(9) of PPDA 2015, it is an offence to procure goods without the necessary budgetary allocation. This means that in essence the Review Board was directing the ex parte Applicant to award a tender without ensuring that there was adequate budgetary allocation for it. The Board failed to appreciate that deficiency in budget is a ground for cancellation of a tender by the Accounting Officer under section 63(1)(b) of the PPDA 2015.

25. The Ex-Parte Applicant submitted, correctly in my view that no judicial or quasi-judicial body is entitled to direct a party to act in breach of the law. In ***Kenya National Examinations Council v Republic Exparte Kemunto Regina Ouru [2010] eKLR*** the Court of Appeal said that;

It is against the law to require an authority to do what is contrary to the law...So, contrary to submissions by Prof Muma, that the council should have released the results of other subjects the council could not do so without breaching rule 9, aforesaid.

26. The third instance on illegality is in making an award contrary to the principles of public finance in Article 201 of the Constitution and section 3 of the PPDA 2015. The award to Eazy Sales was at the price of USD 485,801.43. The award to Mantrad as recommended by the Board is at the price of USD 647,428.00. The disparity in prices is USD 161,626.57. It is noteworthy that the Review Board did not give the ex parte Applicant the option to negotiate Mantrad's bid downwards. It was to award it at the bid price of USD 647,428.00. If allowed, this action would amount to improper use of public money.

27. There are other instances of illegality discernable from the actions of the Respondent. These include their definition of agency relationship, which I will not consider in this Ruling.

Did the Board act unreasonably?

28. ***Republic v Cabinet Secretary National Treasury & another Ex-Parte Car Importers Association of Kenya [2016] eKLR*** described an unreasonable decision one;

...which is so outrageous in its defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it.

29. Some instances of unreasonableness by the Review Board include principles of public finance like **"prudence" and "economy"**. The Board awarded the tender to Mantrad at the price of USD 647,428.00 when Eazy Sales is offering the same goods at USD 485,801.43. The Applicant submitted correctly in my view that it is not reasonable to procure the same goods at approximately Kshs. 17 million more. The same argument is true for the fact that the Review Board order directed the Applicant to enter into a tender contract without ensuring whether there was a budget for the same. Mantrad points out that they can negotiate the bid price downwards. However, that route was closed when the Review Board directed the tender to be awarded at USD 647,428.00". Any other award would be contrary to the Board's decision.

30. From the foregoing paragraphs of this ruling the unescapable conclusion is that this judicial Review application succeeds.

Parties to bear own costs.

Dated, Signed and Delivered in Mombasa this 20th day of December, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Kongere for Ex-Parte Applicant

Mr. Makuto for Respondent

Mr. Makuto holding brief Mbindio for Interested Party