



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 433 OF 2015

JUDICIARY OF KENYA.....APPELLANT

V E R S U S

THREE STAR CONTRACTORS LTD.....RESPONDENT

(Being an appeal from the decision of the Public Procurement Appeals

Review Board (PPARB) dated 11th August, 2015 in

Administrative Review No. 37/2015)

JUDGEMENT

1. Three Star Contractors Ltd, the respondent herein is alleged to have received a letter dated 26.6.2016 from the Judiciary, the appellant herein, purporting to terminate the award of tender to rehabilitate Vihiga Law Courts that had been communicated on 12.3.2016. Being aggrieved by the appellant's decision to terminate the contract, the respondent challenged the said decision by requesting for review that was filed at the Public Procurement Administration Review Board (hereinafter referred to as the 'Board') on 15.7.2015. The appellant responded to the request for review arguing that the Board had no jurisdiction to entertain the dispute and that the termination of the award had been done according to the law existing by then.

2. The Board heard and delivered its decision on 11th August 2015 whereof it allowed the review. Being dissatisfied with the decision of the Board, the appellant preferred this appeal.

3. On appeal, the appellant put forward the following grounds:

1. The Public Procurement Administrative Review Board (PPARB) made a fundamental error and defect in law by elevating the provisions of the Public Procurement and Disposal Act 2007 to supersede the express conditions imposed by the donor in an International Financial Agreement between the Republic of Kenya and the International Development associated (Judiciary Performance Improvement Project) dated 5th December, 2012, contrary to Section 7 of the Public Procurement and Disposal Act 2007 [Rev 2010].

2. The Public Procurement Administrative Review Board (PPARB) erred in law and fact in holding that the request for review was filed within the mandatory seven (7) while the review was filed after 4 months (12 days) contrary to the mandatory provisions of Regulation 73 (2) of the Act.

3. The Public Procurement Administrative Review Board (PPARB) erred in law by acting in excess of jurisdiction neither conferred to it by the constitution or any statute when it purported to adjudicate on an existing contract between the parties, contrary to Sections 7, section 93(2) and Section 68(3) of the Public Procurement and Disposal Act 2007 [Rev 2010] as read together with Section III B. 3(h) of conditions in the International Financial Agreement dated 5th December, 2012.

4. The Public Procurement Administrative Review Board (PPARB) erred in law by failing to appreciate and apply the law that under Sections 7, Section 93(2) and Section 68(3) of the Public Procurement and disposal Act 2007 [Rev 2010] as read together with Section III B(h) of conditions in the International Financial Agreement dated 5th December, 202, a notification of Award constitutes the formation of a contract.

5. The Public Procurement Administrative Review Board (PPARB) erred in law by not appreciating and considering that the Tender Processes was conducted under the World Bank conditions contained in the international Financial Agreement dated 5th December, 2012 and the World Bank bidding Documents and Conditions thereof, and as such the termination of the award was pursuant to Section 1 instruction to Bidders Clause 42 for failure to furnish performance security within 28 days in accordance with the conditions of contract.

6. The Public Procurement Administrative Review Board (PPARB) erred in law and fact in holding that no proper communication of termination of the award of tender was made as envisioned under Clause No. 6.1 of the General Conditions of Contract.

7. The Public Procurement Administrative Review Board (PPARB) made a fundamental error and defect in law and procedure by failure to appreciate and hold that the respondent did not specify the alleged breach, the Sections of the act breached, or the regulations breached as mandatory required by regulations 73(2) (a) of the act.

8. The Public Procurement Administrative Review Board (PPARB) erred in law in holding that in the absence of a written contract between the parties, then the procurement process is still open and that the Board therefore has jurisdiction, contrary to Sections 7, Section 93(2) and Section 68(3) of the Public Procurement and Disposal Act 2007 [Rev 2010] as read together with Section III B(h) of conditions in the International financial Agreement dated 5th December, 2012.

9. The Public Procurement Administrative Review Board (PPARB) erred in law in not appreciating that the subsequent contract was awarded to the next lowest evaluated bidder whose offer was substantially responsive in according with the International Financial Agreement dated 5th December, 2012, and the World Bank bidding documents and conditions pursuant to Section 1 instruction to bidders Clause 42.4.

10. The Public Procurement Administrative Review Board (PPARB) erred in law by acting in excess of its jurisdiction when it purported to force the appellant and the respondent to enter into and execute a formal written contract within 15 days thereby negating the noble principle that no party can be forced to enter into a contract.

4) When this appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submission.

5) I have re-evaluated the arguments made before the Board. I have also considered the rival submissions plus the authorities cited. Though the appellant put forward a total of 10 grounds of appeal, those grounds were argued together and they revolve around the question as to whether the Board had jurisdiction to hear and determine the respondent's request for review. It is the submission of the appellant that the Board fell into error when it heard and determined the request for review whereas a

notification of the award had already been communicated to the respondent. The respondent was of the contrary view that is to say that the Board had jurisdiction to hear and determine such disputes under Section 93 of the Public Procurement and Disposal Act, 2005. The respondent also stated that the mere notification of the award to the respondent cannot be deemed to deprive the Board jurisdiction.

6) The appellant further argued that the Board did not have jurisdiction to hear and determine the dispute as the notification of the award had already been effected. The respondent is of the opinion that this is not the situation that is contemplated by Section 93(2) of the Public Procurement and Disposals Act, 2005 so as to bar the Board from hearing and determining a dispute. It is submitted by the respondent that the Board in this case would only not have had the jurisdiction to hear and determine the request for review if a contract had already been signed. It is also the submission of the respondent that since no contract had been signed by the parties, therefore the Board was correct in holding that it had jurisdiction.

7) The appellant's second ground for challenging the Boards jurisdiction is that the request for review was filed by the respondent out of time. The respondent stated that the request was filed within time. The respondent narrated that the decision was not communicated to it until 8.7.2015 when its managing director visited the appellant's offices. Accordingly the respondent was of the view that the time for filing the request for review therefore started running on 9th July 2015. The request for review was filed on 15.7.2015 and the respondent is of the view that it was filed within the period set out in Regulation 73 of the Public Procurement and Disposal Regulations. It is the respondent's submission that the Board made a factual finding that the award had been terminated on 8th July 2015.

8) Having re-evaluated the dispute that was before the Board and having considered the rival submissions, I have come to the following conclusions in this appeal.

9) First, that tender no. **JPIP/NCB/WORKS/06/2014-2015** for the proposed rehabilitation of Vihiga Law Courts had guidelines attached therein which the respondent used in submitting its bid.

10) Secondly, that by signing the letter of the bid dated 12th March 2015 the respondent accepted the terms of the tender documents in its entirety including the provisions relating the application of the World Bank guidelines to the procurement, therefore the respondent cannot be heard to complain of being bound by those guidelines.

11) Thirdly, that the provision of Section 56(1) of the Public Procurement and Disposal Act creates exceptions to the Provisions of Section 98 of the Act. Section 56(1) of the Act provides as follows:

“Where any provisions of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.”

It is clear in my mind that the Board cannot apply Section 98 without considering the provisions of Section 56 which shields procurement proceedings that are funded by external donors.

12) Fourthly, that under Clause 42.1 of the Instructions to Bidders, the respondent was required to provide performance security within 28 days. In this matter, the respondent relied on an extension of date for delivery of the bid bond which had been granted without the express authority of the accounting officer on 27th April 2015.

13) Fifth, it is clear to me that the Board erred in holding that the request for review was filed within the mandatory seven (7) days while it is apparent that the Review was filed after four (4) months contrary to the mandatory provisions of Regulation 73(2) of the Act. The material presented to this court shows that the appellant awarded the respondent the tender on 12.3.2015 which was later terminated due to the respondent's failure to deliver the performance bond within 28 days as it had stated in the instructions to bidders. The award was terminated on 26.6.2015 and the respondent filed its request for Review on 15.7.2015, outside the mandatory 7 days' period provided by the Regulations alluded hereinabove.

14) The Board therefore had no jurisdiction to hear anything filed outside the seven (7) days. Proceedings touching on procurement matters ought to be heard and determined without undue delay.

In **Republic vs= principal Secretary Ministry of Health & Another, Exparte Apex Communication Ltd trading as Apex Porter Novelli (2015) eKLR** Justice Odunga upheld *the decision of the Public Procurement Administrative Review Board not to entertain a request for review on the ground that the same had been filed outside the period for filing such a review and it did not have jurisdiction to deal with it.*

15) In the end and for the above reasons, this appeal is found to be meritorious. It is allowed. Consequently, the decision of Public Procurement Review Board delivered on 11.8.2015 in Administrative Review Board No. 37 of 2015, Nairobi is set aside and is substituted by an order dismissing the respondent's request for review with costs to the appellant.

Dated, Signed and Delivered in open court this 31st day of March, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent