



REPUBLIC OF KENYA
IN THE HIGH COURT IN KENYA AT NAIROBI
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 86 OF 2017

REPUBLIC

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT,

STATE DEPARTMENT OF PUBLIC WORKS2NDRESPONDENT

EX-PARTE

THE COPY CAT LIMITED APPLICANT

JUDGEMENT

Introduction

1. By a Motion on Notice dated 1st March, 2017, the ex parte applicant herein, **The Copy Cat Limited**, (hereinafter referred to as “**Copy Cat**”) it seeks the following orders:

1. THAT this Honourable Court be pleased to issue an order of CERTIORARI for the purposes of being quashed the 1st Respondent decision made on the 14th February 2017 in Public Procurement Administrative Review Board Application No. 9 of 2017 between The Copy Cat Limited and the Ministry of Transport, Infrastructure, Housing And Urban Development, State Department of Public Works concerning tender No. Tender No. SB/43/2016-2017 for the Supply of Photocopying Machines.

2. THAT this Honourable Court be pleased to issue an order of MANDAMUS to compel the Ministry of Transport, Infrastructure, Housing and Urban Development, State Department of Public Works to award the Applicant Tender No. SB/43/2016-2017 for the Supply of Photocopying Machines.

3. THAT the costs of this application be provided for.

Ex Parte Applicant's Case

2. According to the applicant, on the 19th September 2016 **Copy Cat** received an invitation to Tender from procuring entity the 2nd Respondent herein, **Ministry of Transport, Infrastructure, Housing and Urban Development, State Department Of Public Works** (hereinafter referred to as “the Ministry”) for the Supply of Photocopying Machines under No. SB/43/2016-2017 (hereinafter referred to as “the Tender”). **Copy Cat** accordingly submitted its bid documents to the Ministry having met all the conditions as stipulated in the invitation for tender.

3. It was averred that on 10th January 2017 **Copy Cat** received a Notification Letter from the Ministry dated 3rd January 2017 advising **Copy Cat** that its bid was not successful for the reason that **Copy Cat** “*did not Submit the Original and Copy of the Tender document issued that contains all instructions, Forms, Terms and Specifications governing the Contract.*”

4. According to **Copy Cat** the above reason for disqualification of its bid was not marked a Mandatory requirement in the Special Conditions of the Contract neither was it stipulated in the Evaluation Criteria as a parameter for qualification/disqualification of a bid.

5. Aggrieved by the said decision **Copy Cat** filed a review before the 1st Respondent, the **Public Procurement Administrative Review Board** (hereinafter referred to as “the Board”) stating that the reason given to disqualify its bid was vague and that indeed it satisfied all the conditions of the Ministry in its bid. In response, the Ministry reiterated their reason for disqualifying **Copy Cat**'s bid stated further that:

The Public Procurement and Asset Disposal Act 2015 Clause 135 (6) States that “The Tender documents shall be the basis of all procurement contracts and shall constitute as a minimum:

- a) Contract Agreement Form;*
- b) Tender Form;*
- c) Price Schedule or Bills of Quantities submitted by the tenderer*
- d) Schedule of Requirements;*
- e) Technical Specifications;*
- f) General Conditions of Contract;*
- g) Special Conditions of Contract;*
- h) Notification of Award.*

6. It was further deposed that the Ministry indicated that all the documents above were not submitted by The **Copy Cat** Limited except for items (b) and (c) above. In this application, **Copy Cat** insisted that its bid as submitted met all the prerequisite of the Respondent's invitation for tender. To **Copy Cat**, **Contract Agreement Form** is a Template attached to the Instructions form in the Invitation to bidders that was issued by the Ministry which form is only to be used as a guide and to be completed upon the award of the tenders to the successful bidders. In this respect **Copy Cat** relied on section VIII of the Invitation for Bidders which expressly provides at Clause 4 that the Contract Form shall not be completed by the tenderer at the time of submitting the tender hence the Contract form shall be completed after the award of the contract.

7. With respect to item (d) - **Schedule of Requirements** – **Copy Cat**'s position was that Schedule of Requirement, which is at Page 40 Volume 1, was prepared by the Ministry and attached to the Invitation

for Bids document and required the Bidders to fill it up and that **Copy Cat** duly filled it and submitted it to the Ministry as part of his bid. Accordingly, the Ministry was wrong to hold that the applicant failed to submit the Schedule of Requirements.

8. With respect to item (e) - **Technical Specifications** – **Copy Cat** contended that the Ministry set out in the invitation for bids document the Technical Specifications describing the requirements for the goods to be supplied in the tender. It required Bidders to submit with their offers the detailed specifications, drawings, catalogues, etc. for the products they intend to supply and that **Copy Cat** duly submitted the Technical Specifications as required.

9. As regards item (f) - **General Conditions of Contract** – it was **Copy Cat's** case that the General Conditions of Contract (GCC) states clearly at Clause 3.2 that the GCC shall apply in all contracts made by the procuring entity for the procurement of Goods. In **Copy Cat's** view, these are the conditions as provided by the Ministry that will be applicable for the preparation of the final contract between the Ministry and successful bidders hence are conditions are prepared by the Ministry and are not to be provided by the Bidders as claimed by the Ministry. With respect to item (g) - **Special Conditions of Contract** – **Copy Cat's position was that the Ministry** at Section IV of the Invitation for Bids set forth the Special Conditions of Contract (SCC) and the instructions were that the SCC shall supplement the GCC. The SCC was prescribing conditions that were to be met by the applicant including furnishing of certain documents, furnishing of information, etc. The Tenderer was however required to furnish the following Documents under Clause 4.1 of the Special Conditions of Contract.

- i. Valid Trade Licence, copies to be attached.
- ii. Reliable Communication Service.
- iii. Evidence of Past Performance.
- iv. Certificate of Incorporation.
- v. Value Added Tax Certificate and PIN Certificates.
- vi. Valid Tax Compliance certificates.
- vii. Copy of Registration Certificate from the Insurance Regulatory Authority for candidates using insurance guarantee as tender security.
- viii. Samples/Technical Brochure or Catalogue for each item offered.
- ix. Clause 4.2: The Applicant filled up and duly submitted the required confidential business questionnaire.
- x. Clause 4.3. Not Applicable.
- xi. Clause 4.4: The Applicant furnished the Tender/Bid Security for Kshs. 100,000.00 as required by the 2nd Respondent.
- xii. Clause 4.5: The applicant quoted the prices and met all the requirements thereof.
- xiii. Clause 4.6: The Applicant duly furnished the manufacturer's authorization in the format prescribed.
- xiv. Clause 4.8: The applicant duly submitted evidence of financial stability as required.
- xv. Clause 4.9: The applicant duly submitted the Offers as required.

xvi. Clause 4.14: The Applicant quoted prices in Kenya Shillings as required.

xvii. Clause 4.15: The Applicant duly met all the requirement in the bound bid documents.

xviii. Clause 4.22: The Applicant duly prepared and submitted the Technical Data Sheet form for the item quoted as required.

10. With respect to Item (h) - **Notification of Award** – it was **Copy Cat's** case that this is issued by the Ministry to the Bidders to notify them whether they were awarded the tender or not hence **Copy Cat** was not expected to furnish this document.

11. In **Copy Cat's** view, pursuant to Clause 2.4.2 of the Instructions to Tenderers issued by the Ministry the bidder is only expected to examine all instructions, forms, terms and specifications in the tender documents and thereby submit all the information required and a substantially responsive bid to the tender documents. It is not a requirement in the Invitation for Bid or the Instructions to tenderers or in law to submit back to the Respondent the said Invitation nor the instructions. It was averred that the said instructions and forms and terms and specifications were provided by the 2nd Respondent in its website at a cost of Kshs. 1,000.00 pursuant to Clause 1.3 of the 2nd Respondent Invitation to tender.

12. With respect to the foregoing, it was **Copy Cat's** contention that Clause 2.8 of the Instructions to Bidders provides that the Tender prepared by the Tenderers shall comprise only the following components:

a) A Tender Form and Price Schedule completed in Accordance to Paragraph 2.9 which the Applicant duly submitted corresponding to the Ministry's instructions and template and a price schedule as required.

b) Documentary Evidence established in accordance with paragraph 2.1.2 that the tenderer is eligible to tender and is qualified to perform if its tender is accepted. The Company's profile and Memorandum and Articles of Association and the bid documents as submitted by **Copy Cat** confirmed the eligibility of the Applicant to tender and is qualified to perform.

Documentary Evidence established in accordance with Paragraph 2.2.1 that the goods and ancillary services to be supplied by the tenderer are eligible goods and services and conform to the tender documents; The Bid as submitted by the applicant above met this requirement.

c) Tender Security furnished in accordance with paragraph 2.14. The applicant duly submitted this.

13. According to **Copy Cat**, it is a leading office automation companies in Kenya, with vast experience and resources in this field as a result of which it has been awarded numerous contracts by other Government Departments to supply similar products and services as the products specified in this tender, with satisfaction from the clients for the past 25 years with the Ministry. It asserted that as authorized partners of the manufacturer's **Copy Cat** is equipped with the requisite skills and resources to offer after sales support services at more affordable costs and that the products **Copy Cat** had proposed to supply are of superior quality and at a considerable lower price than the products offered by the successful bidders as a result the Government stands to suffer losses.

14. **Copy Cat** explained that this material tender is undertaken by the Ministry on behalf of the Government to supply the products to all government department, and involves numerous suppliers who have invested heavily in this field and that **Copy Cat** is one of the qualified suppliers of the products sought in the material tender.

15. **Copy Cat's** case was expounded by its learned counsel, **Mr Maloba** who reiterated the foregoing and urged the Court to allow the application.

16. In opposition to the application, the 1st Respondent, the Board averred that on 24th January 2017, the Board received **Copy Cat**'s Request for Review challenging the award of Tender Number No. SB/43/2016-2017 for the Supply of Photocopying Machines.

17. Upon receiving the Request for Review, service was directed to be served on the Ministry notifying the Ministry of the pending Review as required by the provisions of section 168 of the **Public Procurement and Asset Disposal Act, 2015** (hereinafter referred to as "the Act"). It was disclosed that upon service with the Request for Review, the Ministry filed a response in opposition thereto on 7th February 2017.

18. It was averred that the Request for Review was subsequently heard wherein the Board considered the pleadings before it as well as the oral and written submissions of the parties and delivered its decision on 14th February 2017. It also considered the original tender documents, the evaluation reports and other documents supplied to it by the Ministry herein and in determining the Request for Review, it identified one issue for determination namely: Whether the procuring entity applied evaluation criteria not found in the tender document in the evaluation of the applicant's tender and thereby breached the provisions of sections 80(2) of the Act.

19. According to the Board, it observed that the applicant's tender was on a different price schedule from the original documents issued by the procuring entity which had the words "Supplies Branch; SB/43/2016-2017: Supply of Fireproof Cabinets and Shredders" on every page as distinct identification of the tender. Further perusal reveals that the applicant submitted a Form of Tender on its own company letter head.

20. It was averred that as the Board stated in its decision, it is not up to a bidder to elect which tender documents to return in a procurement process that has outlined what constitutes the tender documents and the Board correctly found that the ex parte applicant was properly disqualified by the Ministry since it did not submit a complete tender document as required and was thus found non-responsive to the set evaluation criteria.

21. According to the Board, what **Copy Cat** is actually challenging are the merits of the decision delivered on 14th February 2017 in which the Board disallowed **Copy Cat**'s Request for Review albeit disguised as a judicial review application which ought to challenge the procedure of arriving at a decision.

22. It was therefore the Board's position that **Copy Cat** had not demonstrated the existence of any grounds to warrant the grant of judicial review remedies as sought and the Board concluded that the application lacked merits and should therefore be dismissed with costs to the Respondents.

23. In its submissions, the Board stated that Clause 2.4.1 of the Tender Document provided a list of the documents that comprised the tender document. Further, clause 2.4.2 provided that failure to furnish all required information required by the tender documents or to submit a tender not substantially responsive to the tender documents in every respect will be at the tenderers risk and may result in the rejection of its tender. It is not in dispute that the applicant herein while returning its bid, did not submit some documents including; Invitation to Tender, Instruction to Tenderers, General Conditions of Contract, special conditions of contract and schedule of requirements. It is also not in dispute that the applicant submitted a tender in its own format other than the format stated in the tender document.

24. It was therefore the Board's case that the applicant had not demonstrated the irrelevant issues that the Board considered in making the impugned decision of 14th February 2017. In the Board's view, in determining the Request for Review that had been filed by the **Copy Cat**, the Board identified only one issue for determination namely: Whether the procuring entity applied evaluation criteria not found in the tender document in the evaluation of the applicant's tender and thereby breached the provisions of sections 80(2) of the Act. In dismissing that review, the Board noted that the applicant did not submit a complete tender as described under clause 2.4 of the tender document since some documents were missing. Further the Board was of the view that it is not up to a bidder to elect which tender documents to

return in a procurement process that has outlined what constitutes the tender documents. It therefore found that the Ministry had complied with the provisions of section 80 of the **Public Procurement and Asset Disposal Act** in evaluating **Copy Cat's** tender.

25. In support of its case, the Board relied on **Republic vs. Kenya Power & Lighting Company Ltd & another [2013] eKLR** and the Court of Appeal's decision in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others [2012] eKLR**.

26. It was the Board's case that similarly, in this case **Copy Cat's** application is not confined to the decision making process but with the correctness of the decision on matters of both law and fact. **Copy Cat** was dissatisfied by the 1st Respondent's finding that it violated the provisions of clauses 2.4 and 4.9 by submitting an incomplete tender document and thus rendering it non-responsive to the set evaluation criteria and in violation of clause 4.18 and 7.4 of the tender document. **Copy Cat** was thus dissatisfied with the Board's finding that the Ministry complied with the provisions of section 80(2) of the Act.

27. It was therefore the Board's submission that **Copy Cat** had not demonstrated the existence of grounds to warrant interference of its decision through an order of Certiorari. Further, the prayer for an order of Mandamus against the Ministry is misplaced and should not be issued under any circumstances. **Copy Cat's** bid having been disqualified at the preliminary stage, the same was not subjected to the technical and commercial evaluation stages and thus there is no basis for awarding the tender to it.

28. According to the Board, **Copy Cat** has not demonstrated how it breached the rules of natural justice in making the impugned decision as alleged since it was represented by its advocate during the proceedings before the Board and was accorded an opportunity to present its case. There is therefore no basis to impute the Board's decision on the allegation of breach of the rules of natural justice.

29. To the Board all bidders must comply with the requirements of a tender document for their bid to be accepted. It is immaterial whether a bidder, such as **Copy Cat** herein, has participated in similar tenders for whatever length of time and whether they have the requisite skills and resources as alleged. If anything, **Copy Cat** having participated in such tenders for a long time ought to have known what was required of it during submission of bids. Further, it was only after proper submission of the tender document that **Copy Cat** herein would have been able to proceed to the other stages of evaluation and if successful be awarded the tender. Having failed to properly submit its tender, there was therefore no basis for **Copy Cat's** bid to be subjected to the other stages of evaluation and consequently no basis for having the tender awarded in its favour.

30. It was therefore contended that based on the facts, the law and the judicial authorities cited above, this court ought to decline to grant the judicial review remedies sought and accordingly dismiss the present application with costs to the Respondents.

Determinations

38. I have considered the Notice of Motion, affidavits, the submissions and judicial authorities herein and this is the view I form of the matter.

39. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the

body in question to remain accountable.

40. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

41. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

42. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**

43. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See **Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.**

31. Section 80(2) of the ***Public Procurement and Asset Disposal Act*** which states ***the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents.*** In this case it is clear that Clause 2.4.1 of the Tender Document provided a list of the documents that comprised the tender document. Further, clause 2.4.2 provided that failure to furnish all required information required by the tender documents or to submit a tender not substantially responsive to the tender documents in every respect will be at the tenderers risk and may result in the rejection of its tender. It is not in dispute that the applicant herein while returning its bid, did not submit some of the specified documents. The applicant contends that some of the said documents had actually been supplied by and were in possession of the Ministry hence it would have been superfluous for the applicant to furnish the same. That may be so. However that was what the Ministry expected the applicant to furnish and this Court cannot in light of the express provisions of section 80(2) question in these proceedings as opposed to an appellate proceedings the wisdom behind such a requirement.

32. What is clear is however that the applicant did not comply with the strict requirements of the tender. Apart from that the Board found that the applicant submitted a tender in its own format other than the format stated in the tender document. This was a finding of fact which the Board was entitled to make. In **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others [2012] eKLR** the court observed that:-

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...It is clear from the nature of powers given to the

Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with...In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.”

44. Section 173(c) of the *Public Procurement and Asset Disposal Act of 2015*, provides that:

Upon completing a review, the Review Board may substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.

45. In this case it would seem that the ex parte applicant is aggrieved more by the decision of the Ministry as the procuring entity rather than the decision of the Board. In these proceedings however the Court can only deal with the manner in which the Board handled the request for review before it. The Court cannot therefore nullify the decision of the Review Board based on the manner in which the procuring entity handled the process if in arriving at its decision the Board simply followed the law as it did in this case.

46. In the foregoing premises, I find no merit in the Motion dated 1st March, 2017.

Order

47. In the circumstances of this application fails and is dismissed with costs to the 1st Respondent, the Public Procurement Administrative Review Board.

48. Orders accordingly.

Dated at Nairobi this 31st day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Maloba for the applicant

CA Mwangi