



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 513 OF 2015

IN THE MATTER OF THE LAW REFORM ACT & THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF AN APPLICATION BY AKAMAI CREATIVE LIMITED

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, CAP 412A

AND THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS

BETWEEN

REPUBLICAPPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

MINISTRY OF DEFENCE.....1ST INTERESTED PARTY

TRADE CIRCLES LIMITED.....2ND INTERESTED PARTY

EX PARTE APPLICANT:

AKAMAI CREATIVE LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 29th December, 2015, the *ex parte* applicant herein, **Akamai Creative Limited**, seeks the following orders:

1. That this honourable court be pleased to certify the application herein as urgent and admit it for expedited hearing during this vacation.
2. An order of certiorari to remove to this honourable court and quash the decision by the Respondent contained in its ruling delivered on the 15th December 2015, in respect of tender No. MOD423 (0609) 2015/2016 for the supply of milled rice to the defence forces (the tender) whereby it allowed the 2nd Interested Party's request for review no. 60/2015 of 25th November 2015 and consequently directed the Ministry of Defence to award and enter into a contract with the 2nd Interested Party.
3. An order of mandamus directed the Ministry of Defence reinstating its award of contract to the ex-parte applicant and consequently requiring it to immediately enter into a contract with the ex-parte Applicant as the successful tenderer having scored the highest in the evaluation for the performance of Tender N. MOD423 (0609) 2015/2016 for the supply of milled rice to the defence forces.
4. That the costs of this application be borne by the Respondent.

Ex Parte Applicant's Case

2. According to the applicant, the 1st Interested Party (hereinafter referred to as "the Ministry") advertised tender No. MOD/423 (0609) 2015/2016 for the supply of milled rice to the Defence Forces through a tender notice published in the *Daily Nation* on the 8th July 2015 where it invited bids to apply and to obtain the Tender documents from Ulinzi House. In the said tender notice, the Ministry expressly stated that it reserved the right to accept any tender either wholly or in part and did not bind itself to accept the lowest quotes.
3. Pursuant thereto, the applicant in accordance with the instructions contained in both the tender notice and the tender documents submitted its bid together with other bidders which were opened on the 2nd July 2015. It averred that the tender document had three sections which are "**The Invitation to Tender**" – Section 1, "**Instruction to Tenderer**" – Section 2, which also contained an "**Appendix to Instruction to Tenderer**" and "**General Conditions of Contract**" as Section 3. It was expressly stated under the "appendix to instruction to tenderer" that the provisions of the "appendix" would prevail over those of the "instruction to tenderer" where there was conflict between the two. According to the applicant, the tender document expressly provided at paragraphs 2.24 that the Ministry, being the procuring entity, would evaluate and compare the tenders determined to be substantially responsive, pursuant to paragraph 2.22 of the tender documents.
4. It was averred that under the appendix to Instruction to Tenderer, paragraph 15 of the Tender Document provided that the successful Tenderer would be the tenderer scoring the highest marks from points earned in the evaluation and in relation to the prevailing market price in the region and the tenderer having complied with all stipulated tender conditions. Further, the tender documents contained the parameters of evaluation of the tenderers at paragraphs 9, 10 and 11 and included inspection and testing by Kenya Bureau of Standards of the rice sample to determine quality, line of business, physical inspection to ascertain storage facilities, existence of business premises, transport assets and experience *inter-alia* which demonstrates that there were other criteria other than price that were to be considered by the procuring entity/1st Interested Party prior to awarding the contract.
5. According to the applicant, on the 18th November 2015 it received a notification of tender result letter dated 16th November 2015 from the Ministry where it was indicated that the ex-parte Applicant had emerged as the successful tenderer. The ex-parte Applicant acknowledged receipt of the notification of tender and accepted the award on the 19th November 2015 and was in the process of signing the contract when they were informed that the 2nd Interested party had filed Request for Review No. 60 of 25th November 2015 at the Public Procurement Administrative Review Board (hereinafter referred to as "the Board").
6. In the said Request the 2nd Interested party alleged that it had submitted the most competitive and/or the lowest supply price per bag of rice and that it had not received the notification of tender award and/or regret as the basis of seeking orders for stay and setting aside the award of the tender

- and instead sought an order that the award be made to it. From the response filed by the Ministry dated 2nd December 2015 it was denied that the 2nd Interested Party was the lowest evaluated bidder out of all bidders as alleged which fact is clearly evident from the Tender Opening Minutes reproduced in the review board's ruling and appearing at page 4 to 6 of the said ruling where the price quoted by each bidder is clearly shown. The applicant averred that furthermore the Ministry confirmed that it had in accordance with the tender notice and tender document awarded the ex-parte Applicant the contract as the successful tenderer on the basis of having the highest scores upon evaluation and having quoted prices that were more sustained in view of the prevailing market price in the region.
7. According to the applicant, the ex-parte Applicant and the Ministry were denied a fair hearing when they were ambushed at the hearing of the matter with a further affidavit dated 9th December 2015 that had not been served upon them prior to the hearing as required under the relevant regulation which denied them an opportunity to prepare and interrogate the authenticity of the annexures contained therein. It was the applicant's contention that the review board acted illegally and failed to take into account the relevant criteria of determining the successful tenderer as provided for under the Tender Document which was in conformity with the law when it failed to comply with the provisions of section 66 of the **Public Procurement and Disposal Act** (hereinafter referred to as "the Act") as read in its entirety together with Regulation 16(10)(f) of the **Procurement and Disposal Regulations** (hereinafter referred to as "the Regulations").
 8. In addition, it was contended that the review board denied the ex-parte Applicant a fair hearing when it proceeded to set aside and nullify the Ministry's award of tender no. MOD/423/ (0609) 2015/2016 to the ex-parte Applicant on the basis of grounds that had not been raised/pleaded in the request for review and notice of which had been duly given to the parties. In particular the 2nd Interested Party both in its pleadings and at the hearing had not challenged the Ministry's market survey and neither had they raised any issue with the reliance by the Ministry on the reliability of the ex-parte Applicant in having supplied the product to the Ministry in the past without price adjustment as a basis of evaluation that was indicated at paragraph 16 of the tender document and provided for under section 31 of the Act as requirements of a person to demonstrate their capability and experience for one to be qualified to be awarded a contract which provisions the Respondent ignored and thereby made adverse findings in its Ruling.
 9. To the applicant, the Respondent failed to fairly and objectively apply the provisions of section 2 of the Act which sets out the purpose of the Act when it acted *ultra vires* in blatantly disregarding the statutory criteria of evaluating the tender as provided for under section 66 of the Act and Regulation 16(1)(f) of the Regulations and thereby infringed on the requirement that it promotes the integrity and fairness of the procedure provided under the said Act and the Regulations and its decisions in effect defeated the very purpose for which the law was set. It was the applicant's case that in furtherance of its unfairness and bias against the ex-parte Applicant, the Respondent breached the *ex-parte* Applicant's constitutional right under Article 47 of the Constitution which provides a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair when it failed to provide the ex-parte with the signed decision until 7 days after the decision had been delivered despite a letter dated 16th December 2015 requesting to be availed the signed decisions to enable it file the judicial review application before the High Court vacation thus prejudicing the ex-pate Applicant right to file the judicial review application within 14 days from date of the decision as provided for under the Act.
 10. It was submitted on behalf of the applicant that in its decision the Board disregarded the Ministry's criteria on awarding the tender and instead proceeded to set aside and nullify the award of the tender on two grounds: that the provision in the Tender Document that provided that the award to the successful bidder would be made subject to a survey on the prevailing market prices was vague as to how the said prevailing market prices would be determined and secondly, that the Ministry awarded the contract to the applicant on the basis of the previous experience yet that was not part of the evaluation criteria set out in the Tender Document with a view to lock out potential bidders.
 11. It was submitted that the applicant was not afforded an opportunity to address the issue of the previous experience as a criteria for evaluation hence the Board violated Article 47 of the Constitution. As a result, it was submitted that the Board arrived at an erroneous conclusion both in law and in fact. To the applicant this issue was not pleaded or raised in the Request and was

- never addressed during the hearing before the Board and only surfaced in the ruling for the first time. To the applicant the procedure adopted violated the rules of natural justice and in support of this contention, relied on Attorney General vs. Ryath [1980] AC 718, Ridge vs. Baldwin [1964] AC 40, Onyango Oloo vs. Attorney General [1986-89] EA 456, Pashito Holdings Ltd & Another vs. Paul Nderitu Ndung'u & Others [1997] 1 KLR (E &L) and Nagendra Saxena vs. Miwani Sugar Company (1989) Limited Kisumu HCCC No. 225 of 1993.
12. According to the applicant had the Board afforded it an opportunity to address it on the issue of experience as a criteria for the award of the tender, it would have referred the Board to paragraph 16 of the Tender Document which provides that, *“in the case of candidates who have had occasion to transact business with the Ministry of Defence, their performance during the respective contract period shall be brought into focus during the award process.”*
 13. To the applicant the Board’s conclusion exhibited bias, unfairness and bad faith. The applicant also submitted that the conclusion of the Board that there was no provision for experience and that a consideration of the same was tantamount to shutting out competition, ignored statutory provisions of section 31 of the Act that requires that a person demonstrate capability and experience as a criteria for qualification for an award of a tender.
 14. It was contended that the Board’s failure to furnish the applicant with a signed decision until after the expiry of 7 days after the delivery of the decision violated Article 47 of the Constitution.
 15. It was submitted that the applicant had legitimate expectation that the criteria contained in the Tender Notice and Document which complied with the Act and the Regulations. It was submitted that in submitting its tender, the applicant legitimately expected that the evaluation would be in accordance with the Tender Document. To the applicant the Board instead applied its own criteria thus violating the law and the Tender Document and thus acted *ultra vires* its mandate. In support of the submission, the applicant relied on Keroche Industries Ltd vs. Kenya Revenue Authority & 5 Others [2007] KLR 24.
 16. It was contended that in awarding the tender to the 2nd interested party the Board contravened section 66 of the Act as read with regulation 16(10)(f) Of the Regulations which mandates the Procuring Entity to award the contract to the tenderer with the highest scores after the evaluation process prescribed by the law. The applicant relied on JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 Others [2015] eKLR for the holding that:

“The standards for evaluating an open tender are found in section 66 of the Public Procurement and Disposal Act...The provisions of the cited section must be read as one. No one sub-section is to be read in isolation of the others for that would give absurd results.”

17. It was submitted that by awarding the tender to the 2nd interested party on the basis of only one element of the tender contrary to the express of the Tender Document the decision was arbitrary, unreasonable and irrational. It was further submitted that by awarding the tender to the 2nd interested party after finding that the Tender Document was vague, the Board’s decision was irrational.
18. It was submitted that the Board failed to take into consideration the relevant factor of the evaluation and ranking of the tenderers by the Tendering Evaluation Committee and instead took into account an irrelevant factor by purporting that the 1st interested party ought to have conducted market survey from wholesalers which requirement was neither contained under the applicable law nor in the Tender Document.
19. In the premises the applicant urged the Court to allow the application.

Respondent’s Case

20. On behalf of the Respondent Board, it was contended that the Board received the 2nd Interested Party’s Request for Review on the award of Tender Number MOD/423 (0609) 2015/2016) for the supply of milled rice to the defence forces on 25th November 2015. The matter was then set down

- for hearing on 14th December 2015 and the Applicant and Interested Parties were duly notified as required by regulation 75 of the Regulations.
21. It was disclosed that upon filing its memorandum of response on 8th December 2015, the ex-parte Applicant also filed a preliminary objection challenging the jurisdiction of the Board to hear the request for review on grounds that it was time barred.
 22. According to the Board, it heard the Request for Review together with the Preliminary Objection and delivered its decision on 15th December 2015. However, prior to the hearing and determination of the request for review, the ex-parte applicant was notified of the filing of the Request for Review as required by the provisions of Regulation 74 of the Regulations 2006. When the matter came up for hearing on 14th December, 2015, all the parties present were ready to proceed and indeed proceeded for hearing of the application for review and that no party sought an adjournment on the grounds that they had not had an opportunity to prepare and respond to the application for review and therefore it is misleading for the Applicant to allege that they were not accorded a fair hearing. Similarly, the Board contended that the Applicant never sought an adjournment on the basis that they had been served with the further affidavit dated 9th December 2015 by the 2nd Interested Party on the hearing date nor did they seek leave to respond to the same. The board could not thus deliberate on matters not presented before it.
 23. The Board denied that it denied the Applicant an opportunity to be heard as the Applicant opted to proceed with the matter when the Board directed that the Applicant's preliminary objection and the application for review be heard simultaneously. Contrary to the allegation that the Board acted illegally, unlawfully and *ultra vires* of its mandate by disregarding the tender document in relation to the evaluation process, the Board's position was that it did in fact consider the provisions of the tender document as evidenced at page 26 of its ruling and those of the evaluation report prepared by the procuring entity's tender committee. In its view, in giving its ruling, it was guided not only by the tender documents availed by the procuring entity but also by the provision of the Act particularly section 66(4), the Regulations made thereunder and the facts as presented before it by the parties and no extraneous issue whatsoever were considered. To it, its decision was made within its mandate, and the specific sections of the law on which its decision was based have expressly been set out.
 24. The Board asserted that the Applicant herein is actually challenging the merits of the decision of the Board albeit disguised as a judicial review application which ought to challenge the procedure of arriving at a decision. It therefore argued that the application lacks merit and should therefore be dismissed with cost to the Board.

1st Interested Party's Case

25. On behalf of the Ministry, it was contended that the Board acted in excess of its jurisdiction when it disregarded the market survey conducted by the 1st interested party whereas the same was an evaluation criteria under clause 15 of the appendix to tenderers. In its view, the Public Procurement and Disposal Regulations at regulation 8(3)(z) empowers a procurement entity to carry out periodic market surveys to inform its adjudications and the manner of so doing is to be determined solely by the procurement unit. To the interested party, it was in excess of the Review Boards jurisdiction to purport to conduct the aforesaid market survey.
26. The Ministry averred that the Review Board erred in law by disregarding the consideration of previous experience whereas the same was provided for in the tender document under clause 16 of the appendix to instructions to tenderers in the tender document thus disregarding a consideration which was required by the tender instrument.
27. It was its position that the tender in issue is used to supply rice to service personnel both in operational and non operational duty and thus any interruption in the provision of rice would seriously compromise the delivery of the mandate of the Kenya Defence Forces.
28. Its position was that the requirement of market survey in accordance with paragraph 2.31 of the tender document is intended to avoid artificial non competitive levels and enhance ethical practice and standards within the procurement process thus avoiding possible supply interruptions and price adjustments after award of contract. However, it asserted that the Review Board disregarded the other parameters of evaluation such as in finding that the 2nd interested party ought to have

been the lowest evaluated tenderer solely on the financial quote, yet there were quotations much lower than that of the 2nd interested party.

29. It was contended that the Review Board in awarding the tender to the 2nd interested party relied on section 98(b) of the Act which provision is limited to giving directions to procurement entities to do and a redo of the tender and does not empower the Review Board to substitute its decision for that of the procuring entity.
30. To the Ministry, the procuring entity acted within the law and the tender provisions while evaluating and adjudicating the tender and in fact there was no breach of the Public Procurement and Disposal Act and Regulations disclosed in the decision of the Review Board.

2nd Interested Party's Case

31. According to the 2nd Interested Party, it also submitted its bid for Tender No. MOD/423(0609) 2015/2016 which was opened on the 23rd July 2015. According to the 2nd interested party, it did not receive the notification letter from the Ministry prior to the Request for Review which the 2nd Interested Party filed on the 25th November 2015 to which both the ex parte Applicant and the Ministry responded. Thus it is unconscionable for the ex parte Applicant to claim that they were not accorded an opportunity to be heard.
32. According to the 2nd interested party, whereas the ex parte Applicant states that they received the Notification of Tender result on the 18th November 2015, they did not exhibit their alleged "acceptance" and whether that acceptance was given within the time stipulated in the notification, that is seven days of the date of the letter. However, based on legal counsel, the 2nd interested party contended that even if the time of acceptance of the offer were to be computed from the date of receipt of the notification, the same would have fallen before the Request for Review was filed. However, no evidence was furnished to the Review Board or this Honourable Court of any acceptance of the offer in the notification dated 16th November 2015. Thus, it was contended that the ex parte Applicant does not have *locus standi* to bring this application.
33. The 2nd interested party averred and confirmed that he was present during the hearing of the Review and at no point did the Applicant or its Counsel on record raise an objection to the 2nd Interested Party's further affidavit sworn on 9th December 2015 or seek leave of the Review Board to respond to or interrogate it. Nor did the 1st Interested Party raise any opposition to the said Affidavit being on record. In the 2nd interested party's view, the ex parte Applicant's assertion that it was not given a fair hearing on this ground is fraught with mischief because it is the first time that they raise the same. The Applicant elected to proceed with the hearing despite the fact of the further affidavit and cannot now be heard to cry wolf since equity does not favour the indolent.
34. It was averred that it is a blatant falsehood and a deliberate misdirection to assert that the Board denied the ex parte Applicant a fair hearing when it set aside and nullified the Minister's award of the tender to the ex parte Applicant on extraneous grounds particularly because the 2nd Interested party "did not challenge the 1st Interested Party's market survey or the fact that the Applicant had previously supplied the product". From a plain reading of the Request for Review of 25th November 2015 and the further affidavit sworn on the 9th December 2015, the 2nd Interested Party's case was that it challenged the Ministry's determination of the 'prevailing market price' and provided alternative information sourced from other players in the market that evidenced a difference of almost Kshs. 2,000.00 from the purported 'prevailing market price' advanced by the Procuring Entity. Further, the 2nd Interested Party questioned the economic logic of determining the prevailing market price from high-end Supermarkets whose core business is to offer goods at retail prices and not at wholesale/bulk sellers prices. It averred that the 'market survey' conducted by the Ministry to determine the prevailing market price was subjective because it unreasonably gave unfair advantage to the ex parte Applicant, an act which defeated the objectives of the section 2 of the Act.
35. In the 2nd interested party's view, it is succinctly clear from a plain reading of the Review Board's decision that it went to great lengths to reproduce the tender evaluation process and the respective arguments in pages 3 to 22 of the decision and then interrogated the said process in pages 25 to 30.

36. With regard to paragraph 18 of the verifying affidavit, the 2nd interested party urged the Court to find that the Board acted fairly and objectively and complied with the relevant provisions of the law by giving effect to the provisions of section 2 of the Act. Further to the foregoing it is blatantly false to assert that the Board acted *ultra vires* the provisions of the Act by setting aside and nullifying the award of the Tender to the Applicant and substituting the same with an order awarding the Tender to the 2nd Interested Party because section 98(d) of the Act gives the Board the power to do so.
37. While conceding that the Board did not immediately furnish the Applicant with its decision, the 2nd Interested Party contended that it was also victim to the said delay. The foregoing notwithstanding as both the application for leave and the present application were filed within the stipulated period thus, no prejudice was occasioned on the Applicant.

Determinations

38. According to the applicant, the ex-parte Applicant and the Ministry were denied a fair hearing when they were ambushed at the hearing of the matter with a further affidavit dated 9th December 2015 that had not been served upon them prior to the hearing as required under the relevant regulation which denied them an opportunity to prepare and interrogate the authenticity of the annexures contained therein. However there is no indication that the applicant sought for more time to deal with the said issues.
39. It is clear that the Board reversed the procuring entity's decisions based on two grounds. The first ground was that the procuring entity erred in rejecting the 2nd interested party's bid on account that it offered a price lower than what it considered prevailing market rates. To the Board in so arriving at its decision, the procuring entity contravened the provisions of Article 227 of the Constitution and section 2 of the Act. It was the applicant's contention that the review board acted illegally and failed to take into account the relevant criteria of determining the successful tenderer as provided for under the Tender Document which was in conformity with the law when it failed to comply with the provisions of section 66 of the **Public Procurement and Disposal Act** (hereinafter referred to as "the Act") as read in its entirety together with Regulation 16(10)(f) of the **Procurement and Disposal Regulations** (hereinafter referred to as "the Regulations").
40. Article 227 of the Constitution provides that:

(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.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts;

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and

(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

41. Section 2 of the Act provided as follows:

The purpose of this Act is to establish procedures for procurement and the disposal of

unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives—

- (a) to maximise economy and efficiency;**
- (b) to promote competition and ensure that competitors are treated fairly;**
- (c) to promote the integrity and fairness of those procedures;**
- (d) to increase transparency and accountability in those procedures; and**
- (e) to increase public confidence in those procedures;**
- (f) to facilitate the promotion of local industry and economic development.**

42. Section 66(2) of the Act provided that:

The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

43. According to Regulation 16(10)(f) of the Regulations the report of the evaluation committee to be submitted to the tender committee under Regulation 16(9) thereof is required to include a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score. This position was reflected in clause 15 of the Tender Document which expressly provided that;

The points earned in the evaluations shall be added up and the tenderer scoring the highest points and in relation to the prevailing market price in the region and price having complied with all stipulated tender conditions will be deemed the successful tenderer.

44. It is therefore clear that apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest.

45. According to the Board, other than the issue of pricing the 2nd interested party passed all the other stages of evaluation that the procuring entity had subjected its bid through. However the Board noted that though the provisions of the tender document provided that an award to the successful bid would be made subject to a survey on the prevailing market prices, this clause was vague as to how these prevailing market prices were to be determined. This finding however flies in the face of Regulation 8(3)(z) of the Regulations which expressly provides that one of the functions of the procuring unit is to carry out periodic market surveys to inform the placing of orders or adjudication by the relevant award committee. I agree that the manner in which the procuring entity sets out to achieve this function ought to be left to the entity.

46. Therefore by finding that the said clause as inserted in the tender document was vague, the Board was in effect disregarding one of the provisions in the Regulation. This was contrary to section 27(1) of the Act which provides that:

A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.

47. The Board in my view therefore had no powers to declare the compliance with a regulation vague. If there was vagueness in the provision such vagueness can only be cured by the necessary amendment and not by ignoring the same.

48. That the Board has wide powers in exercising its review jurisdiction is not in doubt. The Board's power in the exercise of its review jurisdiction were explained by the Court of Appeal decision in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others (2012) e**

KLR where the Court expressed itself as follows:

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring 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 of the procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with. Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st respondent’s tender had met the mandatory conditions. The issue whether or not the 1st Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it. 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 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. The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction”.

49. It must however be remembered that the Board’s powers are not unlimited. As was held in JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR:

“The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document.”

50. It was similarly appreciated in Republic vs. Public Procurement Administrative Review Board & 3 Others Ex Parte Olive Telecommunication PVT Limited [2014] eKLR that:

“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.”

51. The Board, in my view while has wide powers of review ought not to make a determination whose effect would amount to a decision totally different from the one which the procuring entity set out to achieve by commencing the tender process.

52. I therefore agree 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. That was the position adopted by the Court in JGH

Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 Others (supra) where it was held that:

“If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender.”

53. Therefore if the Board found that the clause in the tender dealing with the survey on the prevailing market prices was vague, one wonders on what basis it proceeded to award the subject tender to the 2nd interested party. Such decision can, as rightly contended by the Applicant, be termed as being Wednesbury irrational as there is not rational basis upon which such a decision could be arrived at.
54. The other ground on which the Board based its decision was that the Ministry awarded the contract to the applicant on the basis of the previous experience yet that was not part of the evaluation criteria set out in the Tender Document with a view to lock out potential bidders. I have perused the pleadings before the Board and the submissions of the parties as reproduced in the decision of the Board, and it is clear that this was not one of the issues raised before the Board. It would seem that the Board raised the issue for the first time in its decision without affording an opportunity to the parties especially the applicant to address itself to the same. In **Barasa Wanagwe vs. Jafetha Kimokotiani & 7 Others Civil Appeal No. 23 of 1986** it was held by the Court of Appeal that:

“Counsel for the appellant tells the Court correctly that the Judge raised the particular point for the first time in his judgement and so no submissions were made. The exact position was not raised in the pleadings. The defences will have to be amended to include a specific reference to section 6(2)(b) of the Land Control Board to ensure that the issue whether the consent is necessary or not, is considered...We think that it was improper for the Judge to decide that issue of law without giving counsel for the appellant an opportunity to exhibit the title and documents and make submissions on the scope of section 6(2)(b).”

55. In so deciding, it is clear that the Board violated the rules of natural justice. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural

justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio.*" [Emphasis mine].

56. This was a restatement of Lord Wright's decision in General Medical Council vs. Spackman [1943] 2 All ER 337 cited with approval in R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 that:

"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."

57. In Ridge vs. Baldwin [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows:

"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

58. It was contended that the Board's failure to furnish the applicant with a signed decision until after the expiry of 7 days after the delivery of the decision violated Article 47 of the Constitution. In my view, Article 47 of the Constitution requires that parties to an administrative proceedings be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid. However, since these proceedings were instituted within time nothing of substance turns on the said issue.

59. Having considered the issues raised in this application, it is my view and I hereby hold that this application is merited. The Board seems to have considered irrelevant or extraneous issues while failing to consider relevant ones. As this Court held in Zachariah Wagonza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR:

"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."

60. It follows that the Notice of Motion dated 29th December, 2015 succeeds and an order of certiorari is hereby issued removing into this Court for the purposes of quashing the decision by the Respondent contained in its ruling delivered on the 15th December 2015, in respect of tender No. MOD423 (0609) 2015/2016 for the supply of milled rice to the defence forces (the tender) whereby it allowed the 2nd Interested Party's request for review no. 60/2015 of 25th November 2015 and consequently directed the Ministry of Defence to award and enter into a contract with the 2nd Interested Party, which decision is hereby quashed. Having quashed the said decision, it follows that the prayer for mandamus is unnecessary.

61. The costs of these proceedings are awarded to the Applicant and the 1st interested party to be borne by the 2nd interested party.

Dated at Nairobi this 31st day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Thuo for the Applicant

Cc Mutisya