



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 18 OF 2016

KENYA PORTS AUTHORITY.....APPELLANT

V E R S U S –

AUTOXPRESS LIMITED.....RESPONDENT

AND

HAJI MOTORS LIMITED

KINGS WAY TYRES LIMITED.....INTERESTED PARTIES

(Being an appeal from the award and order of the Public Procurement

Review Board dated and delivered in Nairobi on 22nd December, 2015

in Public Procurement Administrative review Number 61 of 2015)

JUDGEMENT

1. Autoxpress Ltd, the Respondent herein, had complained before the Public Procurement Administrative Review Board that the tender process was not fair for violating Section 66(4) of the Public Procurement and Disposal Act (now repealed), Regulation 50 of the Regulations made thereunder and Article 227 of the Constitution of Kenya, 2010. Kenya Ports Authority, the Appellant herein presented the documentation from the advertisement of the tender, through the evaluation processes until the award of the tender. The Appellant maintained that it did not favour anyone in the award but simply carried out the tendering process in a manner that upholds the principles underlying public procurement. By its award made on 22.12.2015, the Board found that the request for review was merited and proceeded to *inter alia* annul the entire tendering process and further ordered for a re-tendering within 30 days. The re-tendering process has not taken place because the decision was stayed by temporary orders for stay given on 22nd January 2016 and later confirmed on 18.03.2016. The Appellant was aggrieved by the decision hence this appeal.

2. On appeal, the Appellant put forward the following grounds of appeal.

1. The Board erred in law and fact by conflating and confusing the issue of its powers under Section 98 of the Public Procurement and Disposals Act and the power to grant reliefs on the basis of pleadings.

2. The Board erred in law and fact in granting reliefs that were not sought by the Appellant in

the pleadings.

3. The Board erred in law and in fact in determining the validity of the Tender Document when there were no pleadings questioning the same nor was there any prayer to annul the Tender Document.

4. The Board erred in law and in fact in finding that there was a breach of Regulation 50 of the Public Procurement and Disposal regulations 2013 in the Financial Evaluation of the bids.

5. The Board erred in law and fact by finding that the Tender Number KPA/030/2015-16/PSM could not be awarded in part to one or more of the successful tenderers.

6. The Board erred in law and in fact when it failed to consider and make a determination on issues pleaded by the parties namely:

1. The consequence, if any, of an acceptance of award in writing by the same tenderer who is questioning the award.

2. The principles of public procurement enshrined in section 2 of the Act as applied against the review application.

3. When the appeal came up for hearing, learned counsels appearing herein recorded a consent order to have the appeal disposed of by written submissions. I have critically examined the manner the Public Procurement Administrative Review Board (PPARB) dealt with the Respondent's complaint plus the rival submissions and authorities filed and exchanged by the parties. Hajj Motors Ltd and Kingsway tyres Ltd the 1st and 2nd Interested Parties too filed and served their submissions.

4. On the first two grounds of appeal it is submitted that the Board erred in law and fact by conflating and confusing the issue of its powers under Section 98 of the Public Procurement and Disposal Act and the power to grant reliefs on the basis of pleadings. It was the submissions of the Respondent before the Board that the reliefs sought by the Respondent was the only thing the Board could give to the Respondent. It would appear the Board in answering that issue started from the point of asking the question as to whether to request for review should be looked at in isolation or together with the affidavit/statement of Dipesh Dodhia. In the end the Board then decided that the request for Review could not be looked at in isolation but had to be looked at together with the affidavit/ statement which the Board considered raised several allegations of breach of the constitution and the statute.

5. The Appellant proceeded to point out that the Board enumerated several breaches of the constitution and the statute that had been alleged have been breached.

6. The Appellant argued that the Board fell into error at this entry point. It is said that even after framing the issues on its own, completely misunderstood the issue. It is submitted that what the Board set out to decide was whether the Respondent was entitled to the reliefs sought on the basis of the request of review as framed. The Appellant further argued that the main issue was that the request for review as framed had sought two specific reliefs i.e whether it could grant those specific reliefs as opposed as to whether it had power to grant other reliefs. The Appellant also argued that the Board failed to appreciate the question before it was not the extent of its powers but rather whether those extensive powers would be excised in the specific circumstances of this case. In short the Appellant is of the firm view that the Board has no power to issue the orders under Section 98 of the repealed Act irrespective of whether or not they have been prayed for. Therefore the Board gave an answer to a question no party asked it to answer thus committing a fundamental error. The Respondent is of the view that the Board has wide powers to review and examine whether the procuring entity complied with the laid down procedures, laws and rules in the procurement process. The Respondent contended that the Board properly exercised its powers in nullifying the process as per Section 66(3). It further pointed out that the Board found out as a matter of fact that the ministry failed to adhere to the procurement rules in the process and therefore the entire process was nullified under Section 98 of the Act.

7. Haji Motors Ltd, the 1st Interested Party supported the appeal arguing that the Board could not determine and pronounce judgment on questions which were not pleaded at all by the parties in this case. Kingsway Tyres Ltd, the 2nd Interest party also made arguments similar to those submitted by the Appellant and the 1st Interested Party, that is to say that the Board erred by formulating questions for determination through the craft of interpretation.

8. After a careful consideration of arguments submitted in support and against the first ground of appeal, I have come to take the following view over this ground. There is no dispute that in this case the Board's jurisdiction was invoked in accordance with the contents of the Respondents request for review.

9. In the request, the Respondent only asked the Board to order that authentic reasons be provided as to why it did not win the majority. The Respondent herein indicated that the reasons for seeking this order was that its technical specifications were accepted, its financial bid was the lowest and it had been awarded only 27% of the tender yet it had been supplying the Appellant with such goods before without receiving any complaints. It is also apparent that the Respondent did not cite any breach of the provisions of the Public Procurement and Disposal Act 2005 (now repealed) or any Regulations therein. It is also glaringly clear that the Respondent did not pin point any fault on the part of the Appellant during the procurement process.

10. The end result of the Board's decision is that the entire tendering process was annulled. With respect, I am persuaded by the arguments put forward by the Appellant and the Interested Parties that the Public Procurement Administrative Review Board's action in formulating questions for determination and decisions is in contravention of Section 95 of the Public Procurement and Disposal Act, 2005(repealed) in that the facts alleged by the Respondent did not support the reliefs sought. There was no request in its application before the Board for the nullification of the award. The Respondent had merely sought to be given the reasons for its failure to be awarded the whole tender. For the above reasons I find the appeal to be well founded.

11. In grounds 3, the Board is accused of determining the validity of the tender document when there were no pleadings questioning the same nor was there any prayer to annul the same. It was correctly pointed out by the Appellant that the Respondent had in its pleadings made specific averments that it wanted the Board to review the award process and substitute the award of 27% of the tender with an award of 100% of the same in the Respondent's favour. The Appellant further argued that there was no complaint against the validity of the tender document. However, the Board decided to inquire into the validity or otherwise of the tender and found that the award was in contravention of the form of tender by the respective bidders. The Board also formed the opinion that the tender did not contemplate the award of the tender in lots or per item. The Board further opined that the tender document did not state how the marks were to be awarded and finally concluded that the same was based on defective documents from the word go. This court was urged to find that the findings based on the validity of the tender documents was a misdirection. The Respondent on the other hand is of the view that the Board has a wide discretion under Section 98 of the Act (repealed) to determine the validity of the tender document even though there are no pleadings questioning the same. I have carefully considered the rival submissions over this issue. It is not in dispute that the Board determined the validity of the tender document yet there was no pleadings from the Respondent to do so. With respect, I agree with the Appellant's argument that, that was a great misdirection on the part of the Board. The Board's decision was made without giving the Appellant and the Interested Parties reasonable opportunity to respond. Just like in the first two grounds of appeal, I find that no matter how noble and well intentioned the Board was, it introduced and determined issues which the parties had not put it for determination.

12. The Court of Appeal expressed itself succinctly over the issue in **Stephen S. Pareno vs= Judicial Service Commission of Kenya (2014) eKLR** in part as follows:

“It was correctly opined by the learned judge that there was no jurisdiction to award a relief which had not been sought for by a party to any proceedings. However this notwithstanding, the learned trial judge failed to appreciate that this principle binds both the litigant and the court.”

13. In the fourth ground of appeal, it is the submission of the Appellant that the Board erred in law and fact in finding that there was a breach of regulation 50 of the Public Procurement and Disposal Regulation, 2013 in the Financial Evaluation of the bids. It is the submission of the Appellant that the Board appreciated that the Respondent's main contention before it was that the award of the tender violated Regulation 50 of the Public Procurement and Disposal Regulation 2013 as well as Section 66(4) of the 2005 Act. The Board noted that the Respondent was declared as having attained the score of 75% at the technical evaluation stage and therefore qualified to move to the financial evaluation stage. The Appellant avers that the Board committed a factual error in the above holding. The Respondents are of the view that the Board made no error in finding that there was a breach of Regulation 50 of the Regulations.

14. The Respondent pointed out that clause 2.32.2 of the appendix to instructions to tenderers set out the technical requirements and the aggregate marks that were to be awarded to each bidder for the purposes of determining technical compliance, the tender document did not however state how the marks were to be apportioned. The parameters having not been set out in the tender document and were therefore not part of the evaluation criteria set out in the tender document. It is argued that this action therefore contravened the provisions of Section 66(2) of the Act on evaluation. The Respondent further pointed out that the technical evaluation report shows that one of the bidders, that is the 2nd Interested Party herein attained a combined technical score of 100% but a perusal of the attachment numbers headed terminal Engineering shows that out of the 18 items it bid for under this head, 6 of the said items were found to be non compliant which begs the question of how the bidder was awarded 100% marks in technical evaluation with such a substantial number of its items being declared as non-compliant. The Respondent is of the view that the Board correctly applied that this tender was based on a defective tender document *ab initio* by following the evaluation committee to fill in the gaps and add a scoring criteria that was not contained in the tender document and that the financial evaluation was also based on the wrong premise and the entire evaluation process was so fundamentally flawed leading upto uncertain awards being made to three different bidders in a single tender and which were not in conformity with the prices submitted by the bidders in their forms of tender. After a careful consideration of the rival submissions over this ground. I am persuaded by the Appellant's arguments that the Board committed a factual error in the findings that the Appellant's financial evaluation committee imported the technical requirements into the financial evaluation. The record shows that the tender required the supply of at least one hundred and thirty eight different items. Each item had different manufacturers with different qualities. Each bidder appreciated this diversity and therefore provided at least three different prices depending on the brand to be supplied. This would then mean that at the technical evaluation stage, the bidders will score for offering an item that meets the technical specifications. That is all that the technical evaluation committee was expected to do and that is all they did. When bids are moved to the financial evaluation committee, the finance committee will in most cases check on the technical evaluation committee's report to find out which specific item that met the technical qualifications and with the lowest price. It is that item that would then be said to have had the lowest evaluated price. The material placed before this court would show that the Board looked at the tender as a tender where the price indicated in the form of the tender assumed that the items to be supplied were similar and were therefore capable of being awarded on the basis of the cumulative price indicated in the form of tender. With respect, I agree with the submission of the Appellant that had the Board considered the above factors and the unique nature of the tender, it would have come to the conclusion that the financial evaluation committee did not import technical requirements but only looked back to the technical committee to ensure that it was awarding the tender at the lowest price but for a technically compliant product.

15. The Appellant further argued that the Board apart from determining issues not raised by the parties, also failed to consider and determine issues raised by the parties. I have already stated that the Respondents are of the view that the Board did not err. The record shows that the Appellant had invited the Board to determine the question as to whether or not the Respondent was estopped from contesting the award of the tender having itself accepted the award on 26.11.2015. It would appear this position was strongly rebutted by the Respondent in its submissions. The Board did not deem it fit to determine the issue as to whether or not the Respondent was now estopped from challenging the procurement process. This is in my view rendered the Board's decision incomplete hence amenable to challenge.

16. In the final analysis, I find the appeal meritorious.

It is allowed as prayed. Consequently, the decision of the Public Procurement Administrative Review Board is set aside and is substituted with an order dismissing the request for review with costs to the Appellant.

Dated, Signed and Delivered in open court this 19th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent