



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW NO. 72 OF 2016

1. BLUE SEA SERVICES LTD

2. JOHN MUSYOKA KIVUNZI.....APPLICANTS

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

KENYA PORTS AUTHORITY.....INTERESTED PARTY

J U D G M E N T

Outline

1. This Judicial Review emanates from the decision of the Public Procurement Administrative Review Board dated 14/9/2016 in which it determined a Request for Review by the *exparte* applicant as follows:-

“ **FINAL ORDERS**

In view of all the foregoing facts and in the exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act the Board makes the following order on this Request for Review:-

a) The decision made by the procuring entity on 11th August, 2016 awarding the several zones under Tender No. KPA/124/2015-2016/MO hereby annulled.

b) The procuring entity is directed to carry out a financial re-evaluation of the tenders that reached the financial evaluation stage and award each zone to the lowest evaluated bidder per zone in accordance with Clause 36.1 of the tender document.

c) The re-evaluation process set out in (b) above shall be completed and awards made within Seven(7) days from today’s date.

d) Each party shall bear it’s own costs of this Request for Review. ”

2. That determination concerned the award by the Interested Party over Tender No. KPA/124/2015-16/MO for provision of cleaning and hygiene services in designated zones of the interested party's premises. Being a Judicial Review Jurisdiction, this court in making its determination on the challenged decision of the Respondent can only concern itself with the process and not the merits.

3. In the matter before me the *exparte* applicant seeks two substantive orders that:-

a) THAT an order of Certiorari be issued to quash the decision made on 14th September, 2016 by the Respondent in Public Procurement Administrative Review Board No. 61 of 2016 between the Applicants herein versus the Interested Party herein whereby the Respondent directed the Interested Party to, within seven (7) days of the said date, award tenders in respect of zones 1 to 13, 16 and 21 to the lowest evaluated bidders per zone in respect of Tender No. KPA/124/2015-16/MO despite the tendering process having been nullified by the Respondent. For the avoidance of any doubt, the Interested Party be directed to undertake a fresh tendering process in the said zones.

b) THAT an order of Certiorari be made to quash the decision made on 14th September 2016 by the Respondent in Public Procurement Administrative Review No. 61 of 2016 between the Applicants herein versus the Interested Party herein whereby the Respondent decided that the Applicants were not entitled to payment of costs on the said review and for the avoidance of any doubt the Interested Party be ordered to pay the costs of the said review to the Applicants.

Background

4. Tender No. KPA/124/2015-2016/MO was floated by the interested party on terms contained in the Tender Document. One of the terms was that the bidders would be put through two evaluation stages being technical and financial evaluation criteria and that only tenderers who scored atleast 75% at the Technical evaluation stage who be allowed proceed to be evaluated at the Financial Evaluation Stage.

5. According to the *exparte* applicants, only 44 tenderers proceeded to the Financial evaluation stage out of the 127 and therefore 83 tenderers were disqualified as non-responsive. However, according to the Respondent in its analysis 78 tenderers were non-repulsive and therefore 49 ought to have proceeded to the Financial evaluation stage. To the contrary the tenderers listed as having been responsive and were scored at the technical evaluation stage are listed as 31 with 4 firms failing to achieve the minimum score of 75%.

6. According to that listing therefore only 27 tenderes qualified to proceed to the Financial evaluation stage. I may say even at this preliminary stage that it is difficult to reconcile the three sets of facts from the Record of the Board.

7. It is contended that although the procedure was clear on how tenderes would be openly and transparently evaluated, the 2nd *exparte* applicant participated in the Financial Evaluation Stage but its name is not listed as such.

8. Additionally, the applicants complain that although two tenderers, Naldo Enterprises and Graceworth Enterprises did not appear at both the technical and Financial Evaluation Stages they ended up being beneficiaries of awards of zones 6 & 7 respectively. One Ollreggy Investment scored 55 % and was therefore in terms of the tender document disqualified from proceeding to the Financial Evaluation Stage, but ended up being a beneficiary of the award of zone 16.

9. Examples are then provided to demonstrate that the awards did not make financial sense when regard is taken for the requirement that the persons awarded the tender were bound to comply with Labour Statutes regarding remuneration of the staff together with the fact that two different zones with similar requirements were awarded at different prices.

10. Based on those complaints the *ex parte* applicants fault the decision by the Respondent for being contrary to the parent statute in that the effect would be to allow the persons who were by the terms of the tender not allowed to participate in further evaluation. To the *ex parte applicants*, the enforcement or execution of the decision of the Respondent will lead to permitting the interested party flout its own set procedures against logic and therefore allow it to act contrary to the dictates of the constitution at Articles 10, 47 201 and 227. Further it is contended that transparency required the interested party to disclose to the tenderers, at the time of opening the tenders, its estimated costs for the tender and that having nullified the award, it was illogical to order that it starts midstream. Those grounds were reiterated in the statement of facts and the affidavit in verification and sought to be proved by the documents annexed thereto.

11. The application was opposed by both the Respondent and the interested party who respectively filed grounds of opposition and a replying affidavit. For the Respondent, it is contended that the application is frivolous vexatious and amount to an abuse of the court process; that no prejudice was disclosed to the *ex parte* applicants; that the issues raised here were the same raised before the Review Board and that the decision by the Respondent was sound and not liable to be disturbed.

12. The interested party on its part narrated the circumstance leading to the application and contended that the decision by the Respondent was sound in law and in consonance with the powers donated to it, the Review Board, by section 173 of the Act. The matter came before court on 3/10/2016 and after disposing of an application by the interested party to correct the extracted order so as to conform with the orders granted by the court, it was ordered that parties file submissions respecting the application and that they would attend court on 7/11/2016 to highlight the submissions.

13. Pursuant to those directions the *ex parte* applicants filed submissions on the 4/11/2016 while the interested party had filed submissions on 01/11/2016. The respondent choose not to file any submissions. When the parties attended court to highlight the submissions an issue arose as to the evaluation results of the tenderers and the court made an order pursuant to the provisions of 67 of the Act. In compliance with that order, the interested party furnished court with a document headed "Technical Evaluation for Tender No. KPA/124/2015 – 2016/MO – DIENNIAL CONTRACE FOR PROVISIONS OF CLEANING AND LANDSCAPING SERVICES".

Submissions by the parties

14. The submissions therefore proceeded on the basis of documents formally filed by the parties as well as that document as availed to court as aforesaid. MR GIKANDI ADVOCATE, for the applicant dwelt largely on the facts pleaded in the application and only underscored the fact that the totality of the record did not disclose transparency and accountability as the core values under the Act. Premium was placed on the fact that Ollreggy investments having not been qualified to proceed to Financial Evaluation would not have awarded the tender but was awarded. Equally it was pointed out that the 2nd *ex parte* applicant was disclosed to have scored 90%, by the document given to court by the interested party, at the technical evaluation stage yet the analysis by the Respondent did not disclose it to have participated at the technical evaluation at all.

15. Issues were taken with the number of entities who participated at the technical evaluation when one looks at the data quoted by the Review Board in its determination and the document availed to court by the interested party. The counsel for the applicants then asked the justification for exclusion of a whopping 17 entities from the list of the evaluation committee of the interested party.

16. Mr. Gikandi then wound up his submissions with an attack on the Board for denying his clients the costs of the Review Proceedings yet they had succeeded and without assigning any reasons therefor. He then relied on the decision in **Associated Provincial Picture House Ltd vs Wednesbury Corporation [1974] KB ALL ER** and the **LAW SOCIETY OF KENYA VS JUDICIAL COMMISSION OF INQUIRY MISC. CIVIL APPLICATION NO. 141 OF 1998** (Unreported) for the proposition that any demonstrated irrationality, illegality or procedural impropriety is enough to vitiate a decision and therefore a justification to issue an order of judicial review which in this case in an order for certiorari.

17. Reliance was equally placed on the decision in **Peter vs Emery Reimbold & Strict Ltd [2002] App L.R** for the proposition that it is inescapable duty on any adjudicating authority to give reasons for its decision so that the parties before it leave with knowledge why one party won and the other lost. The same proposition was also cited in case of **Flannery vs Hanitax Estate Agencies Ltd [2000] WLR 377** and **Auron Odipo vs Boitallin Supply & Trading Co. Ltd & Another [2016]eKLR** . To Mr. Gikandi, the Review Board was obliged to give reasons why the award was nullified on the basis that the procurement entity introduced a criteria midstream and yet proceeded and ordered that the process proceed from the evaluation stage without assigning any reason.

18. In conclusion Mr. Gikandi submitted that articles 201 and 227 of the constitution which set thresholds for public finance administration and administration of procurement and public asset disposal was not complied with by both the interested party and the Respondent. He was of the view that failure to give reason had the effect of diluting the values systems envisaged by section 3 of the Act and the constitution and seeking to promote transparency fairness, integrity affirmative action, social justice equity and inclusiveness. To him failure to give reason by the Review Board would create bad perception that the principles of the law were never complied with and were not due for observation. He then sought and urged the court to allow the application and quash that part of the decision that sought to have the procurement process proceeded with midstream.

19. Mr. Simiyu who had informed the court that he was to hold brief for Ms. Lutta later on sought to be excused from attending and was released. The matter therefore proceeded without input on the part of the Respondent who also failed to offer any written submission.

20. On its part the interested party opposed the application and offered both written and oral submissions through Ms. Ikegu advocate. The gist of those otherwise very cogent and forceful submissions were that the board's decision could only be disturbed if there was demonstrated *ultra vires* acts or if there could be demonstrated acts of illegality, irrationality or procedural impropriety. Ms. Ikegu submitted that the decision by the Respondent was sound and within its mandate as enacted under section 28 and 173 of the Public Procurement & Asset Disposal Act, No. 33 of 2015 which included the power to annul a decision by an accounting officer or procuring entity and to give directions with respect of anything to be done with regard to a procurement process. To the interested party the Board acted within its mandate and therefore the *ultra vires* rule cannot be invited to warrant grant of the order of *certiorari*.

21. It was equally submitted on the part of the interested party that judicial review looks at the process and not merit and therefore the powers the court exercises are not appellate and that the court cannot look at the merit of the decision. To her the fact that all those who were interested in the procurement process by the interested party having been notified of the Request for Review having been given the opportunity to appear and be heard and having been heard at the review, the process was not capable of being faulted as the Review Board acted within its mandate. The decision in **Associated Provincial Picture House Ltd vs Wednesbury Corporation [1947] 2 ALL ER 68** was relied upon by Ms. Ikegu for the proposition that a decision by the Board can only be quashed if it is shown that the Board flouted the law and not otherwise by the court substituting its discretion for that of the Review Board.

22. The second limb of the submissions was that there was never demonstrated any taint on the decision by the "Three Is" (3 Is) - illegality, irrationality and impropriety in procedure. The decision in **Pastoli vs Kabale District Local Government Council & Others [2008] 2 E A 30**, was then cited for the definition of illegality, irrationality and procedural impropriety. To the interested party the determination by the Review Board was beyond reproach on the parameters available for upsetting such decisions. Ms Ikegu therefore prayed that the application be dismissed for lacking merits.

Analysis and determination

23. Both sides in this litigation agree that this court has powers to upset the decision of the Review Board only if the Board is demonstrated to have acted in a judicial manner being a public body and only when that decision was *ultra vires*, illegal, irrational or tainted with procedural impropriety. That the Review Board was a public body exercising judicial functions so as to be susceptible to supervision by this court

by the process and procedure of judicial review is not in dispute and was never made an issue by the parties. The court takes the view that by dint of its powers under the Act, and the provisions of Article 169 of the Constitution the Review Board is a judicial body and must be seen as an inferior tribunal to the High Court and therefore subject to the courts power of supervision by judicial review. What however the court needs to decide is whether, on the record availed, the tribunal met its mandate and if so whether the decision is subject to disturbance.

24. In seeking to make that determination it must be born in mind that the *ex parte* applicants only impugn part of the decision which ordered that the process of procurement by the interested party proceeds by way of re-evaluation of the tenders that reached the financial evaluation stage and award each zone to the lowest evaluated bidder per zone in accordance with clause 36.1 of the tender document to be completed within 7 days from the date of the decision and the order that each party bears own costs.

25. The courts appreciation of the matter is that two issues are due for consideration:-

i) Did the Respondent conduct itself within the law so as to be beyond reproach within the parameters set for judicial review?

ii) Was the Respondent entitled to order that each party bears own costs when the *ex parte* applicants had succeeded in their request for review?

26. I will deal with the two issues in the order set out above

a) Did the Review Board Respondent conduct itself within the law so as to be beyond reproach within the parameters set for judicial review.

This court's jurisdiction in an application for review is well defined and may need no repetition. Simply put the court is bound to only look at the process and never the merits as judicial review is never an appeal. The court is therefore only mandated to examine the record of the Respondent and certify itself that in coming to the decision it did, the Respondent has not exposed itself to demonstrated charges of illegality, irrationality and procedural impropriety.

27. This matter was adjourned on 7/11/2016 to the 11/11/2016 because it was not possible for the court on that day, to appreciate the accusation by the *ex parte* applicants that parties who did not qualify to proceed to the financial evaluation stage were indeed awarded tenders and that parties who indeed qualified for that evaluation stage and did participate were not shown to have participated. Because of that difficulty the court invoked the provisions of section 67 of the Act to compel production by the procuring entity of its Technical evaluation summaries. Indeed the interested party cooperated and the document was availed to court and the parties.

28. The availability of that document evidently demonstrated an open and irreconcilable discrepancies between the record the Review Board relied upon in its decision and the record of evaluation and results as kept by the interested party. There could be more but the following three discrepancies are to the court enough to guide on the procedural propriety of the proceedings before the Review Board:-

i) while the Review Board repeated remarked and observed that out of the 127 tenderers only 49 qualified to the Financial evaluation stage after 78 had been disqualified for being non-responsive, the table at pages 6 -7 of the decision show that only 31 tenderers were responsive. To the contrary, the evaluation summary by the interested party say 48, and not 49 were responsive. The first question on openness and transparency is how to reconcile that disparity. One may as well ask whether either the Review Board or the interested party or indeed both ever got their facts right or just manipulated the list and the technical evaluation results. That to this court begs the question whether the process met the requirements of section 3 of the act as read with Articles 10 & 27 of the constitution. To this court that disparity shrouds both the tender process and the proceeding before the Review Board in a cloudy picture and it therefore falls short of the Constitutional Values and Principles of openness, Transparency and accountability. The records in so far as it cannot

account for one tenderer at the technical evaluation stage is bad enough. Singularly that was enough for the Review Board to nullify the entire process. It did not and it falls upon this court to review that act and remedy the wrong so committed.

ii) The Records of the Review Board are clear that a tenderer called Ollregy Investments, entry No. 30 at page 7 of the decision, scored 55% at the technical evaluation stage and was therefore by dint of clause 28.2 not qualified to proceed to the financial evaluation stage. However the evaluation summary provided by the interested party on its part says that tenderer scored 80%. Once again between the Respondent and the interested party who has the true facts. It was however the duty of the Review Board to ensure that the level playing ground intended to achieve transparency and integrity of its process as set out in the tender document was complied with. That compliance required that only those who qualified upon both technical evaluation and financial evaluation were due for consideration for the awards. Contrary to that duty the Review Board turned its eyes to the fact that Ollregy did not score the minimum score but was awarded zone 16 at Kshs.348,000 per month.

iii) There were also two bidders namely Graceworth Enterprises and Nalido who are not shown by the records of the Review Board to have participated at the Financial Evaluation Stage but were all the same awarded tenders for zones 7 & 6 respectively.

29. In the words of the judges in the decision of **Associated Provincial Picture House (Supra)** failure to take into account a matter it was under duty to take into account is a ground for issuance of certiorari. The court said:-

“ The law recognizes certain principles on which discretion must be exercised but within four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law. What, then are those principles? They are perfectly well understood. The exercise of such discretion must be real exercise of discretion. If the statute conferring discretion there is to be found expressly or by implication, matters to which the authority exercising discretion ought to have regard, then, in exercising the discretion they must have regard to those matters ”

30. In my finding, the power donated to the Respondent under section 173(a) & b are judicial in character and must therefore be exercised judiciously. To be exercised judiciously implies and mandates that the power must be exercised and decisions arrived at based on facts and reasons. The one fact that cannot be denied is that the tender documents set criterion for evaluation and minimum required score to enable one proceed to the next level of evaluation. To me failure to detect that Ollregy did not meet the minimum requirement at technical evaluation was such a glaring omission that doesn't only defeat logic but demonstrate irrationality and unreasonableness. To the extent that the tender document is by law required to conform to the legal requirement under the Act and the Constitution, that document is itself a derivative of the law and constitution and has the force of both. Therefore a party who flouts or tries to circumvent it, circumvents the law and to me that is an illegality. The foregoing reasons can also be said of Nalido Enterprises and Graceworth Enterprises who are not shown to have been evaluated passed the technical stage but ended up being awarded zones 6 & 7 respectively.

31. There was then a matter that was never raised by the parties but which the court thinks deserves some observation. I think it deserves some observation because before the Review Board and this court, the *ex parte* applicants argued that the Principle of transparency demanded that the procuring entity disclose to the parties at the time of opening the tenders what its budget was for the tendered works. It was also submitted that at the hearing before the Review Board they requested to be availed the evaluation summaries but without success. For the interested party it was contended that the law insulates the procuring entity from making such disclosures. The provisions of section 67.1 & 2 of the Act were therefore relied upon as providing the veil of protection. To me that protection was resorted to in a manner that was not appropriate regard being had to the very purposes of the Act as disclosed under section 3. In my view the Act, enacted in 2015 was clearly intended to align the previous statute with the Constitution to include the principles and value systems Kenyans thought should be given Public

Procurement and Asset Disposal. For better clarity that section provides:-

“ Section 3

Guiding principles

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- a) The national values and principles provided for Under Article 10.**
- b) The equality and freedom from discrimination provided for under Article 27.**
- c) Affirmative action programmes provided for under Article 55 and 56.**
- d) Principles of integrity under the Leadership and Integrity Act 2012(No. 19 of 2012).**
- e) The principles of public finance under Article 201,**
- f) The values and principles of public service as provided for under Article 232,**
- g) Principles governing the procurement profession, international norms.**
- h) Maximisation of value of money.**
- i) Promotion of local industry, sustainable development and protection of the environment and**
- j) Promotion of citizen contractors. ”**

32. If National values and principles including the Rule of Law is an integral principle of Procurement and Asset Disposal, then it goes without saying that a party seeking to challenge a procurement process must be entitled to right to fair hearing. If that be true then such a challenge cannot be reasonably mounted if the procurement entity is allowed to keep next to its chest the records and reasons for awarding a tender to one party in preference to the other. The procuring entity must be seen to act with absolute transparency such transparency only being limited for purposes of protecting healthy competition and genuine privacy and public interest. No wonder section 67 (3) expressly say that disclosure of information is permitted for purposes of enforcement of the law. I am not in doubt that a party seeking disclosure for purposes of Review or a proceeding challenging decision by the Review board seeks to enforce the law and therefore fits squarely within the constitutional enactment under Article 47.

33. For this purposes of this matter, and considering the disparities shown between the Records of the Review Board and the interested party, I doubt if there was afforded to *ex parte* applicant adequate opportunity and facilities to adequately argue their request for Review. To this court that is a denial of fair treatment before the Review Board which is equally a denial of right to a fair hearing.

34. I have equally noted from the submissions offered by the interested party before the Review Board that there was uniformity as to compensation for the labour force. For example each worker was procured at Kshs.12,600 per month while supervisor was procured at Kshs.15,000 per month. What however is not clear, and which could have become clearer with more disclosure is why two or more zones with similar demand for personnel were procured and awarded at different sums. That concern of the court becomes more glaring when one looks at the awards for zone 2 & 3 with minimum labour force of 28 workers to include two (2) supervisors. Transparency and equal treatment would demand that equal work be remunerated equally. However, both the workings exhibited in the affidavit of MAINA MUTURI and the award in the record of the Respondent show that zone 2 was tendered and awarded at

Kshs.544,000 while zone lured was awarded at Kshs.4219,000.

35. Similar disparity is to be seen between zone 4 & 9 with similar workforce of 24 people yet the awarded sums were Kshs.272,000 and 302,000 respectively. Same can be said of zones 7, 9 and 13 with workforce of 21 people yet the tender sums is different for each of the three. I hold the view that however noble the reasons for the disparity and difference could be, without disclosure of such reasons one would doubt the fairness involved. To this court such is the situation that doesn't inspire trust and confidence in the process and the state organ as having been undertaken transparently and fairly.

36. I say this, even if it be gratis, that the Respondent as any other state organ is obliged under Article 3, to protect and uphold the Principles of the Constitution which include encouraging transparency in its proceedings. That can be best achieved by availing to the parties before its such information as is necessary to enable such parties to adequately urge their requests: for the foregoing reasons, I grant to the *ex parte* applicants an order of judicial review in the nature of Certiorari to bring before this court the decision of the Respondent dated 14/9/2016 in so far as it directed the interested party to within 7 days from the date of the decision carry out re-evaluation of the tenders that reached the financial evaluation stage and award each zone to the lowest evaluated bidder. The entire tender process is annulled and ought to be initiated afresh.

37. On Prayer (b) challenging the Respondents decision for denying the *ex parte* applicants, the costs of the proceedings before the Review Board, I find that prayer to be straight forward and meriting no much argument. No wonder the interested party in both the written and oral submissions did not seek to support that decision without saying so unequivocally.

38. This court takes the position that a party whose rights have been determined need to leave before the adjudicator well aware why he lost or won. The need for reason is to legitimize the decision by exposing it to interrogation. Indeed a decision based on no reason is not judicial but may be described as being whimsical and capricious. The decision impugned in this matter as far as it concerned costs is to say the least made in the air. And so made in the air and without regard to the powers donated by the statute upon the Respondent to award costs. This is not to say that in every situation costs must be awarded. An award of costs or denial of costs may as well be in the discretion of the Respondent but that decision must be grounded upon reason. Where no reason is given a party leaves wondering, the way the applicants here do, what was the justification for being denied costs.

39. To this court, costs, however, little are expressed in monetary terms and therefore property to a person entitled. Being property it should not be deprived arbitrarily. That is the clear dictate of article 40(3). To the extent that no reason was given for the order that each party bears own costs, without reasons to justify same, that decision was arbitrary, irrational and contrary to the law. For that reason it is equally called and brought before this purposes of being quashed and is hereby quashed.

40. Having been so quashed and regard being had to the reasons leading to this court's decision to quash it, and the provisions of section 175(7) that this court shall not award to or impose costs against any of the parties, I order that the *ex parte* applicant get the costs before Review Board for which reason the decision number (d) by the Review Board and dated 14/9/2016 is remitted back to the Board for purposes of assessing those costs only.

41. It is so ordered.

Dated and delivered at Mombasa this 24th day of November 2016.

HON. P.J.O. OTIENO

JUDGE