



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR MISC. CIVIL APPLICATION NO. 1 OF 2014**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**CHAIRMAN PUBLIC PROCUREMENT**  
**ADMINISTRATIVE REVIEW BOARD.....1<sup>ST</sup> RESPONDENT**  
**KENYA POWER AND LIGHTING CO LTD.....2<sup>ND</sup> RESPONDENT**  
**AND**  
**TOTAL QUALITY TRAINING**  
**CONSULTANTS LIMITED.....INTERESTED PARTY**  
**EX-PARTE**  
**ZAPKASS CONSULTING AND TRAINING LIMITED**

**JUDGEMENT**

The 2<sup>nd</sup> Respondent (Kenya Power and Lighting Company Limited), hereinafter simply referred to as the company, is mandated to distribute electricity in the Republic of Kenya. It has over ten thousand employees. In order for it to effectively discharge its mandate, it needs to constantly train its staff, to not only retain them, but to navigate the employment market by retaining the best and most competent. In the quest to fulfill this mandate, it in March 2013, advertised a tender from qualified and competent firms for “Supervisory Skills Development Training”. The same was done through the open tendering system, with twenty six firms applying. Only four made it to the final stage. These were Zapkass Consulting & Training Limited, Total Quality Training Consultants Ltd, SBO Training Ltd and Exceptional Management Consultants.

At the conclusion of the tendering process Total Quality Training Consultants Ltd the Interested Party in these proceedings was declared the winner having presented the lowest bid for the tendered services according to the company’s Evaluation Committee. The ex-parte Applicant (“the Applicant”) herein Zapkass Consulting & Training Limited was aggrieved by the decision of the company and upon being informed of the outcome of the tendering process, immediately filed a **Request for Review No. 49 of 2013 of 6<sup>th</sup> December, 2013** with the 1<sup>st</sup> Respondent the Public Procurement Administrative Review

Board (“the Board”).

The Board delivered its decision on the 20<sup>th</sup> December, 2013 dismissing the Applicant’s request for review. Not satisfied with the decision of the Board, the Applicant sought and obtained leave to commence these judicial review proceedings and has through the Notice of Motion dated the 6<sup>th</sup> January 2014, prayed for orders as follows:

1. **THAT an order of certiorari be issued and directed to the 1<sup>st</sup> Respondent to remove and quash the decision/ruling delivered on 20<sup>th</sup> December, 2013 in Review Case No. 49 of 2013 dismissing the Applicant’s appeal.**
2. **THAT an order for certiorari be issued and directed to the 2<sup>nd</sup> Respondent to remove and quash the decision via letter dated the 21<sup>st</sup> November, 2013 awarding the tender No. KP1/5BA/6.1/02/13 for supervisory skills development training to M/s Total Quality Training Consultants Ltd.**
3. **THAT an order of prohibition to be issued to the 2<sup>nd</sup> Respondent prohibiting them from signing the contract and or awarding the tender No. KP1/5BA/6.1/02/13 to M/s Total Quality Training Consultants Ltd AND INSTEAD award the said tender to the Applicant herein AND OR that the whole tendering process is repeated afresh.**
4. **THAT in the meantime there be issued a stay until further orders are given by this Honourable Court prohibiting the 2<sup>nd</sup> Respondent from signing the contract and or awarding the tender No. KP1/5BA/6.1/02/13 to M/s Total Quality Training Consultants Ltd.**
5. **Cost of this application be provided for.**

The application is premised on the grounds on its face, the statutory statement, the verifying affidavit and supplementary affidavits of Salome Ndungu sworn in her capacity as the director of the Applicant.

The Applicant’s case is that in the month of March 2013, the company through an advertisement sought to procure the services of competent training firms for the purpose of training its staff.

After the evaluation process, the Applicant, the Interested Party, Exceptional Management Consultants and SBO Training Ltd were found to be suitable. The four firms were consequently invited to submit their proposals in response to the tender for Supervisory Skills Development Training.

The Applicant submitted its tender in time having met all the requirements. The tenders were opened in public where it was announced that it had quoted Kshs.3,797,400/= and the Interested Party had quoted Kshs.2,290,768/=.

On the 29<sup>th</sup> November, 2013, the Applicant received a notification from the company dated 21<sup>st</sup> November, 2013 informing it that its bid was not successful owing to the fact that its financial bid was higher than that of the other bidders. The Applicant was not satisfied with the decision of the company and filed a request for review with the Board, seeking to review the company’s decision.

It is the Applicant’s case that its case before the Board was heard under duress due to the short notice given to it by the Board. The Applicant contends that it had established sufficient grounds for allowance of its request for review by the Board hence was not satisfied with the Board’s decision. The Applicant asserts that the Board’s decision was unfair, devoid of merit and had not taken several issues into consideration. The Applicant submits that the decision of the Board was therefore contrary to the Public Procurement and Disposal Act, 2005 (“the Act”) whose spirit is the promotion of competition and fairness in procurement and disposal of public assets.

In its first ground in support of the application, the Applicant contended that it was served with a short and unreasonable notice in respect of the hearing as the notice was served on the 17<sup>th</sup> December, 2013 for the hearing on 18<sup>th</sup> December, 2013. The Applicant’s case is that there was therefore no sufficient time to adequately prepare for hearing.

On the second ground, the Applicant submitted that the Board relied on documents that were not executed. The Applicant made specific reference to the company's response to its request for review. The Applicant argued that the Board ought to have expunged the said response *sou moto* from its record.

On the third ground, it was the Applicant's case that Clause 2.4.1 of the tender required all competitors to list all costs associated with the assignment which included remuneration for staff, housing, reimbursable expenses, transportation, services and equipment, vehicles, furniture, supplies, office rent, insurance, printing of documents, surveys and training. The Applicant's case is that the Interested Party's bid was non responsive as it did not disclose all the costs as required by the said Clause. It is the Applicant's case that it fully complied with the said requirement and provided full disclosure in its financial breakdown.

The Applicant asserts that the Interested Party did not make full disclosure as its costs amounted to Kshs. 2,290,798/= which was way below that of the other bidders, since it did not disclose transportation and other expenses as required by the tender document. The Applicant averred that should the ruling of the Board not be quashed, it would stand to be side-lined by a non-responsive bidder.

In the Applicant's supplementary affidavits in rejoinder to the replying affidavits filed by the respondents and the Interested Party, the Applicant refuted the Interested Party's assertion that its bid was responsive. The Applicant contended that if the Interested Party's bid was indeed responsive, then it ought to have exhibited its financial proposal through the replying affidavit. It was the Applicant's case that the company had refused to attach the minutes which would prove that the information was placed in the public domain.

The Applicant asserted that its request for review was dismissed without any merit and the Board was simply trying to justify the breach of the law by the issuance of the short notice and by disposing the matter in a record eight days despite the Act providing that a decision should be reached within thirty days. The Applicant conceded that it had previously tendered with the company and won or lost some tenders but this was always done in a fair manner.

It was the Applicant's case in response to the Board's affidavit that the duty of issuing adequate notice always rested with the Board. The Applicant asserted that the Board was wrong in finding that the information about the Interested Party's financial proposal, used to support its request for review, was not in the public domain yet the same had been revealed during the opening of the financial proposals and also exhibited before the Board by the company at the hearing of the request for review.

The respondents and the Interested Party opposed the application by way of replying affidavits. The Board, through the replying affidavit sworn on 24th January, 2014 by Pauline Opiyo in her capacity as its Secretary put its case as follows; that they received the Applicant's request for review on the 6<sup>th</sup> December, 2013 and subsequently thereafter notified the parties about the application and served them with copies of the request for review.

The Board countered the Applicant's claim that the hearing notice was inadequate and stated that upon being served with the application for review the Applicant automatically knew that the hearing would be soon and it ought to have started its preparation for the hearing. The Board submitted that the inadequate notice was occasioned by the company's delay in providing the tender documents.

The Board stated that the company availed the tender documents on 16<sup>th</sup> December, 2013 and upon receipt the parties were immediately notified that the matter would be heard on 18<sup>th</sup> December, 2013. The Board's case is that all the parties were heard prior to the delivery of the ruling on 20<sup>th</sup> December, 2013.

On the Applicant's claim that the company's response to the request for review was not signed, the Board contended that the assertion is false and malicious as the company submitted a response to the request for review on the 17<sup>th</sup> December, 2013 that was duly signed by an advocate known as Owiti Awuor on behalf of the company and it is this executed response that the Board relied upon and not the unsigned one.

The Board's case is that it dismissed the request for review after finding that the information canvassed by the Applicant to support its grounds could not be information in its domain as the same related to another's bidder's tender and could not be public information shared at the tender opening as alleged by the Applicant and hence the Applicant had not established its claim that the Interested Party had not disclosed all its expenses as required by the tender.

The Board submitted that it found that the evaluation was done using the same parameters for all bidders and that the Applicant's bid was not the lowest evaluated bid for the tender. Further, it also noted that the tender document provided the procedures to be followed when undertaking the technical and financial evaluations respectively and this were followed by the company. The Board asserted that it did not find any evidence of unfair treatment of any of the bidders.

It is the Board's case that in reaching its decision it was guided by the submissions of all the parties to the request for review and the law and at the end of it came to the conclusion that the Applicant had not established grounds for the grant of the request for review.

The company opposed the application through the replying affidavit of its Legal Officer Imelda Bore sworn on 14<sup>th</sup> February, 2014. The deponent started by urging the Court to dismiss the application on the ground that it is an attack on the merits of the decision of the Board and does not show any fault in the process that led to the making of the decision.

The company's case is that it conducted a prequalification exercise of twenty six firms who had responded to its advertisement. Only four of the firms emerged successful after the applicable evaluation process and these were the firms asked to submit their proposals in response to Tender No. KP1/5BA/6.1/02/13 for "Supervisory Skills Development Training" with the evaluation scheduled in stages meaning that the preliminary and technical evaluation stages would be conducted separately from the financial evaluation thus the bidders were required to submit their bids in two separate envelopes i.e. technical and financial proposals.

Ms Bore averred that after the tender was closed the Evaluation Committee conducted the technical evaluation and submitted reports with its recommendations. She stated when the financial bids were opened the Interested Party's bid was Kshs. 2,290,768/= and at the conclusion of the evaluation it was found to be the most responsive bid to the tender.

Ms Bore averred that the Applicant could not have been in a position to know the particulars of the other bidders' financial proposals as the details were not announced at the opening of the financial proposals. She deponed that it is evident that the Board established that the company conducted the evaluation of the financial proposals and ranked them on a table with the Applicant coming last.

Ms Bore averred that Clause 2.8.3 of the tender document provided that **"the evaluation committee will determine whether the financial proposals are complete i.e. whether the consultant has costed all the items of the corresponding Technical Proposal and correct any computational errors."** The same Clause also provided that the **"cost of any unpriced items shall be assumed to be included in other costs in the proposal. In all cases, the total price of the Financial Proposal as submitted shall prevail."**

She therefore averred that there was no risk of the Interested Party charging the company a higher amount than the one quoted.

It is the company's case that the proceedings before the Board were conducted in strict compliance with the Act and the Applicant cannot be heard to say that it did not receive a fair hearing.

Ms Bore swore that after receiving the letter notifying the company of the request for review the company on 16<sup>th</sup> December, 2013 emailed the Board a soft copy of its response and followed this by filing ten hard bound copies of its duly executed response on 17<sup>th</sup> December, 2013.

The company's Legal Officer denied that the Applicant's counsel applied for an adjournment and the request was denied. It is therefore the company's case that the proceedings were conducted fairly and in accordance with the law.

The Interested Party opposed the application through the replying affidavit of its Managing Consultant Veronica L. Fondo sworn on the 13<sup>th</sup> February, 2014. The Interested Party's case is that upon becoming aware of the advertised tender it participated in the prequalification stage and on or about 4<sup>th</sup> July, 2013 it was informed that its bid was responsive. It was invited to submit its proposal for the tender and it complied by proposing to provide the Supervisory Skills Development Training at a fee of Kshs. 2,290,768/= inclusive of V.A.T.

The Interested Party asserted that the Applicant's appeal to the Board was dismissed after a fair hearing. It is the Interested Party's submission that this application for judicial review is but an appeal and the remedies the Applicant seeks are therefore not available as judicial review is concerned with the decision-making process and not the merits of the decision.

Having gone through the pleadings and heard the parties' submissions I find that the issues for the Court's determination are:

1. Whether the Applicant was given a fair hearing by the Board;
2. Whether the orders sought should issue; and
3. Who should have the costs of the application?

The Applicant contended that it was ambushed by being served with a hearing notice on 17<sup>th</sup> December, 2013 at 2.00 p.m. for a hearing that was to take place the following day.

The right to a fair hearing encompasses a right to adequate notice. It is noted that under **Section 97 (1) of the Act** the Board has to complete its review within thirty days after receiving the request for review. Owing to this statutory provision, the Board must therefore operate under tight schedules. Nevertheless, the Board cannot overlook the requirement to comply with the rules of natural justice. Sufficient notice ought to be given to the parties so that they can prepare their cases. Notice of one day cannot be said to be sufficient. It is noted that the Applicant was most likely served with the company's response on 17<sup>th</sup> December, 2013 and it ought to have been given time to study the response and put in further evidence if that was necessary.

Whether or not failure to comply with the rules of natural justice should result in the quashing of the proceedings of a tribunal depends on the circumstances of each case. In the case before this Court, it has emerged that all the parties received the hearing notice almost at the same time. One cannot therefore say that the late service of the hearing notice on the Applicant was unfair. The Applicant was not prejudiced by this late service. The Applicant contended that it was denied an adjournment but there is no evidence show that it indeed applied for an adjournment and the same was rejected.

The Applicant alleged that the Interested Party's bid was non-responsive for failure to comply with Clause 2.4.1 of the tender which required that all the costs associated with the assignment be listed. The Applicant asserted that it complied with the requirement and gave full disclosure and breakdown of each item which brought its total costs to Kshs 3,797,400/=. It is the Applicant's case that the Interested Party's price of Kshs 2,290,768/= was way below that of other bidders because it had failed to disclose all the expenses as required by the aforesaid Clause.

The Interested Party strongly opposed this allegation and asserted that Clause 2.4.1 provided that bidders were not required to include third party costs which were to be borne by the Procuring Entity (the company). The Interested Party's assertion was supported by the company. It is therefore the Interested Party's case that its bid was responsive.

In its ruling the Board considered this particular issue and held:

**“The Board notes that the information being canvassed by the Applicant to support this ground cannot be information in the domain of the Applicant as it relates to another bidder’s tender and cannot be public information shared at the tender opening as alleged by the Applicant. The Board further notes that the Applicant has not adduced evidence to support its allegation that the Procuring Entity acted in breach of Sections 2 and 31 of the Act. The Board therefore finds that the Applicant has not established this ground and as such, the Board holds that this ground for Review fails.”**

The Board therefore considered the Applicant’s complaint that the Interested Party’s bid was non-responsive and reached a conclusion that there was no evidence to support such an allegation. This was a decision on merit and it is not about the process of reaching the decision. The Board was entitled to make the decision it made and if the Applicant had any issues about that decision then it ought to have filed an appeal-see the decision of the Court of Appeal in **KENYA PIPELINE COMPANY LIMITED v. HYOSUNG EBARA COMPANY & 2 OTHERS [2012] eKLR**. I therefore agree with the respondents and the Interested Party that the Applicant is indeed arguing an appeal in the pretext of a judicial review application.

The Applicant submitted that the copy of the company’s Response to the Request for Review filed on 16<sup>th</sup> December, 2013 served on it was not signed. It is the Applicant’s case that the Board should not have relied on the unsigned document and the same should have been expunged from the record *suo moto*.

The Board in reply contends that the response it relied on was duly executed by the company’s advocate on record. On its part the Interested Party argues that the issue of the alleged un-executed document was not raised at the hearing of the matter by the Board and it cannot form a basis for challenging the Board’s decision.

The Applicant did indeed exhibit the company’s response to the request for review. There is a stamp with the name of the Board showing that the document was received on 16<sup>th</sup> December, 2013. The document prepared by an advocate by the name Owiti Awuor and which was supposed to be signed by the same advocate on behalf of the 2<sup>nd</sup> respondent is indeed not signed.

The Board on the other hand exhibited the company’s response to the request for review received on 17<sup>th</sup> December, 2013. This particular response is signed.

I have gone through the decision of the Board and I do not find any mention about the unsigned document. There is therefore no evidence that the Applicant raised the issue before the Board. It is difficult at this stage to fault the Board’s claim that it relied on the signed response. I also note that the company explained that it emailed its unsigned response on 16<sup>th</sup> December, 2013 and followed it by filing signed hard copies on 17<sup>th</sup> December, 2013. This is believable and may explain why the Applicant never raised the issue with the Board.

In any case, since the Applicant did not raise the issue before the Board, it would be difficult for this Court to make a finding on an issue that is being raised for the first time. This is a Court of review and it basically looks at the records of the Board. Without the proceedings of the Board, the Court cannot fault the Board for keeping quiet on an issue for which there is no evidence that it had been asked to address.

The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.

At the end of the day, it is clear that the Applicant has not made a case for the grant of the orders sought. The application is therefore dismissed. The Applicant had a genuine complaint about the short notice in respect of the hearing of the request for review. For that reason I will make no orders as to costs.

Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of June, 2014

**W. KORIR,**

**JUDGE OF THE HIGH COURT**