



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Judicial Review 491 of 2009**

**IN THE MATTER OF A DECISION AND ORDER DATED 7<sup>TH</sup> AUGUST 2009 BY THE  
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD  
BETWEEN**

**REPUBLIC.....**

**.....APPLICANT**

**AND**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ..... THE  
RESPONDENT**

**EX PARTE:**

**KENYA MEDICAL SUPPLY AGENCY, CROWN AGENTS, DEUTSCHE GESELLSCHAFT  
FUR TECHNISCHE ZUSAMMENARBEIT AND JOHN SNOW INC.,**

**AND**

**HETERO DRUGS LIMITED ..... 1<sup>ST</sup>  
INTERESTED PARTY**

**LORDS HEALTH CARE LIMITED ..... 2<sup>ND</sup>  
INTERESTED PARTY**

**RANBAXY LABORATORY LIMITED ..... 3<sup>RD</sup>  
INTERESTED PARTY**

**JUDGMENT**

This application revolves around public procurement which is governed by the Public Procurement and Disposal Act, 2005 (‘the Act’), which was enacted as an ‘Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores and equipment by public entities and to provide for other related matters’. Its objectives are captured in section 2 thereof as:

- (a) To maximize 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.

**KENYA MEDICAL SUPPLY AGENCY (‘KEMSA’), CROWN AGENTS (‘CA’), DEUTSCHE  
GESELLSCHAFT FUR TECHNISCHE ZUSAMMENARBEIT (‘GTZ’), and JOHN SNOW INC.**

(‘JS’), which are all involved in the procurement and supply chain management as a consortium on behalf of the Ministry of Health, advertised a tender on 6/3/2009, for the supply and delivery of anti-retroviral drugs (‘ARV’). I shall henceforth also refer to the consortium as ‘KEMSA’. The tender documents, which they availed to the intending bidders, set out the manner and format in which the bids would be submitted, in what it referred to as the Instructions to Tenderers, whose clause 21.1 provided as follows:

*“21.1 The tenderer shall prepare an original and the number of copies/sets of the tender indicated in the TDS, clearly marking each one as ‘ORIGINAL TENDER’ and ‘COPY OF TENDER’, as appropriate. In the event of any discrepancy between them, the original shall govern.*

*21.2 Each tender shall contain a separate technical and financial proposal.*

*21.2.1 The technical proposal consists of: Technical specifications, Schedule of Requirements, Manufacturer’s Authorizations, Certificate of a Pharmaceutical Product (if applicable) as well as other technical documentation.*

*21.2.2 The financial proposal consists of: Tender form; price summary sheet and Price Schedule(s) and Tender security as well as other financially relevant information like discounts etc.*

*21.3 The original and all copies of the tender, each consisting of the documents listed in ITT sub-clause 14.1., shall be typed or written in indelible ink and shall be signed by the Tenderer of a person or persons duly authorization shall be indicated by written power of attorney, which pursuant to ITT sub-clause 14.1. (d) shall accompany the tender.*

*21.4 Any interlineations, erasure, or overwriting to correct errors made by the Tenderer shall be initialed by the person or persons signing the tender.*

*21.5 The Tenderer shall furnish in the Tender form (a sample of which is provided in the Sample Forms Section of the tender documents) information regarding commissions or gratuities, if any, paid or to be paid to agents relating to this tender and to the execution of the contract if the Tenderer is awarded the contract.*

According to KEMSA’s Executive Officer, one Dr. Munyua Thuku, the tenders which were submitted, were opened in public and the consortium’s representative proceeded to evaluate the bid documents at a preliminary level with a view to confirming whether they complied with the tendering requirements, at which point it transpired that the tender documents that had been submitted by one of the bidders,

**HETERO DRUGS LIMITED** which is also the 1<sup>st</sup> interested party in these proceedings, and which I shall hence forth refer to as ‘Hetero’, included a scanned copy of the Price Schedule instead of an original document and for these reasons, Hetero’s bid was declared non-responsive for contravening clause 21.1 of the aforementioned Instructions to Tenderers. Hetero’s tender was therefore disqualified at the said preliminary evaluation stage. Members of the consortium then proceeded with the technical and financial evaluation of the other bids and the tender was thereafter awarded on 25/6/2009 to **LORDS HEALTHCARE LTD., RANBAXY LABORATORIES LTD., and EMCURE PHARMACEUTICALS LTD.**, in respect of the items they were found lowest bidders as evaluated.

Being dissatisfied with the decision, and being of the view that the reasons advanced by the consortium were ‘*unsatisfactory and contrary to the express provisions of both the law and the tender document*’, Hetero proceeded to request **THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**, which I shall henceforth refer to as ‘the Board/the respondent’, which Board was established ‘*to deal with complaints submitted by candidates who are invited to take part in public procurement*’, to review the consortium’s decision. The consortium filed its reply thereto contending that Hetero’s bid document were not responsive as it submitted a scanned copy of the price list as opposed to an original. The Board considered the review favorably, and nullified the award of five items of the tender on 7/8/2009 and ordered the consortium not only to admit Hetero’s bid documents, but to carry out a fresh re-evaluation of the entire bid documents.

That decision seems to have aggrieved the consortium, which is of the view that in doing so, not only had the Board acknowledged that Hetero had submitted a scanned copy of the Price Schedule, but that it had proceeded to decide that the tender Form was the primary document and that in the circumstances, a scanned copy of the Price Schedule which would suffice, which action, the consortium feels was beyond the Board's jurisdiction. The consortium thus decided to move this court by way of an application for Judicial Review in which it seeks an order for certiorari to remove to this court for purposes of being quashed the aforementioned decision and order of the Board.

The consortium which also prays for costs, bases its application on several grounds but mainly that:

- ***The respondent failed to appreciate that the consortium was mandated by the Public Procurement and Disposal Act to reject Hetero's scanned copy of a Price Schedule as it was not an original.***
- ***The respondent made grave errors of law in failing to apply the mandatory provisions of the Public Procurement and Disposal Act 2005.***
- ***The respondent failed to appreciate that its jurisdiction was limited to determining whether Hetero's scanned copy of a price schedule conformed to the mandatory requirements of the instructions to Tenderers.***
- ***The respondent erred in law in failing to appreciate that the items in the tender were to be awarded on an item per item basis and not on the total price. The price schedule clearly required the bidders to bid on an item by item basis and the tender for each item would be awarded on the basis of price quoted in the price schedule for each item. Therefore the respondent erred in law in stating that the Tender Form was the primary document. The Price Schedule was equally important and hence the requirement for the Price Schedule to be an original.***
- ***In reaching its decision, the respondent made grave errors of law in applying the provisions of the Kenya Communications Act to the tender when section 5 of the Public Procurement and Disposal Act clearly states that in matters relating to procurement, the Act prevails over all other Acts where there is a conflict.***
- ***The respondent erred in law in finding that section 83G of the Kenya Communications Act rendered Hetero's price Schedule acceptable as an original even though it was a scanned copy.***
- ***The respondent erred in law in failing to appreciate that section 83G of the Kenya Communication Act does not state that information rendered in electronic form converts a copy of a document into an original. The section merely provides that where the law required that information should be in writing then such information can be rendered in electronic form. The requirement for the submission of an original price Schedule written in indelible ink was contained in the ITT and not the law.***
- ***The respondent erred in law in applying section 83G to the scanned copy of the price Schedule as the said Price Schedule was not rendered in electronic form within the meaning of the Kenya Communications Act.***
- ***The respondent failed to appreciate that the effect of its decision is to give tenderers the liberty to submit copies of documents where originals are required therefore making it impossible for procuring entities to establish the authenticity of documents. The consortium therefore stands to suffer severe prejudice if it is unable to establish the authenticity of documents.***
- ***The entire purpose of the Public Procurement and Disposal Act which is to make public procurement a fair, transparent and accountable process will be defeated if tenderers are allowed to submit copies of documents instead of originals.***

*The respondent's decision will result in a grave injustice to all the other bidders who submitted originals as per the requirements of the Instructions to Renderers. It will also undermine the purpose of the Public Procurement and Disposal Act which is to ensure that competitors are treated fairly.*

KEMSA therefore opines that it would be *'the interests of justice and good governance that the Board's decision be quashed and the mandatory provisions of the Instructions to Tender and consequently the Public Procurement and Disposal Act be upheld'*.

Hetero which maintains that the use of a scanned copy of a price schedule is not precluded, opposes the application, and it is of the view that it is but an attempt by the consortium *"to disguise an appeal as a judicial review"* and that in the circumstances, the application is not only frivolous but is vexatious and an abuse of the process, meant to delay the cause of justice.

**LORDS HEALTH CARE LIMITED** and **RANBAXY LABORATORY LIMITED** who were until nullification of the tender award, its beneficiaries, were enjoined to these proceedings as the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties. I shall refer to them jointly as *'the interested parties'*.

The board's learned counsel Mr. Ombwayo made submissions to the effect that for the consortium to succeed in its application, it must establish that the respondent's decision was tainted with illegality, irrationality and that it was guilty of procedural impropriety. He relied on section 98 of the Act which in his view empowered the Board to nullify the award by KEMSA and to order the admission of Hetero. Indeed the said section clearly provides that upon completing a review the Board has several options open to it, one of which is to *'annul anything the procuring entity has done in the procurement proceedings, including the annulling the procurement proceedings in their entirety'*.

Hetero was represented by Dr. Muma, whose submission it was that that main issue for consideration is whether a scanned document would qualify as an original document of the tender document. He urged the court to dismiss this application as the Board did not err in its decision.

I am well alive to the fact that in an application of this nature, one of the court's main concerns would be whether the Board acted within its mandate as provided for under the Act.

As stated earlier, the Board was established to deal with complaints submitted by candidates who are invited to take part in public procurement. In my mind the Board would be expected to act within the confines of the Act and other related laws, bearing in mind the fact that *'if there is a conflict between the Public Procurement and Disposal Act or the regulations there under and any other Act or regulations, in matters relating to procurement and disposal, the Public Procurement and Disposal Act, or the regulations made there under this act shall prevail'* (**Sect. 5:(1) of the Public Procurement and Disposal Act, 2005**).

I am aware that in cases of this nature, the court would be required to ascertain what was the question submitted for the determination by the Board, and it would of necessity enquire what were its terms of reference, as well as what was its jurisdiction. *"If Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers it is clear that the tribunal will not have those powers unless the situation exists. The decided cases illustrate the infinite variety of the situations which may exist and the variations of statutory wording which have called for consideration. Most of the cases depend, therefore, upon an examination of their own particular facts and of particular sets of words. It is, however, abundantly clear that questions of law as well as of fact can be remitted for the determination of a tribunal. (Anisimic Ltd v Foreign Compensation Commission (1968) APP.L.R.12/17).*

I have considered the submissions of the able counsel and the first question that comes to mind is whether the consortium would have the capacity to prefer these proceedings. Mr. Ombwayo was of the view that it being a consortium for the Government, it would not. There is no doubt being the procuring entity, an entity which is recognized under section 96 of the Act as a party to a review, KEMSA participated in the review proceedings as a party, and in my view having been a party thereto, the consortium is rightly

before this court by virtue of the provisions of the Act which recognizes the right of parties to the review proceedings to apply for orders of judicial review. Indeed section 100 (1) of the Act which recognizes the right for a party to apply to this court for judicial orders of review of its decisions, adds that “*a decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board’s decision*”. Further thereto, the fact that the Republic is the applicant in this matter cannot deny KEMSA a right to be heard as an ex parte applicant for it is trite that all applications for “*prerogative orders are issued in the name of the Crown and applications for such orders must be correctly intituled*” (**Farmers Bus Service and others v. The Transport and Licensing Appeal Tribunal [1959] E.A. 779**), which therefore means, that this application is properly before this court.

Be that as it may, the fact that the Board acknowledged that Hetero had submitted a scanned copy of the Price Schedule is not denied, nor is the fact that the said Board went ahead and decided that the tender Form was the primary document and therefore a scanned copy of the Price Schedule would suffice, or even that it further identified the issue to be decided as being whether the scanned price schedule that was submitted qualified as an original.

Upon perusal of the relevant regulations of the Act I take cognizance of the provisions as contained in regulations 47 and 48 of the Act, wherein it is provided that:

47. ‘(1) *Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether –*

(a) *the tender has been submitted in the required format;*

(b) *any tender security submitted is in the required form, amount and validity period;*

(c) *The tender has been signed by the person lawfully authorized to do so;*

(d) *the required number of copies of the tender have been submitted;*

(e) *the tender is valid for the period required;*

(f) *all required documents and information have been submitted; and*

(g) *any required samples have been submitted.*

(2) *The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1)’.*

48. ‘(1) *Procuring entity shall reject all tenders, which are not responsive in accordance with section 64 of the Act.*

(2) *the classification of a deviation from the requirements as minor under section 64(2) (a) of the Act shall be applied uniformly and consistently to all the tenders received by the procuring entity’.*

It is clear from the above provisions, that the requirements that the bids be compliant, is mandatory; to be fulfilled to the letter, one of such requirements being that ‘*the tender has been submitted in the required format*’, which takes me back to the provisions of section 64 of the Act wherein it is provided that:

‘(1) *A tender is responsive if it conforms to all the mandatory requirements in the tender documents.*

(2) *The following do not affect whether a tender is responsive –*

(a) *minor deviation that do not materially depart from the requirements set out in the tender documents; or*

(b) *errors or oversights that can be corrected without affecting the substance of the tender.*

(3) *A deviation described in subsection (2)(a) shall-*

(a) *be quantified to the extent possible; and*

(b) *be taken into account in the evaluation and comparison of tenders’.*

It is common ground that the Act does not cater for matters pertaining to e-procurement, yet the copy that it attempted to have admitted was a scanned copy instead of the original, and further more it is now submitted for the respondents that the Board was empowered under section 83 G of the Kenya Communications Amendment Act No. 1 of 2009 to act in the manner that it did. The said section provides that:

“*Where any law provides that information or other matter shall be in writing then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such*

information or matter is:-“

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference”.

It is clear that this section is a direct contradiction of the requirement that the “*tenderer shall prepare an original and the number of copies/sets of the tender indicated in the TDS, clearly marking each one as ‘ORIGINAL TENDER’ and ‘COPY OF TENDER’, as appropriate. In the event of any discrepancy between them, the original shall govern*”. (Clause 21.1 of the Instructions to Tenderers (supra)). I need not reiterate that the Act guards its supremacy in matters pertaining to public procurement and disposal jealously and as is clearly demonstrated in its section 5 (1) (supra).

In view of the above, it is my humble opinion, that the Board had no jurisdiction to waive the obvious mandatory statutory requirements or even to handle the review in the manner that it did, for to allow so would be tantamount to negating the whole essence of the Act, and to encourage actions which would best be described as ultra vires, which would in any event be null and void. There is no doubt in my mind that the Board exceeded its jurisdiction; it overstepped its mandate by dealing with issues that were not pleaded before it and in doing so, it reached the wrong conclusion. I find that its decision was therefore ultra vires. To find otherwise would be tantamount to negating the whole essence of the Act, which was enacted for the specific purposes of inter alia, promoting competition and to ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency and accountability in those procedures; and finally to increase public confidence in those procedures.

All in all it was proper for KEMSA to prefer this application in the manner that it did.

I find that KEMSA has ably demonstrated that the Board acted in excess of its jurisdiction by acting outside its mandate. I do in the circumstances grant it an order of certiorari and accordingly remove to this court and quash the aforementioned decision and order of the Board. The interested parties, who supported this application, likewise succeed.

KEMSA, the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties shall also have the costs of this cause.

Dated and delivered at Nairobi this 4<sup>th</sup> day of March 2010.

**JEANNE GACHECHE**

**Judge**

Delivered in the presence of:

For the ex parte applicant (KEMSA) – Miss Malik

For the 1<sup>st</sup> respondent (the Board) – Mr. Ombwayo

For the 2<sup>nd</sup> interested party (Hetero) – Dr. Muma

For the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties – Miss Muguongo holding brief for Mr. Nguli