



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

Misc Appli 67 of 2009

**REPUBLIC.....
APPLICANT**

Versus

**MINISTER IN CHARGE OF ENVIROMENT MINERAL RESOURCE & OTHERS...
RESPONDENT**

**LYLE AND PRESSCOTT INTERNATIONAL.....EXPARTE
APPLICANT**

JUDGMENT

The Notice of Motion dated 3rd February 2009 is filed by Lyle and Presscott International against the Minister in charge of the Ministry of Environmental and Mineral Resources, Kenya Meteorological Department, Head of User Department in the Meteorological Department and the Attorney General seeking the following orders:

1. Orders of prohibition to issue against the Respondents prohibiting the shortlisting, discussion, implementation, supply installation and commissioning of the electronic weather display Board under tender No. KMD/5/2008/2009 and vide tender receipt purchase No. A 1729417 forthwith;
2. Orders of certiorari to issue against the Respondent quashing the decision of the Respondent for the supply, installation and commissioning of an electronic weather display Board vide tender No. KND/5/2008/2009 vide receipt purchase No. 171729417 forthwith;
3. Orders of mandamus to issue against the Respondent, their servants and agents to redraft the proposed tender with specific directions directed upon the Commissioner of the Kenya Anti-corruption to ensure full, strict compliance upholding full accountability and transparency in any other future tenders in respect to the supply, installation and commissioning of an electronic weather display Board forthwith;
4. Costs be provided for;
5. Any other relief the court may deem fit to grant.

The motion is supported by the verifying affidavit of Humphrey Odanga Achala, the Technical and legal Director of the ex parte Applicant, dated 3rd February 2009 and a statement dated 27th January 2009; submissions and list of authorities filed in court on 4th March 2009. The motion was opposed and Dr. Joseph Mukabana, Director, Metrological Department filed a replying affidavit dated and filed in court

on 10th March 2009.

Briefly, the facts of this case are that on 15th October 2008, the Respondent advertised a tender for supply of an electric weather display Board. The tenderers were 9 in total. The Applicant bought tender documents vide receipt No. A 1729417. Upon perusal of the document, they found a lot of contradictions in date and specifications and they did not conform with S. 34 of the Public Procurement and Disposal Act. For fear that their bid would be disqualified, they lodged a complaint with the Review Board which dismissed their complaint. That the tender as prepared is meant to favour certain Interested Parties. That on 12th November 2008, the Applicant submitted their tender at 9.00 a.m. but it was not submitted their complaint but it was not submitted to the procurement Board and they lodged an application to the Review Board but lost to a technicality raised by the Respondent. The ruling is exhibited as HOA3. That Section 3 (2) of the Public Procurement and Disposal Act, 2005 provides for prequalification and did set it out in its ruling.

That there was conflict of interest contrary to Section 42 and 43 of the Act. That the tender documents lacked the necessary qualifications to draw them and the Applicant held them to strict proof. At paragraph 39, the Applicant seeks to be compensated for loss suffered and recommends criminal proceedings against the Respondent.

In his replying affidavit Mr. Mukabana deponed that after they advertised the tender for supply of, installation and commissioning of an Electrical Weather Board, tenderers responded but the Applicant was none of them. (See paragraph 4 of the Affidavit). Before evaluation of the tender could be done, the Applicant moved the Review Board which dismissed their request on 23rd December 2008. The Board found that the Applicant was not a candidate in terms of S.3 as read with S 93(1) of the Act. That instead of presenting its tender to the 2nd Respondent, presented a document dated 4th November 2008 called **“Critical Analysis of the tender”**. That the Applicant should have deposited the tender documents or complaint in the tender box as indicated in the tender notice and should have explained that they were unable to bid (JM (1) due to insufficient time). On the other hand, if the Applicant had a problem with the tender documents he should have sought clarification or requested for extension of time. It is denied that the specifications in the tender document were unrealistic because they were prepared by professionals. That there having been no decision made by the Respondents, Judicial Review orders cannot issue.

It is not in dispute that the Applicant never tendered any bid. The Applicant claims to have been denied the opportunity to submit their bid. The Applicant was not one of the candidates as envisaged under S. 3 (1) of the Act. That Section defines candidate as a person who has submitted a tender to a procuring entity. The Applicant did not submit a bid and therefore not a candidate who can move this court for review.

The Applicant seeks to have the decision of the Respondent quashed by an order of certiorari. The Respondents deny that any decision has so far been made by them to warrant a challenge of this nature by way of review. The Applicant has made several allegations against the Respondent, that the documents as prepared were incompetent, confused, that the tender was tailor made to suit some people and that there was collusion which offends provisions of the Act. Sections 42 of the Act prohibits collusion and S. 43 requires a person with an interest with respect to the procurement not to take part in the process. It was upon the Applicant to provide evidence of collusion or that there was conflict of interest in the procuring process. It is not sufficient to make sweeping allegations. Besides in my view these allegations could only be made after somebody takes part in the tendering process where those allegations would be disclosed. These allegations are premature and would not be disclosed in any event until the Applicant has taken part in the tendering process

As regards the quality and preparation of the tender documents, these were done by experts and technocrats in that area and this court would not be in a position to tell whether or not some specifications were or were not complied with. In any event that would be better dealt with where evidence would be adduced to support or contradict the facts. That would be an issue for the Review Board which is

composed of technocrats in the specific tender. Those allegations also go to the merits of the tender which is not within the jurisdiction of this court. This court reviews not the merits of the decision but the decision making process. The process had not even taken place yet and the Applicant sought to stop the process.

The Applicant had approached the Review Board created under S 98 of the Act for redress which rejected his request. S 100 of the Act allows a party aggrieved by the decision of the 3rd party to seek Judicial Review of the decision of the Board. That is what the Applicant should have done before they came to this court. To the Contrary the Applicant seeks what they complained of before the Review Board. It is the same issue raised here. They cannot have a second bite at the cherry and the orders sought cannot therefore be granted.

S. 53(1) of the Act allows the amendment of tender documents at any time before the deadline for submitting tenders by issuing an addendum. The amendment may be made on the procuring entity's own initiative and or on request to an inquiry. It is evident that the Applicants had complaints to raise about the tender documents even before they submitted their tender. The Applicant should have raised them as provided under the Act and they could only raise such complaints if the Respondents did not take any steps. On the other hand, if there was an ambiguity in the tender documents, the candidates can seek clarification. Under S 62 of the Act, the procuring entity can clarify a tender document. This is the course that the Applicant should have taken instead of coming to this court for review of what does not exist. Allowing such an application would be encouraging would be tenderers to avoid due process under the Act and come to this court even when they have no cause of action. Due process must be followed to discourage frivolous applications such as this one before the court. The Applicant avoided to take part in the tendering process and instead wants a short cut to being shortlisted as a candidate by coming to this court. That is not within the jurisdiction of this court. To do so would be interfering with the mandate of the procuring entity. He should have submitted his tender and fought the battle from within. The Applicant also wants this court to consider the merits of the tender which is not this courts jurisdiction. It is limited to reviewing the fairness of the decision making process. In this case the process is yet to take place and there is nothing to review.

To demonstrate further that the Applicant has come to the wrong forum for redress at paragraph 39 of the affidavit they are seeking compensation and threaten criminal proceedings.

For the above reasons, I find this application to be premature, and it is hereby dismissed with the Applicants bearing the costs.

Dated and delivered this 19th day of June 2009.

R.P.V. WENDOH

JUDGE

Present

Ms. Keli for the Respondent

Muturi: Court Clerk