



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Civ. Appli. 1269 of 2007

REPUBLIC APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD RESPONDENT

KENYA POST OFFICE SAVINGS BANK 1ST INTERESTED PARTY

RILEYT SERVICE LIMITED 2ND RESPONDENT PARTY

JUDGMENT

The applicant seeks an order of certiorari to remove to this Court and to quash the ruling and/or decision of the Public Procurement and Review Board in application number 60 of 2007 made on 28th November, 2007.

The principal grounds for the attack on the decision are:

- (a) That the Respondent acted ultra vires by failing to consider section 29(4) ie failure to use the prescribed standard document.
- (b) That the Respondent acted ultra vires by failing to consider s 52 of the Act which sets out the requirements of procedure and criteria to be used in evaluation of tenders
- (c) The Respondent acted ultra vires by failing to notify the applicant of the results of the tender contrary to section 67(2) of the Act.

I have examined the Request for Review by the applicant and the ruling of the respondent. It is clear to the Court that although the ground pegged on s 29(4) was not part of the Review, the Statement did raise it as a ground. It cannot therefore be said to be a new ground. All the same, the respondent in its ruling did address this aspect by saying that the Act does have inbuilt measures for a tenderer to seek clarification and explanation. The respondent after examining the documents used including the Minutes of the tender Board, was satisfied that the requirement and criteria for evaluation were substantially complied with.

The ruling did sufficiently address the requirements of s 52 of the Act and the Board was satisfied that the evaluation was correctly done.

Similarly as regards the requirements of s 67(2) the Respondent did address the effect of not notifying the applicant of the results of the tender simultaneously with the notification to the successful bidder and reached the decision that there was no prejudice in the circumstances, because the applicant was immediately able to mount a challenge within the stipulated time.

Taking into account the written submissions and the affidavits of the parties touching on the issues raised it cannot reasonably be concluded or said, as the applicant sought to show, that the respondent as a decision maker did not correctly address the law. Similarly it cannot reasonably be said that the Respondent did not ask the right question concerning past performance which the procuring entity indicated it had taken into account, as the exhibited minutes and evaluation process revealed that in actual fact and on the ground it did not take past performance into account, in that the tender was awarded as required by law to the lowest tenderer. The irrelevant consideration would only have taken its toll if the applicant as the second lowest tenderer were to be denied the next chance in favour of the third lowest tender on account of past performance. On the issue of clarification this is also allowed as a requirement in the tendering process. Law is applied to facts and this is what the Board did. Provisions of law cannot be taken on their own and taken to be violations as alleged - without applying the law to the facts. I am satisfied that the process followed, did substantially meet the principal objectives of the Procurement Act.

The thrust of the applicant's case is to attack the merit of the decision and overall I find no procedural impropriety that could have affected the award to the lowest tenderer. The minutes sufficiently reflected the evaluation criteria and the applicant has not demonstrated how he could have been prejudiced in the circumstances.

Even when there is some violation of the law the Court must consider whether it is a material violation and how it has affected the fairness of the process and in particular whether a material procedural safeguard, has seriously been compromised. If not the Court should exercise its discretion not to intervene. Law is made by human beings. Flesh and blood are not stamps of perfection and therefore law is not an instrument of mathematical precision. Whereas in this case what has been done substantially meets the objectives of procurement laws there cannot be any good reason for court's intervention.

In this regard the Court is in full agreement with the views of the House of Lords as captured in the *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 3rd Edn by S.A de SMITH pp 10-11* as follows:-

“The House of Lords has laid down the principle that “whatever may fairly be regarded as incidental to, or consequent upon those things which the Legislature has authorized ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires.”

Finally the Applicant did not approach this court with all its cards face upwards on the table, in that it concealed that it had abandoned supplementary grounds at the review stage, yet it included an annexure on this, at the Judicial Review stage. In judicial review, all parties are partners of the court and owe the court a duty of openness, transparency and disclosure of material facts. In this regard it must not be forgotten that even where an applicant would on the facts and the law be entitled to judicial review orders the granting of the orders is still discretionary and in the circumstances, I decline to exercise the court's discretion in favour of the applicant.

The application stands dismissed with costs to the respondent and the interested party.

DATED and delivered at Nairobi this 20th day of June 2008.

J.G. NYAMU

JUDGE

Advocates

Mr Njuguna for the Applicants

Mr Onguto for the 1st Interested Party

Agimba & Associates for the 2nd Interested Party

Mr Waigi Kamau for the respondent