



Republic v Public Procurement Regulatory Authority; Accounting Officer Kenya Power & Lighting Co. Plc & 21 others (Interested Parties); Harpcon Security Service Limited (Exparte) (Judicial Review E066 of 2024) [2024] KEHC 5104 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5104 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW E066 OF 2024**

J NGAAH, J

MAY 13, 2024

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY RESPONDENT

AND

**ACCOUNTING OFFICER KENYA POWER & LIGHTING CO.
PLC INTERESTED PARTY
KENYA POWER & LIGHTING CO. PLC INTERESTED PARTY
BOB MORGAN SERVICES LTD INTERESTED PARTY
HATARI SECURITY GUARDS LTD INTERESTED PARTY
LAVINGTON SECURITY LTD INTERESTED PARTY
RILEY FALCON SECURITY SERVICES LTD INTERESTED PARTY
BASEIN SECURITY SERVICES LTD INTERESTED PARTY
ROSE GUARDS SERVICES LTD INTERESTED PARTY
MOCAM SECURITY SERVICES LTD INTERESTED PARTY
PRIDE KINGS SERVICES LTD INTERESTED PARTY
PROTECTIVE CUSTODITY LTD INTERESTED PARTY
SOLVIT SECURITY SOLUTIONS LTD INTERESTED PARTY
SPYEAGLE SECURITY SERVICES LTD INTERESTED PARTY
VICKERS SECURITY SERVICES LTD INTERESTED PARTY**



BABS SECURITY SERVICES INTERESTED PARTY
DELTA GUARDS LTD INTERESTED PARTY
GYTO SUCCESS CO. LTD INTERESTED PARTY
ISMAX SECURITY LTD INTERESTED PARTY
HOUNSLOW SECURITY LTD INTERESTED PARTY
SUPERIOR SECURITY LTD INTERESTED PARTY

AND

HARPCON SECURITY SERVICE LIMITED EXPARTE

AND

KLEEN HOME SECURITY SERVICES LTD INTERESTED PARTY
TOTAL SECURITY SURVEILLANCE LIMITED INTERESTED PARTY

JUDGMENT

1. The application before court is a motion dated 28 March 2024 seeking judicial review reliefs of certiorari, mandamus and prohibition. The prayers for these reliefs have been expressed as follows:
 - “ a. An order of certiorari do (sic) issue to remove into this Honourable Court and quash the decision of the Public Procurement Administrative Review Board dated 25th March, 2024 dismissing the Request for Review No. 16 /2024 of 4th March, 2024 by the 22nd Interested Party and directing the Kenya Power & Lighting Co. PLC to proceed with the tender process in respect of the Tender No. KP 1/9A.2/OT/060/HT/23-24.
 - b. An order of certiorari do (sic) issue to remove into this Honourable Court and quash the decision of Kenya Power & Lighting Co. PLC as set out in the letter dated 19thFebruary, 2024 to award Tender No. KP1/9A.2/OT/060/HT/23-24.
 - c. AN ORDER OF CERTIORARI do (sic) issue to remove into this Honourable Court and quash the contracts, if any, signed pursuant to the decision of the Public Procurement Administrative Review Board dated 25th March, 2024 and the decision of the Kenya Power & Lighting Co. PLC dated 19th February, 2024.
 - d. An order of mandamus do (sic) issue directed to the Kenya Power & Lighting Co. PLC to re-tender for Guarding Services Countrywide and to award the said tender in compliance with the provisions of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations and the tender documents issued by the Kenya Bureau of Standards.”
2. The applicant also seeks an order for costs.



The application is expressed to be brought under Articles 22, 23(3), 47, 48, 50(1), 159 (1) & (2) and 165 (6) & (7), 258 (1) of *the Constitution*; sections 8 and 9 of the *Law Reform Act*, cap. 26; section 175 (1) of the Public Procurement and Disposal Act, 2015; sections 7, 8, 9, 10 & 11 of *Fair Administrative Action Act*, 2015 and Order 53 Rules 1 and 2 of the Civil Procedure Rules.

3. It is based on a statutory statement dated 27 March 2024 and an affidavit verifying the facts relied upon sworn on even date by Japheth Otieno Midigo Kaudo who has sworn that he is the human resource manager of applicant. The applicant is a private limited liability company which unsuccessfully participated in Tender No. KP 1/9A.2/OT/060/HT/23-24. This was an open tender according to which the 2nd interested party sought for provision of security guard services.
4. The tender was eventually awarded to the 3rd to 21st interested parties. Total Security Surveillance Limited, the 22nd interested party in these proceedings applied for review of the award before the respondent in Public Procurement Administrative Review Board Application No. 16 Of 2024; Total Security Surveillance Limited Vs Accounting Officer, Kenya Power & Lighting Co. Plc & Others. The applicant participated in the proceedings before the respondent as an interested party.
5. In its decision dated 25 March 2024, the application for review was dismissed. It is this decision of the respondent that is the subject of these proceedings. According to the applicant, the respondent did not address the issues the applicant raised in its decision. The issues that the respondent is alleged to have ignored are not quite clear in the affidavit but in paragraph 10(I) (c) thereof it is sworn that:

“That it is irrational of the respondent not for the respondent to accord the applicant an opportunity to be heard and not make a pronouncement as to whether the Tender was Clear and not confusing.”

From what I gather, this is the only indication of the applicant’s gripe with the respondent’s decision and it is the only reason upon which it alleges that the respondent’s decision is want of legitimate expectation, rationality and reasonableness.

6. James Kilaka swore a replying affidavit on behalf of the respondent. He has sworn that he is “a procurement professional” and the acting secretary of the Public Procurement Administrative Review Board. He has admitted that on 4 March 2024, the 22nd interested party instituted the proceedings before the respondent in application No. 16 of 2024 but that the request for review was eventually dismissed
7. Kilaka has sworn that the request for review was on specific ground by Total Security Surveillance Services Limited which was that it was unfairly disqualified from the tender. The applicant, as an interested party opted to deviate from that ground by the applicant and introduced the ground of clarity of the tender yet this was not an issue for consideration in the request for review before the respondent.
8. According to Mr. Kilaka, the applicant was out of time to file a request for review and that it is why it participated in the proceedings before the respondent as an interested party and not as an applicant. In any event, it has been urged that applicant has failed to demonstrate any elements of illegality, irrationality, procedural impropriety or unfairness in the manner in which the respondent considered and interrogated the evidence and pleadings before reaching the impugned decision.
9. The 22nd interested party also filed a replying affidavit but supporting the motion. The affidavit was sworn by Daniel Kipkorir Bunei who swore a similar affidavit in support of the 22nd interested party’s application, filed in this Honourable Court as application no. E067 of 2024, seeking to impeach the same decision which is the subject of this judgment. For this reason, I need not go into the details of



the issues raised in Mr. Bunei's affidavit as they have been covered in the judgment in the application no. E067 of 2024.

10. I have had opportunity to consider the respondent's decision and with particular interest on whether its is true, as alleged by the applicant, that the respondent "did not accord the applicant an opportunity to be heard" and that it "did not make a pronouncement as to whether the Tender was Clear and not confusing".

11. First, unlike Total Security Surveillance Services Limited which invoked section 167 of the *Public Procurement and Asset Disposal Act* and requested for a review of the procuring entity's decision to award the tender, the applicant in these proceedings did not file such an application. Section 167(1) reads:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

12. The applicant ought to have invoked this provision of the law and challenged the procuring entity's decision. As a matter of fact, it did but its quest in this regard was dismissed by the respondent. At Paragraph 31. ii of the respondent's decision, the reason for the applicant's failed bid to challenge the decision given as follows:

"Harpcon Security Services Limited's application for joinder in the Request for Review as an Applicant was dismissed as they were outside the 14 days' statutory timeline to file a Request for Review. However, they were allowed to participate in the Request for Review as an interested Party by virtue of their participation in the subject tender as tenderers."

13. In effect, what the applicant is doing in these proceedings is to seek to achieve what it could not achieve, by its own inaction, in the proceedings before the respondent.

Be that as it may, even in its capacity as an interested party in the proceedings before the respondent, the applicant was allowed to make submissions which the respondent captured in its decision as follows:

"20th Interested Party's Submissions

48. Counsel for the 20th interested Party, Mr. Muchiri, associated himself with the submissions made on behalf of the Applicant. He equally added that the Tender Document was unclear on how a tenderer was to fill its tender where its preference did not fit any of the preferences provided for under the Tender Document

49. He maintained that the tender process was not competitive and equally not compliant with the Act. He therefore sought that the Request for Review be allowed." (Emphasis added).



14. On the question of clarification of what the applicant has alleged was confusing and that the respondent did not make any finding on it, the respondent noted as follows in its decision:

“ 53. The Board equally wanted clarity from the Respondents and 20th Interested Party on whether there was any clarification that was sought by the 20th Interested Party on any of the tender provisions. Counsel for the Respondents, Ms. Mulela pointed out that though the Tender Document made room for seeking clarifications, the 20th interested Party never sought any such clarification. Counsel for the 20th interested Party, Mr. Muchiri, equally admitted that the interested Party did not seek any clarification.”

15. The contention by Ms. Mulela, the learned counsel for the procuring entity, that the tender document provided room for clarifications, if any was required, was not disputed. The provision for such clarifications has also a statutory underpinning in section 94 of the [Public Procurement and Asset Disposal Act](#) which states:

94. Pre-qualification documents

- (1) An accounting officer of a procuring entity shall promptly issue prequalification documents to all candidates who request them and shall maintain a record of all candidates to whom documents are issued.
- (2) The pre-qualification document shall contain all the information specified in section 93 and any other information necessary for the potential candidates to prepare and submit applications to be pre-qualified.
- (3) Without prejudice to the generality of paragraph (2), such information shall include—
 - (a) the name, address and contact details of the procuring entity;
 - (b) details of the procurement requirements, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;
 - (c) instructions on the preparation of applications to pre-qualify, including any standard forms to be submitted and the documentary evidence and information required from candidates;
 - (d) instructions on the sealing, labelling and submission of applications to pre-qualify, including the location and deadline for submission; and
 - (e) information on how applications will be evaluated.
- (4) The accounting officer of a procuring entity shall allow the candidates at least fourteen days to prepare and submit their applications to be pre-qualified.
- (5) The accounting officer of a procuring entity shall promptly respond to all requests for any clarification relating to the pre-qualification document where such requests are received before the deadline for submission. (Emphasis added).

16. So, if the applicant was in doubt or “confused” on instructions on the preparation of the its application, including filling of any standard forms to be submitted and any other documentary evidence or information required, it was open to the applicant to seek clarification not just on these issues but on any other aspect of the tender that it was not clear about. The fact that it did not seek the necessary



clarification would have been sufficient to have its request for review dismissed, assuming that it had filed one within the prescribed timeline.

17. I find it rather intriguing, if not disturbing, that the applicant would fail to seek clarification, if any was necessary, fail to file an appropriate application within the prescribed timeline before the respondent under section 167 of the *Public Procurement and Asset Disposal Act*, and come to this Honourable Court accusing the respondent of having failed to make a finding on an application that was not even before it. As an interested party in the proceedings before the respondent, the applicant could not purport to pursue its failed course through the 22nd interested party's application.
18. Having made an application before the respondent which, as noted, was rejected, the applicant is restricted to challenging that aspect of the respondent's decision. It cannot purport to escalate the application which ought to have been heard by the respondent to this Honourable Court. If, for any reason, the applicant was not satisfied with the respondent's decision dismissing its application and, instead, relegating the applicant to the status of an interested party, the applicant ought to have thereby invoked section 175 (1) of the *Public Procurement and Asset Disposal Act* and challenged that decision by way of judicial review in this Honourable Court. This section reads as follows:

175. Right to judicial review to procurement

- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

In view of this provision of the law, it would be a mockery of section 167 of the *Public Procurement and Asset Disposal Act* if this Honourable Court was to proceed to entertain an application which the applicant filed before the respondent but was dismissed for reasons which the respondent gave in the impugned decision.

19. For these reasons, I am satisfied that the applicant's application is not only misconceived but it also a blatant abuse of the court process. It is hereby dismissed with costs to the respondents. It is so ordered.

SIGNED, DATED AND DELIVERED ON 13 MAY 2024.

NGAAH JAIRUS

JUDGE

