



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. E013 OF 2020

IN THE MATTER OF: THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSETS DISPOSALS ACT NO. 33 OF 2015

AND

IN THE MATTER OF: AN APPLICATION BY THE ACCOUNTING OFFICER, KENYA PORTS AUTHORITY AND KENYA PORTS AUTHORITY FOR THE JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD MADE ON 14TH DECEMBER 2020 IN RESPECT OF REQUEST FOR REVIEW APPLICATION NUMBER 142 OF 2020

BETWEEN

1. THE ACCOUNTING OFFICER, KENYA PORTS AUTHORITY

2. KENYA PORTS AUTHORITY.....EX PARTE APPLICANTS

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

1. ROYAL HISHAM LIMITED

2. BIZCAN TRANSPORTERS

RULING

1. The 1st and 2nd Ex parte Applicants vide a **Notice of Motion** Application dated 22/12/2020 sought for leave to have an application by way of **Notice of Motion** dated 22/12/2020 and filed under the provisions of **Order 53 Rule 1 of the Civil Procedure Rules, 2010** certified urgent and fit to be heard over vacation.

2. The order was granted ex parte by the court which allowed both applications to be heard over the vacation and proceeded to grant leave to the Applicants to file an application seeking orders for judicial review.

3. Under the **Public Procurement and Disposal Act, No. 33 of 2015**, and Regulations thereto of 2020, strict timelines have been set requiring that the court renders its decision within 45 days. To expedite the proceedings in light of the said statutory timelines, the court

issued directions as set out hereunder in extenso:

- a) *That the Chamber Summons dated 22/12/2020 is hereby certified urgent and the same to be heard during vacation.*
- b) *That the Chamber Summons dated 22/12/2020 is allowed in terms of prayer two to the extent that leave to commence Judicial Review proceedings is granted.*
- c) *That the Applicants to file substantive Notice of Motion within 7 days from today.*
- d) *Upon service, the Respondents and Interested Parties to file their respective responses within 7 days and corresponding leave to apply.*
- e) *Interpartes hearing on 7/1/2021 before the duty Judge.*

4. In compliance with these raft of orders, the Ex parte Applicant filed a substantive **Notice of Motion** application dated 29/12/2020. On 30/12/2020, they also filed skeleton submissions dated 6/1/2021 together with a list of authorities on even date. They further filed an affidavit of service to confirm electronic mail service upon the Respondent and the Interested Parties.

5. The record shows that the Respondent and the Interested Parties were served but they had not responded by the time the matter was placed before me on 11/1/2021.

6. The court, being minded of the strict timelines as set by the law, that the court should render its decision within 45 days of the Tribunal's decision which is to lapse on 12/2/2021, had to satisfy itself with the procedural requirement as set out under **Order 53 Rule 4(1) of the Civil Procedure Rules**. This rule requires that the facts relied upon when leave to apply for an order of Judicial Review ought to be the same unless by leave of court according to sub-rule 4(2) of the Civil Procedure Rules, 2010.

7. Having been so satisfied that the Ex parte Applicants had complied with the statutory requirement under **Order 53 Rule 4(1) of the Civil Procedure Rules**, the court went on to observe that the Respondents and the Interested Parties had been properly served by electronic mail service in accordance with the provisions of **Order 5 Rule 22B of the Civil Procedure Rules, 2010**.

Determination

8. I have carefully read through the entire document, the **Ruling** of the Review Board delivered on 14/12/2020, the Ex parte Applicants applications and affidavits in support as well as the statement and skeleton submissions. I find that the issues that commend themselves for determination are as follows:

- a) *Whether the Public Procurement Administrative Review Board acted in excess of its jurisdiction under Section 173 of the Public Procurement Disposal Act, No. 33 of 2015.*
- b) *Whether the said Board's decision delivered on 14/12/2020 should be removed into court and be granted.*
- c) *What orders should the Honourable Court reach?*

9. These proceedings have been triggered by the following award:

- i) *The Accounting Officer of the Procurement Entity's letter of award dated 9th November 2020 with respect to Tender No. KPA/005/2020-21/ADM Provision of Commuter Bus Services for ICD Nairobi and ICD Naivasha addressed to M/s Bizcan Transporters, be and is hereby cancelled and set aside.*
- ii) *The Accounting Officer of the Procuring Entity's letters of notification of unsuccessful bid dated 9th November 2020 with respect to Tender No. KPA/005/2020-21/ADM Provision of Commuter Bus Services for ICD Nairobi and IDC Naivasha addressed to all unsuccessful bidders, including the Applicant herein be and are hereby cancelled and set aside.*
- iii) *The Accounting Officer of the Procuring Entity is hereby directed to reinstate the Applicant's bid together with all the bidders in the subject tender who made it to the preliminary evaluation, at the preliminary evaluation stage and direct the evaluation committee to conduct a re-evaluation at the Preliminary Evaluation stage with respect to mandatory requirement (f) of Clause 2.7 Appendix to instructions to the Tenderers on page 27 of the Tender document, in accordance with the provisions of the Act and the constitution taking into consideration the Boards findings in this Review.*
- iv) *Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the Procurement process to its logical conclusion including making of an award within (14) days from the date of this decision.*

v) *Each party shall bear its own costs in this request for review.*

10. Section 173 of the Public Procurement and Disposal Act donates the following powers to the Review Board –

- a) *appeal anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling*

the procurement on disposal proceedings in their entirety;

b) give directions to the procuring officer of a procuring entity with respect for anything to be done or redone in the procurement or disposal proceedings;

c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

e) order termination of the procurement process and commencement of a new procurement process.

These are sweeping powers which can have a far-reaching impact on the procurement process. Why?

11. This is so because public officers, entrusted with carrying out certain functions on behalf of the people of Kenya ought to swiftly follow the law to ensure fairness. For instance, where there is suspicion that there was canvassing which resulted in a party being favoured against another, remedy should not be remote. At the same time, to avoid delay so that the public benefits from the service being offered to the parties, the law gives the procuring entity and all redress tribunals strict timelines.

12. **The first issue for determination is whether the Review**

Board acted *ultra-vires*.

The procuring entity contends that the Review Board acted in excess of the powers granted by **Section 173** of the **Public Procurement and Disposal Act, 2015** when it gave directions for the evaluation of Tender **No.KPA/005/2020-21/ADM** for the provision of a commuter bus services for ICD-Nairobi and ICD-Naivasha. It claims that this is contrary to **Section 79(1)** of the **Public Procurement and Disposal Act, 2015**. **Section 173(b)** of the **Public Procurement and Disposal Act**, as read with **Section 79(1)** of the same Act shed light on this assertion. I have reproduced **Section 173(b)** of the **Public Procurement and Disposal Act, 2015**, which gives the Review Board power to give direction to the procuring entity. It can direct the entity to do or re-do anything in the procurement proceedings.

13. **Section 79(1)** of the **Public Procurement and Disposal Act** deals with the repossession of tenders. It states as follows:

“79 (Repossession)

(1) A tender is repossessed if it confirms to all the eligibility and other mandatory requisition in the tender documents.”

14. The disputed letter dated 9/11/2020 informed the 1st Interested Party that its tender bid was non-responsive because it failed to provide valid/current business permit issued by the local authority where the business is domiciled/located. The letter complied with Section 87(3) of the Act.

15. **Section 80(2)** of the **Public Procurement and Assets Disposal Act** makes its mandatory for the procuring entity to adhere to its set criteria in the tender document. It provides in part as follows:

“The evaluation and comparison shall be done using procedures and criteria set out in the tender document.”

16. As to whether or not the procurement entity adhered to and correctly applied the threshold set, Clause 2.7 (f) of the Tender Document is the one under scrutiny. The second Clause provides thus:

“Valid/current business permit where the business operations of tenders are domiciled (mandatory).”

17. The Review Board considered the meaning attributed to “value” and “current”. It came to the conclusion that the provision permits to cover a period of time is valid and could not be the basis to reject the tender and ordered the process to be repeated by its finding in paragraph 3 reproduced at paragraph 9 of this Judgment.

18. In my view, the action by the Review Board in giving directions is valid whether the decision is wrong or right. The powers to give such decisions are well within the law and therefore, the Board cannot be faulted.

19. On the issue of illegality, the Applicant has challenged the Board’s decision on the ground that it has sanctioned an illegality, and alleges that the law does not permit documents returned to be recalled, hence the decision has violated **Sections 87(3)** and **82(3)** of the **Public Procurement and Assets Disposal Act, 2015**. Also, that the interpretation of provisional licence as a valid licence is contrary to the mandatory provision of the law.

20. By virtue of **Section 173(b)** and **(c)** of the **Public Procurement and Assets Disposal Act**, as set out at paragraph 10 in this Ruling, the powers donated to the Review Board are wide. The mere fact that it can substitute its decision or that of the Accounting Officer, suggests that the implementation of its decision is left to the officer to comply with the law.

21. A record of what the Tenderers gave is captured by the confidential dossier, which acts as a balance and therefore the previous procedure followed is what was adopted in implementing its decision.

22. **Section 82(3) and 87(3) of the Public Procurement and Assets Disposal Act, 2015** are provisions which direct the procuring entity's communication of results and conclusion of the process.

23. Section 173 of the same Act, was enacted well after the provisions cited. The drafters were aware of the said provisions and by donating such powers to the Review Board, it was intended to control the activities of errant officers who blatantly violate the law with impunity. Therefore, whether or not there were difficulties in implementing the decision, the Board acted within the powers given to it by the statutes.

25. With regard to "*unreasonableness*" and "*irrationality*", the main complaint under this head is that the decision is likely to undermine public confidence in the procurement process and will allow bids that failed to be re-entered. What the Board saw was that it never asked the committee to qualify all bids. The decision was based on the interpretation of Clause 2.7 (f) which is set out at paragraph 17 of the Judgment. I find that the Review Board in determining the application before it, was very industrious and referred to various texts and dictionaries for the meaning of the word "*valid*" and "*current*" and the syntax used valid/current.

26. I also wish to have a bite at it. The Merriam-Webster Dictionary which has been in existence since 1828, defines the word "*valid*" as "*having legal efficacy or force, especially executed with the proper legal authority and formalities.*" The examples given also added detailed more meaning to what is "*valid*". A time frame fixed is usually stated. Current is defined as "*present*", "*now*" by the Collins Dictionary. The words were used by the Ex parte Applicant to mean the same thing.

27. The next issue to be determined is the Finance Act, where parties are by law required to have lawful businesses. The Mombasa County Finance Act, 2019 by virtue of Section 5(1) stipulates as follows:

“(1) A person shall not carry out any businesses or service within the county without a valid licence or permit issued by the relevant county office.

(2) A person who intends to carry out any of the businesses listed in the or under the schedule or Single Business Permit Regulation shall apply for a licence or permit from any of the county offices or any such designated agents as shall be prescribed by the county government from time to time.”

28. It goes on to state as follows:

“A person who applies for licence or single business permit under sub-section (2) shall be issued with a licence on payment of the applicable fees, depending on the location and size of the business as specified in the Schedule of the single business permit regulations.”

Section 70(1) of the Public Procurement and Assets Disposal Act provides that "*all payments made to the County Government shall be through authorized channel.*" Further, it goes on to state at **Sub-Section 3** that:

“an official receipt shall be issued for all payments made to the County Government.”

29. It then suffices to note that when the 1st Interested Party realized that it intended to rely on the authenticity of the permit, it ought to have filed a copy of the receipt, be it electronic or otherwise. It was correctly observed by the 2nd Interested Party and the Ex parte Applicant that the permit is provisional whereby there is no mention of a provisional licence or permit in the Act. The Act states that when a party pays, it is issued with a licence or permit there is no other instrument issued and there is no period for waiting to be issued with any other document once payment has been made. It was therefore not for the evaluation to find out this fact as suggested by the Review Board.

30. A further scrutiny at the provisional permit indicates that it was obtained for the purpose of the tender and was meant to last for only one (1) month. The same was issued on 25/8/2020 and was to end on 24/9/2020. By the time the results were communicated on 9/11/2020, the 1st Interested Party was already not holding a valid, current single business permit.

31. It is worth noting that the public invests heavily in projects to be undertaken by credible firms. Thus the slightest suspicion of the viability of a bidder should entitle an entity to reject a tenderer. This is the reason why certain requirements are mandatory.

32. In the instant case, the process is complete, and the second highest bidder has not joined the proceedings. There is no evidence to that effect. If the decision is left to stand, it can lead to unsurmountable difficulties because parties will not submit new documents and in addition, it can lead to a lot of canvassing, hence deny the winning bidder justice.

33. For the reasons advanced herein, I find and hold that the Review Board misdirected itself on the facts surrounding the disputed document and thereby reached a wrong decision. Therefore, the following orders issue:

(1) The Ex parte Applicants' Notice of Motion application dated 29/12/2020 succeeds in terms of prayer No. 2, to the extent that the Review Board's decision rendered on 14/12/2020 is removed into court and quashed.

(2) The Ex parte Applicants do proceed as per their letter dated 9/11/2020 issued to the winning bidder of Tender No. KPA/005/2020-21/ADM provision of Commuter Bus Services for ICD-Nairobi and ICD-Naivasha addressed to M/S Bizcan

Transporters Limited.

(3) The amount paid pursuant to Section 175(2) of the Act and Regulation 222 be refunded to the Ex parte Applicant.

(4) Each party to bear their own costs.

Dated, Signed and Delivered at Mombasa this 10th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D. O. CHEPKWONY