



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. E003 OF 2021**

**SPACE CONTACTORS & SUPPLIERS**

**INVESTMENT LIMITED.....EX PARTE APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**AND**

**1. THE ACCOUNTING OFFICER, KENYA MARITIME AUTHORITY**

**2. KENYA MARITIME AUTHORITY**

**3. VIRGIN CLEANING LIMITED**

**4. SIMCA AGENCIES LIMITED.....INTERESTED PARTIES**

**RULING**

1. By the Judicial Review application herein dated 25/1/2021 the Ex parte Applicant prays that an order of certiorari be granted by this Court to bring into this Court and quash the Respondent's decision contained in the Ruling dated 8/1/2021.

2. The reasons advanced by the Ex parte Applicant for the grant of the said certiorari are that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties invited sealed bids through open international tendering for Tender No. KMA/ONT/01/2020-2021 for provision of general cleaning and landscaping services (reserved for women, youth and persons with disability); that following the said invitation, the Applicant submitted its bid; that on 12/11/2020 all the received bids were opened in the presence of all the bidders who had submitted bids and their financial proposal were read out; that on or about 11/12/2020 the Applicant received a notification letter dated 10/12/2020 informing it of its unsuccessful tender and disclosing reasons thereof; that the said notification letter dated 10/12/2020 informed the Applicant that its bid was unsuccessful because it did not comply with the following:

- Did not mark the two tender documents submitted to indicate the original and copy
- The tender – Securing Declaration Form on paragraph two, period of time for suspension in the event of breach and the start date of this period (months/years) and date not indicated

3. The Ex parte Applicant states that the above reasons advanced by the procuring entity are completely unfounded and false as the Applicant's bid was compliant with all the tender requirements.

4. The Applicant being dissatisfied appealed to the Respondent for a review vide PPARB application No. 153/2020. The Board delivered its decision on the request for review on 8/1/2021 and dismissed the request for review.

5. Being dissatisfied with the decision of the Board, the Ex parte Applicant filed this judicial review application stating that the Respondent did not take into consideration all material information before it, and that the reason advanced by the Respondent that the Ex parte Applicant did not mark the two tender documents properly to indicate the "**Original**" and "**Copy**" is unfounded and untrue; that the assertion that the

Ex parte Applicant's tender – **Securing Declaration Form on paragraph two: period of time for suspension in the event of breach and the start date of this period (months/years) and date** not indicated is also false as the same is clearly indicated; that for the Respondent to declare the Ex parte Applicant's bid unsuccessful, on nonfactual reasons is a clear manifest of the Respondents' failure to act in a fair, transparent, accountable and credible manner as required by Articles 10, 47, 201 and 227 of the Constitution; that Clause 1.4 of the tender document required all the bidders to attend a mandatory pre bid conference and site visit scheduled for Mombasa, Lamu, Kisumu and Lodwar offices on diverse dates; that further, Clause 1.4 stipulate as follows:

**All bidders shall be required to sign an attendance register as evidence of having participated in the site visit. ALL bidders shall be issued with a Site Visit Certificate that must be duly filled and signed by the bidder or his representative and also the KMA representative (must by duly signed and stamped at every zone).**

6. The Applicant avers that the procuring entity was in breach of this mandatory requirement as the site visit certificates issued at Lodwar office to all the bidders were not duly stamped as required and in total disregard of Clause 1.4 of the tender document. The Applicant states that in fact none of the bidders complied with the above requirement; and therefore all the bids submitted were not responsive and hence not in compliance with Section 79 of the Act; that the Respondent ought therefore to have invoked provisions of Section 63(f) of the Act to terminate or cancel procurement proceedings in its entirety.

7. Further, the Applicant believes that the 3<sup>rd</sup> Interested Party herein was the preferred candidate to be given the tender. This is so because the 3<sup>rd</sup> Interested Party or its representative did not attend the mandatory pre-bid conference and site visit scheduled for Lodwar office on 2/11/2020 in compliance with Clause 1.4 of the tender document; and that in any event the 3<sup>rd</sup> Interested Party's financial proposal does not conform with the minimum wage requirement as provided under the Kenyan Labour Laws and Regulations. The Applicant believes that the Respondent might have engaged in a flawed procurement process and acted against the laid down laws and procedures, to tilt the scales, and carried out a sham procurement process in breach of the Act, thereby failing to ensure fairness, integrity, transparency and accountability with the result that prejudiced the legitimate expectations of bidders.

8. The Ex parte Applicant avers that due to the above failures it was unfairly denied an opportunity to earn profits, and it also suffered expenses of preparing the tender documents.

### **Response**

9. The application is opposed by the Respondent vide a Replying Affidavit sworn by **Philip Okumu** on 16/2/2021. Mr. Okumu is the Acting Secretary of the Respondent. The deponent avers that the application has no merit because the decision reached by the Respondent on 8/1/2021 was arrived at after hearing all the issues raised by the Ex parte Applicant.

10. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties objected to the application vide Grounds of Opposition filed on 8/3/2021, stating that the Applicant has not shown that they (Applicants) complied with Section 175(2) of the PPPADA and Regulation 222 thereof. They also filed a Replying Affidavit sworn by **Robert Mutegi Njue** and filed herein on 8/3/2021.

11. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Party's case is that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties authorized the advertising of the invitation to tender through open tender for tender No. KMA/ONT/01/2020-2021; provision for general cleaning and landscaping services reserved for women, youths and persons with disability on 20/10/2020; that all tenders submitted to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties following the invitation to tender were opened on 12/11/2020 in the presence of all tenderers' representatives at the Respondents headquarters; that one of the tender documents received and opened during the tender was the tender document of the Applicant which was opened in the presence of the Applicant herein; that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties established an Evaluation Committee pursuant to Section 46 of the Public Procurement and Disposal Act, 2016 (PPDA) to evaluate all tender documents submitted; that the Interested Parties evaluation process took place from 25/11/2020 to 30/11/2020 where the Applicant's tender was declared non responsive for failing to comply with the mandatory requirements: one of the mandatory requirements indicated in clause 2.15.1 of the tender document required tenderers to prepare two copies of the tender, each marked "Original Tender" and "Copy of Tender", as appropriate; that the Applicant herein did not comply with requirements under the abovementioned clause and instead, the Applicant marked the envelope holding the tender document as 'Original Tender' and 'Copy of Tender'; that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties could not confirm the Applicant's original tender document from the copy of the tender document contrary to the tender requirements; that all tenderers were required to comply with the mandatory requirement of completion of the tender-securing declaration form under Section VIII of the tender document in accordance with the instructions provided and as required under Section 61 of the PPDA; that upon completion of the evaluation process, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties notified the successful tenderer and all the unsuccessful tenderers, with reasons, including the Applicant herein in accordance with Section 87 of the PPDA; that the Applicant's claim that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties failed to act in a fair, transparent, accountable and credible manner as required under the constitution, is baseless, frivolous and vexatious and lacks evidence to support the claim; that on the contrary the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties complied with all provisions of the PPDA and the values and principles entrenched in Article 10, 227 and 232 of the constitution in evaluating the said tender; that the claim by the Applicant of non-conformity with the law and the alleged failure to conduct due diligence on the successful tenderer are not credible and are designed to frustrate the procurement process of the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties and that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties during the evaluation process considered the certificates required as prima facie evidence of compliance with requirement under 2.15.1; and that, in particular, all tenderers were required to submit a valid/current tax compliance certificate from KRA and a valid certificate issued by the authorities under Access to Government Procurement Opportunities (AGPO) which were not submitted.

### **Submissions and Determination**

12. Parties filed submissions to the application which I have carefully considered. In my view, the only issue for determination herein is whether or not the Respondent Board overshoot its jurisdictional limit in its decision of 8/1/2021.

13. I have carefully considered the issues that were present before the Respondent Board. Review No. 153/2020 is with respect to a tender process initiated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through Tender NO. KMA/ONT/CL/01/2020-21 for provision of general cleaning and landscaping services (reserved for women, youths and persons with disability). Upon hearing each of the parties' cases, the 1<sup>st</sup> Respondent rendered a decision in Review No. 153/2020, dismissing the same, and directing parties to carry their own costs.

14. The record shows that the Respondent first addressed a preliminary issue regarding grounds for review raised by the 4<sup>th</sup> Interested Party herein and found the said grounds were not properly filed before the Respondent and thus the same were struck out from the record of the Respondent's proceedings. The Respondent then addressed the grounds raised by the Applicant in Review No. 153/2020 identifying the following issues for determination:

(i) Whether the Applicant's bid was found non-responsive at the Preliminary Evaluation Stage in accordance with Section 80(2) of the Act read together with Article 227 (1) of the constitution with respect to the following mandatory requirements:

a. The bidder shall be required to submit one (1) original and one (1) copy of their original bid marked "ORIGINAL" and "COPY"; and

b. Duly filled, signed and stamped Tender Surety Declaration Form.

(ii) Whether the procuring entity evaluated tenders received in response to the subject tender at the Preliminary Evaluation Stage in accordance with Section 80(2) of the Act read together with Article 227(1) of the constitution with respect to Clause 1.4 of Section one: Invitation to Tender on page 3 of the Tender Document;

(iii) Whether M/s Virgin Clean Limited (3<sup>rd</sup> Interested Party herein) attended the mandatory pre-bid conference and site visit scheduled for the procuring entity's Lodwar office in compliance with Clause 1.4 of Section one: Invitation to Tender on page 3 of the Tender Document;

(iv) Whether the 3<sup>rd</sup> Interested Party's bid complied with the minimum wage requirement as required under Labour Laws and Regulations; and

(v) Whether the procuring entity conducted due diligence in the subject tender in accordance with Clause 2.24 of Section II. Instructions to Tenderers on page 15 of the Tender Document read together with Section 83 of the Act.

15. On the first limb of the first issue for determination, the Respondent found the Applicant failed to satisfy the mandatory requirement under Clause 2.15.1. Preliminary mandatory requirements of Section III Appendix to instructions to Tenderers on page 28 of the Tender Document because the Applicant marked its envelopes as "Original" and "Copy" instead of marking its tender documents as "Original" and "Copy"; that on the second limb of the first issue, the Respondents held that the Applicant failed to satisfy the mandatory requirement specified in Clause 2.15.1. Preliminary Mandatory Requirements of Section III Appendix to instructions to Tenderers on page 28 of the Tender document because the Applicant did not insert the number of months or years, or state the start date of the period for the bidder's suspension in the event of breach of its obligations and thus the Applicant's tender securing declaration was not complete or duly filed as required in the Tender Document.

16. Therefore, the totality of the first issue for determination is that the Respondent found the Applicant's bid was rightfully declared non-responsive at the preliminary evaluation stage in accordance with Section 80(2) of the Act and Article 227(1) of the constitution; that upon perusal of the site visit certificates and evaluation report dated 1/12/2020 forming part of confidential documents submitted to the Respondent by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, the Respondent noted that no bidder was disqualified on the issue of site visit certificates because it was noted that the procuring entity's stamp was not available on the date of issuance of site visit certificates to bidders at the procuring entity's Lodwar Office and so, this could not be visited upon any bidder.

17. Consequently, the Respondent ruled on the second issue that the procuring entity evaluated tenders in accordance with Section 80(2) of the Act and Article 227(1) of the constitution to ensure fairness in the subject procurement process.

18. On the third issue, the Respondent ruled that there was sufficient evidence from the confidential documents submitted before it, notably a copy of a site visit certificate dated 2/11/2020 showing a representative of the 3<sup>rd</sup> Interested Party attended the mandatory pre-bid conference and site visit held at the procuring entity's Lodwar office on 2/11/2020 and so the 3<sup>rd</sup> Interested Party complied with Clause 1.4 of Section one: Invitation to Tender on page 3 of the Tender Document.

19. On the fourth issue, the Respondent studied the 3<sup>rd</sup> Interested Party's financial proposal and found that the said bidder attached a document known as "staff payroll summary: August 2020" showing the minimum payments to the 3<sup>rd</sup> Interested Party's staff was Kshs. 14,573.00 which was above the minimum wage specified under the schedule of Regulation of Wages (General) Amendment Order, 2018 as amended by Legal Notice No. 2 of 2019 read together with Section 48(d) of the Labour Relations Act No. 12 of 2007.

20. On the fifth issue, the Respondent addressed its mind on the importance of a due diligence exercise and the manner in which the same ought to be conducted and found that the procuring entity conducted a due diligence in accordance with Clause 2.24 of Section II. Instructions to Tenderers on the Tender Document read together with Section 83 of the Act. It is noteworthy that this process did not apply to the Ex parte Applicant who had been found non-responsive at the Preliminary Evaluation Stage, and did not progress to other stages of evaluation and was not qualified for recommendation for award of the subject tender.

21. A cursory look at the above issues before the Board shows that they were issue of facts, which required verification. They concerned

whether or not the Applicant's bid was responsive, how evaluation was done, attendance to pre-bid conferences, compliance with minimum wage, due diligence and so on. The verification of these factual issues were within the mandate of the Respondent. In this Court, we are concerned with procedural justice and not issues of facts, because this is not a verification forum. This Court therefore cannot question the Respondent on its finding on issues of fact. This Court will however question the process of the procurement, and how the established facts relate to the law.

22. Section 173 of the Public Procurement and Disposal Act, 2015 provides for the powers of the Review Board which include:

- Annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- Give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- Substitute the decision of the Review Board for any decision of the accounting officer of an entity in the procurement or disposal proceedings;
- Order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- Order terminating procurement process, or commencement of a new procurement process.

23. From the foregoing, it is the finding and holding hereof that the Review Board in granting the orders herein remained faithful to its powers and mandate, and did not divert from the same contrary to what is alleged in this application.

24. The purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies. It is not the purpose of judicial review to micromanage the Review Board especially where the Board has lawfully and reasonably exercised its statutory mandate. The verification of factual issues complained of herein are in the domain of the Respondent, and this Court will not interfere with that process, even if the decision arrived at is below merit.

25. While a merit review is now possible under the Constitution 2010, the Court will still not freely enter into the province of the Respondent unless the Respondent arrived at a manifestly wrong decision. In the matter before the Court there is no reason to interfere with the merit of the Respondent's decision.

26. For above reasons, the application before the Court is dismissed with no orders on costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MAY, 2021.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Kiprono for 4<sup>th</sup> Interested Party

No appearance for others

Ms. Peris Court Assistant