REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

APPLICATION NO. 61 OF 2020

REPUBLIC.....APPLICANT

-VERSUS-

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

KENYA AIRPORTS AUTHORITY LTD.....1ST INTERESTED PARTY

SAFARICOM LTD.....2ND INTERESTED PARTY

ENCAPSULATED LTD.....3RD INTERESTED PARTY

SIMBANET LTD.....4TH INTERESTED PARTY

Ex parte:

INTERNET SOLUTIONS LTD

JUDGMENT

The applicant's motion is dated 4 March 2020 and is made under section 3 of the Civil Procedure Act, cap. 21and Order 53 Rules 3(1), (2), (3), 4, 4(1) and 7(2) of the Civil Procedure Rules. It seeks the following orders:

"

1. That an order of certiorari to remove into this court to review and quash the decision of the respondent issued on the 12th of February 2020 in Public Procurement Administrative Review Board Application No. 9 of 2020 to uphold the award of Tender Number KAA/OT/ICT/00200/2019-2020 Provision of Service for Maintenance of Passenger Internet Wireless Hotspots for Kenya Airports Authority to the 2nd Interested Party herein.

2. That an order of mandamus to compel the 2nd Interested Party (sic) to restart the tender process in respect of Tender Number KAA/OT/ICT/00200/2019-2020 Provision of Service for Maintenance of Passenger Internet Wireless Hotspots for Kenya Airports Authority and the same be done in compliance with the provisions of the Public Procurement and Asset Disposal Act.

3. That an order of prohibition directed to the 1st interested party from executing a contract or any transaction in respect of Tender Number KAA/OT/ICT/00200/2019-2020 Provision of Service for Maintenance of Passenger Internet Wireless Hotspots for Kenya Airports Authority with the 2nd Interested Party herein or any other company or body.

4. That the Honorable Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.

5. That the cost of this application be provided for."

The motion is based on the statement of facts dated 28 February 2020 and a verifying affidavit sworn by **Sylvester Wasonga Mboya** who has described himself as the "chief commercial officer" of the applicant.

He has sworn that by a tender described as "**Tender No.KAA/OT/ICT/0020/2019-2020 PROVISION OF SERVICE FOR MAINTENANCE OF PASSENGER INTERNET WIRELESS HOTSPITS FOR KENYA AIRPORTS AUTHORITY**" of September 2019, the procuring entity, which is the 1st interested party in these proceedings, invited bids from eligible tenderers that are locally registered Information and Communications Technology (ICT) service providers. The initial closing date of the bids was 5 November 2019 at 11 A.M.

The tender closing date was set for 19 November 2019; it is also the same date that the tenders were opened.

On 19 November 2019, the applicant submitted its bid for the sum of Kshs. 40,386,808.01.

There were three other bidders for the same tender and these were listed as follows:

1. Encapsulated EA. 75,282,240.00

2. Safaricom Ltd. 72,331,396.88

3. Simbanet. 41,752,369.00

On 8 January 2020, the procuring entity notified the applicant vide a letter dated 6 January 2019 that the applicant's bid was unsuccessful for the reasons that, first, the applicant did not provide proof of academic qualifications of its team leader whether by a degree or a diploma certificate; second, the applicant did not provide four on-site personnel who were to be based at the Jomo Kenyatta International Airport (JKIA) in shifts.

In the same letter the applicant was notified that the lowest evaluated bidder and therefore the successful tenderer was the 2nd interested party at Kshs. 72,331, 396.88.

It is the applicant's case that in awarding the tender, the procuring entity failed to apply itself to section 79 of the Public Procurement and Asset Disposal Act, 2015, (herein "the Act") on the responsiveness of tenders; that tenders, such as the applicant's, which conform to all the eligibility and other mandatory requirements in the tender document should not be affected by:

(a) minor deviations that do not materially depart from the requirements set out in the tender documents, or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

The deponent, however, conceded that there was an oversight on the part of the applicant to provide a copy of the certificate of the academic qualifications of either a diploma or a degree of a team leader and also failed to indicate four on-site personnel to be based at JKIA on the shift basis. In the deponent's view, these were minor errors that could be corrected under section 79 of the Act according to which errors can be corrected if they do not affect the substance of the tender. In the applicant's view, it ought to have been accorded opportunity to provide a copy of the degree certificate.

The applicant also took issue with the letter from the procuring entity notifying the bidders of the successful and unsuccessful bids. According to the applicant, the letter was backdated to 6 January 2019 well before the tender was announced in September 2019. Again, the letter was not signed by the accounting officer of the procuring entity as required by Section 87 of the Act.

Being dissatisfied with the award of the tender, the applicant filed before the respondent Request for Application No. 9 of 2020 challenging the procurement process and the award of the tender to the 2nd interested party.

The respondent, rendered its decision on 12 February 2020 but a copy of the written decision was not ready and available to the parties until the 19th day of February 2020.

Henock K. Kirungu, the 1st respondent's secretary swore a replying affidavit opposing the applicant's application. He began his depositions by acknowledging that indeed the respondent had received the applicant's request for review on 21 January 2020.

He directed that the procuring entity together with all other bidders who participated in the tender be served and notified of the pending review as required by the provisions of section 168 of the Act. At the same time, he directed the 1st interested party to submit all confidential documents pertaining to the subject tender to the respondent as required by section 67(3)(e) of the Act, including the list and contacts of all bidders who participated in the tender.

Once he received this information together with the original bids of all bidders and their contact details, he immediately notified them of the existence of the request for review; in his communication, he attached the request for review and further informed all bidders, including the applicant, of the date scheduled for hearing of the request for review.

The respondent framed issues for determination and, in doing so, it noted that the applicant had introduced a new issue which, apparently, was not in the original application and for that reason, the 1st interested party was given opportunity to respond to this particular issue at the

hearing of the Request for Review. To be precise, the issue concerned the registration of the 2nd interested party as an ICT service provider.

On this particular issue, the respondent observed clause 7 of Stage 1. Preliminary (Mandatory) Criteria at page 21 of the Tender Document required bidders to provide a copy of a relevant and valid Communications Authority of Kenya (CAK) Permit or licence.

The respondent scrutinised the 2nd respondent's bid to satisfy itself that the 2nd interested party complied with this requirement; it noted at pages 79 to 82, 83 to 87, 88 to 91 and 92 to 95 that the bid contained a Network Facilities Provider-Tire 1 Licence dated 23 June 2014 issued by the Communications Authority of Kenya, an Application Services Provider Licence issued by the Communications Authority of Kenya for a period of 10 years, and International Gateway Systems and Services Provider Licence granted to the respondent by Communications Authority of Kenya on 23 June 2014 valid for a period of 10 years.

Based on this information, the respondent was satisfied that the 2nd interested party was an ICT service provider and the applicant's allegations to the contrary were dismissed.

The respondent also observed that the applicant challenged the outcome of the tender process on grounds of non-compliance with two criteria that were mandatory requirements at the technical evaluation stage.

The first mandatory requirement was outlined in Clause 3 of Stage 2. Technical Evaluation at page 22 of the Tender Document with respect to the requirements of the Team Leader proposed by a bidder.

During the hearing, the respondent gave the applicant opportunity to clarify who its team leader was in the original bid; through its representative, it asserted that one Mr. James Mattu was the cyber security leader of the applicant. The applicant was the given opportunity to clarify where the diploma or degree certificate of the team leader could be found but it was unable to produce it.

And when the respondent studied the applicant's bid, it noted that in fact James Mattu, was presented in the bid as a Senior Installations Engineer. The only certificate he possessed was a CISCO Certified Network Professional Routing and Switching Certification which was valid from 17 December 2014 to 17th December 2017.

One other officer who was named in the applicant's bid was one Derrick Adak who was identified as one of the 'Applicant's Project Implementation Team; he too did not 'possess a degree or diploma certificate.

Having studied the applicant's bid in its entirety and having noted that the requirements as to the qualification of the team leader were a mandatory requirement at the technical evaluation stage, the respondent came to the conclusion that the applicant failed to meet this requirement and was rightfully evaluated on the criteria as outlined in Clause 3 of stage 2. Technical Evaluation at page 22 of the Tender Document.

The respondent further addressed the issue of the criterion under Clause 2 (c) of Stage 2. Technical Evaluation of the Tender Document regarding Implementation Methodology and noted that the 1st interested party required bidders to indicate at least 4 personnel on shift arrangement, in that, in that while others are out of shift, at least 4 personnel should be on shift.

The respondent observed at pages 309-335 of the applicant's original bid a list together with a summary of qualifications and experience of 17 of its support team without the requisite details on the shift arrangement.

It is the 1st respondent's case that failure to comply with the mandatory criteria would not amount to a minor deviation and the the provisions of section 79 (2) of the Act would not be applicable to the applicant's case. A bidder who fails to meet the mandatory requirements which have otherwise been met by other bidders cannot expect any preferential treatment; if its omissions or errors were to be ignored and the bid treated as if it was responsive, this would go against the principle of fairness embodied in Article 227 (1) of the Constitution.

Having addressed its mind to the import of section 79 (1) of the Act, which states that a responsive bid is one that meets the eligibility and mandatory requirements in the Tender Document and section 80(2) of the Act which requires an Evaluation Committee to follow the procedures and criteria set out in the Tender Documents, the respondent found that the applicant's bid was rightfully evaluated by the 1st interested party.

On the question that the applicant's bid was the lowest and therefore ought to have been accepted as such, the respondent stated that the criteria for the award was based on section 86 (1) (a) of the Act; in this regard, the 1st interested party considered the difference between the lowest evaluated bid price and the lowest bid price and found that a bid must first meet the eligibility and mandatory requirements which would include technical specifications before being subjected to an evaluation based on the prices proposed by a bidder at the last stage of financial evaluation. The applicant's bid did not make it to this stage of evaluation; having failed to meet mandatory requirements at the technical evaluation, it could not compete for the award of the tender with those bidders who made it to the financial evaluation stage.

On the question of notification letters to the bidders, the respondent stated that the letters of notification sent to the successful bidder and also to the unsuccessful bidders were erroneously dated 6 January 2019 instead of 6 January 2020; once the mistake was noted, it was corrected by the 1st interested party.

Regarding the issue of the proper officer authorised to sign the letters, the 1st respondent noted that this authority had been delegated by the 1st interested party's accounting officer to the General Manager, Procurement and Logistics. The latter could not purport to delegate this authority to any other person and to the extent that he did, the letters signed by the purported 'sub-delegatee' were null and void; it is for this reason that, in exercise of its powers under section 173(b) of the Act, it directed that the fresh letters duly signed by an authorised officer be

issued.

It was the respondent's case that, in disposing of the applicant's Request for Review, it did observe the rules of natural justice and acted lawfully, fairly and reasonably in the exercise of its statutory mandate under section 28 as read with section 173 of the Act.

Apart from the respondent, the only other party that responded to the application is the 2nd interested party. In the replying affidavit sworn in its behalf, **Daniel Mwenja Ndaba,** the 2nd interested party's Senior Litigation Counsel, swore that the applicant has not demonstrated how the procedure adopted by the respondent in disposing its request for review and, ultimately reaching at its decision of 12 February 2020 failed to adhere to the due process of law.

Ndaba swore that the 2nd interested party became aware of the procuring entity's tender in October 2019. It submitted its bid on 19 November 2019. On 6 January 2019 it was notified that it had been awarded the Tender its bid having been held to be the lowest evaluated bid. The procuring entity further informed the 1st interested party vide a letter dated 9 January 2020 that it had erroneously captured the date of the Notification of Intention to Enter into a Contract as 6 January 2019 instead of 6 January 2020.

The award was challenged by the applicant but in its ruling delivered on 12 February 2020 the 1st respondent effectively upheld the award. After the ruling the 2nd interested party received a fresh Notification of Intention to Enter into Contract dated 21st February 2020 from the 1st interested party. According to Ndaba, the applicant's allegations that the 2nd interested party did not qualify to be awarded the tender on the basis it was not a locally registered ICT service provider are both factually and legally incorrect because:

> a) The 2nd interested party duly provided evidence of its registration as an ICT service provider in its bid and these were confirmed by the respondent in its decision.
>
> a) The eligibility requirements in any tender are set by the procuring entity in accordance with the Public Procurement and Asset Disposal Act, 2015 and not by anybody else, not least, the applicant.
>
> b) The argument that the licenses issued to the 2nd interested party by the Communication Authority of Kenya are insufficient is untenable.

The applicant, according to the 2nd interested party, has failed to show the manner in which the respondent's decision making process was procedurally wrong. Neither has it demonstrated that the respondent exercised its powers or made a decision that is *ultra vires* the Public Procurement and Asset Disposal Act, 2015 nor that the respondent failed to exercise its duties demanded of it by the Act.

My assessment of the applicant's application is that it is more of an appeal against the procuring entity's decision to award the tender to the 2nd interested party than an application for this Honourable Court to invoke its judicial review jurisdiction and interrogate the process by which the 1st respondent's decision dismissing the applicant's application for review was arrived at.

Lest we forget, section 175 (1) of the Act reminds us that it is only the decision of the Review Board that may be subjected to judicial review; that section states 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. (Emphasis added).***

It follows that, in invoking its judicial review jurisdiction, this honorable court is not concerned with the procuring entity's decision at any stage of the procurement process; rather it is the Review Board's decision on a request for review by "*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"* (See section 167(1) of the Act) that is the subject of interrogation. Of course the judicial review court may refer to any aspect of the procurement process in its determination of the application before it but only to the extent that those aspects are relevant to the determination of the question whether the process by which Review Board reached its decision is impeachable on any of the grounds for judicial review.

As always, this court would, in appropriate cases, evaluate the Review Board's decision on the basis of all or any of the grounds for judicial review of illegality, irrationality and procedural impropriety (see **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410).**

But even when considering the decision of the Review Board or any other tribunal for that matter, this honourable Court is not exercising its appellate jurisdiction which, ordinarily, would entitle the Court to consider the merits of the impugned decision and, where it is appropriate, substitute the decision with its own decision; judicial review would be concerned with the process by which the impugned decision was arrived at.

It is also trite that judicial review jurisdiction is, by its very nature supervisory; it is the means through which judicial control over administrative action is exercised and, generally speaking, it is intended to impugn any unlawful decision. Lord Diplock's classic dictum in **Council of Civil Service Unions versus Minister for the Civil Service (supra)** provides a useful guide on what an unlawful decision entails. The learned judge spoke of these grounds as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

I am unable to fault the respondent's decision on any of these grounds; to be precise, there is no evidence that the 1st respondent did not appreciate correctly the law regulating its decision-making power or that it did not give effect to it with respect to the applicant's request for review.

There is also no evidence that the decision was irrational or unreasonable as in the "Wednesbury unreasonableness" **(Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223).** In other words, there is nothing to suggest that the respondent's decision was *'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'*.

Finally, there is again no evidence that the proceedings leading to the decision or the decision itself was tainted with procedural impropriety. Looking at the affidavit sworn by the 2nd interested party's representative, and which, for the record, was not controverted, there was fairness to all parties who participated in the proceedings, not least, the applicant, at every turn.

When I consider the applicant's application from this legal perspective I am not persuaded that it meets the requisite threshold for judicial review orders sought. None of the grounds upon which it has sought review have any factual or legal basis.

It is apparent that, contrary to the applicant's allegations, the 2nd interested party was a duly registered ICT service provider. Again, by its own admission, the applicant's bid did not meet the mandatory requirements at the technical evaluation stage of the procurement process. According to section 79 (1) of the Act, a tender is responsive only if it conforms to all the eligibility and other mandatory requirements in the tender documents. As much as section 79 (2) (a) says that a responsive tender shall not be affected by "*minor deviations that do not materially depart from the requirements set out in the tender documents"* there is no doubt that failure to comply with mandatory requirements cannot, by any stretch of imagination, be regarded as 'minor deviations'.

As far as the errors on the date of the notification letters is concerned, the 1st respondent noted the error and corrected it at the earliest opportunity possible. And as for the signatory of those letters, I am satisfied that the respondent properly invoked its powers under section 173 (a) and (b) in cancelling the letters erroneously signed by unauthorised officer and directing the 1st interested party to issue fresh letters properly signed by a duly authorised officer.

In any event, there is no evidence that the applicant suffered any prejudice or any disadvantage, more than any other bidder as a result of the errors in the date of the letters or by the fact that they were initially signed by an unauthorised officer.

On the whole I am satisfied that in coming to the decision it did, the respondent acted within its powers and, no doubt, its decision was legal, rational and procedurally proper; as I have noted above, the decision cannot be faulted on any of the grounds of judicial review. The applicant's motion dated 4 March 2020 is therefore dismissed.

Considering that the Court of Appeal has not yet given its reasons in the **Court of Appeal Case No. 39 of 2021, Aprim Consultants versus Parliamentary Service Commission**, on the fate of decisions delivered on applications filed under section 175 (3) of the Act and, considering that it is out of the consent of the parties that I have delivered this judgment, there will be no order as to costs. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 2ND JULY 2021.

NGAAH JAIRUS

JUDGE