



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 214 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

PRINCIPLES STYLES LIMITED.....1ST INTERESTED PARTY

RAPHA VETIVER ENGINEERING.....2ND INTERESTED PARTY

AND

THE ACCOUNTING OFFICER,

KENYA WATER TOWERS AGENCY.....1ST EX PARTE APPLICANT

KENYA WATER TOWERS AGENCY.....2ND EX PARTE APPLICANT

JUDGMENT

The Parties

1. The first applicant is the Director General of the Kenya Water Towers Agency, the second applicant herein.
2. The second applicant, Kenya Water Towers Agency (KwTA) is a State Corporation under the Ministry of Environment and Forestry established in 2012 through Kenya Gazette Supplement No. 27, Legal Notice No. 27 of 20th April 2012. The Agency is mandated to coordinate and oversee the protection, rehabilitation, conservation and sustainable management of all the critical water towers in Kenya. Water towers support socio-economic development, which is a major pillar of Vision 2030, specifically by supporting generation of electricity, industrial development, irrigation, agriculture, wildlife, tourism, and health as well as conservation of biodiversity, indigenous knowledge and research.
3. The Respondent, the Public Procurement Administrative Review Board, is a central independent procurement appeals review board established under section 27 of the Public Procurement and Asset Disposal Act^[1] (herein after referred to as the act). Its functions pursuant to section 28 of the act are reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to it by the Act, Regulations or any other written law.
4. The first Interested Party, Principles Styles Limited is a limited liability company registered under the Company's Act.^[2]
5. The second Interested Party, Rapha Vetiver Engineering Ltd is a private limited company duly registered in Kenya under the provisions of the Companies Act.^[3]

Factual Matrix

6. The factual chronology of the events which triggered these proceedings is essentially common cause or not disputed. My reading of the respective parties' pleadings is that the history of this dispute is uncontroverted. Notably, the second applicant invited sealed tenders from eligible candidates for Provision of Water Tower Ecological Restoration Works for 100 Hectares of the Degraded Area within Enoosupukia Water Tower through a publication of the MyGov pull out appearing on the local dailies on 30th April 2019 and standard documents made available online. On the closing date and time fifteen tenders had been received.

7. It is common ground that after preliminary evaluation, Sanjemu Investments and Global Woods Harware bids were rejected for submitting an invalid Tax Compliance Certificates, the bid for Greenbelt Movement was rejected for submitting an expired Tax Compliance Certificate and Jagla Agencies bid was rejected for not submitting a Tax Clearance Certificate. It is also common ground that after technical evaluation, the following bids passed the mark as follows; Basugen Holdings Limited scored 64, Northern Dymamic scored 61, Pondopack Limited scored 64, Rapha Vetiver Engineering Scored 71, Bloomerg Africa Limited scored 63 and Principles Styles Limited 72.

8. In addition, it is uncontested that after commercial evaluation the following results were recorded; Basugen Holdings Limited- 16.07, Northern Dynamic- 18.35, Pondopack Limited- 18.68, Rapha Vetiver Engineering-19.00, Bloomerg Africa Limited-14.43 and Principles Styles Limited- 20.00. Also, after both technical and financial evaluation, the ranking was:- Basugen Holdings- 4, Northern Dynamic- 5, Pondopack Limited- 3, Rapha Vetiver Engineering- 2, Bloomerg Africa Limited- 6 and Principles Styles Limited-1. Lastly, the applicant's Evaluation Committee recommended the first Interested Party to be considered for the award of the tender subject to positive report on due diligence as set out in the bid documents.

9. The point of departure is the applicants' position that the first Interested Party was found to have negative observations after due diligence was done; namely, (i) in a previous procurement process, it submitted an invalid Tax Compliance Certificate which was falsified, (ii) that the winning bidder as well as all other bidders who made similar actions were recommended for debarment as may be fit by the Regulator.

10. The applicants state that the criteria for awarding the successful bidder was carrying out a preliminary evaluation, technical evaluation and financial evaluation, and, that, the second applicant's evaluation committee was required to carry out due diligence in conformity with section 83 (1) of the Act and ensure that the successful bidder conformed to the eligibility requirements of the act.

11. The applicants state that it was discovered that the first Interested Party in a previous tendering process with the second applicant had submitted a fraudulent document, namely, a Tax Compliance Certificate which upon scrutiny at the Kenya Revenue Authority found to be invalid.

12. The applicants state that in bid to curb these irregular and illegal practices it commenced the right to debar as provided under section 41 of the act and wrote to the Director General of the PPRA on 21st May 2019 providing a list of 6 firms including the first Interested Party citing various reasons for commencement of the action. As a consequence, the second ranking bid was recommended for the award and the Notification of Tender results was done through letters to all bidders dated 20th May 2019 and sent through e-mails. The applicants state that on 28th May 2019, the first Interested Party filed Request for Review No. 58 of 2019 seeking that Tender Number KWTA/034/2019/2020 be awarded to it which was determined on 18th June 2019 culminating in the Respondent's decision the subject of challenge in these proceedings.

Legal foundation of the application

13. The applicants seek to review the said decision on grounds that it is ultra vires the law which requires due diligence to be carried by the Procuring Entity prior to an Award being issued. They also contend that since the Respondent found that there was no due diligence report initialed on each page and signatures appended, it ought to have directed that a repeat exercise be carried out as required under the act. The applicants also state that the impugned decision is irrational and unreasonable to the extent that it requires the second Respondent to award a tender without following the mandatory provisions of the Tender Document and the recommendations of the Tender Committee.

14. The applicant also states that the decision is against the applicant's legitimate expectation to the extent that, if at all there was procedural impropriety in the applicants' process, the applicant had legitimate expectation that the stage with impropriety would be redone.

15. The applicants also state that the decision was done with improper motive in that the Respondent imputed improper tender influence by the second applicant's head of procurement by alleging alteration of recommendations of the Tender Evaluation Committee when it was aware that the Head of Procurement was required to issue a Professional Opinion under section 84 (1) of the Act by reviewing the Tender Evaluation and providing a signed professional opinion to the accounting officer on the procurement process.

16. Lastly, the applicants state that the impugned decision was irrational as it failed to consider the fact that the first Interested Party is currently being investigated for previously submitting a forged document in a previous procurement process and misrepresenting to the second applicant that it has previously not engaged in a fraudulent practice.

The Reliefs sought

17. As a consequence of the foregoing, the applicants seeks the following orders:-

a. An order of **Certiorari** to remove to the High Court for the purposes of quashing the Respondent's decision dated 18th June 2019 in application number 58 of 2019 of 28th May 2019.

b. That the costs of this application be provided for.

c. Such further or other order/relief as the honourable court may deem just and expedient to grant.

Respondent's Replying Affidavit

18. **Hennock K. Kirungu**, the Respondent's Secretary swore the Replying Affidavit dated 30th September 2019. He deposed that the Respondent framed and determined one issue, i.e. whether or not the head of the Procuring Entity's Supply Chain Management Services could change the recommendation of the Tender Evaluation Committee regarding a recommendation of award made by it to a tenderer, and in its ruling it allowed the Request for Review and annulled and set aside the award. It also set aside the Letter of Notification of unsuccessful bid to the first Interested Party and directed the Procuring Entity to award the Tender to the first Interested Party. He averred that in arriving at the said decision, the Respondent considered all the material submitted to it, the facts and issues raised by the parties, the law and it observed the rules of Natural Justice including considering relevant pertinent material facts. He also averred that the decision was reasonable, rational and lawful.

First Interested Parties Replying Affidavit

19. Mukami Gatonye, a director of the first Interested Party swore the Replying Affidavit dated 24th July 2019. She deposed that the first Interested Party scored the highest marks in both the technical evaluation (72) and financial evaluation (20). She averred that on 24th May 2019 the first Interested Party received a letter dated 20th May 2019 from the applicant informing it that its bid was not successful because of a pending determination of eligibility regarding compliance with tax obligations, based on information provided during a previous procurement proceeding relating to Certificate Number KRANON2949882018.

20. She deposed that the reason for failure of its bid was not legal because the bids were evaluated in accordance with the tender document and it emerged the best evaluated bidder hence the reasons given are extraneous because they relate to documents submitted in a separate tender which should not have been considered in the present tender. She averred that at the time of the tender, the first Interested Party had not been debarred or even notified of any intention to debar it. She deposed that section 55 (1) of the act provides that only persons who are debarred and not those recommended for debarment are eligible to participate in procurement proceedings. She also deposed that the first interested party has not been afforded an opportunity to defend itself against the said allegations. She further averred that the first Interested Party has not been reported to any enforcement agency, prosecuted or convicted on any charges relating to the impugned Certificate.

21. M/s Gatonye deposed that the head of the applicant's Procurement Unit exceeded his powers in handling the professional opinion because the law requires him to make and sign a professional opinion report to the Accounting Officer regarding the procurement proceedings and to forward the same to the Accounting Officer alongside the Tender Evaluation Report for purposes of making a decision on the award. She averred that in the said report, he may provide guidance to the Accounting Officer in the event of dissenting opinions in the tender evaluation and award recommendation, and, that, the Accounting Officer is then required to take views of the Head of the Procurement Unit in making the decision to award the tender.

22. M/s Gatonye deposed that the Professional Opinion under section 84 of the Act is intended to advise on the tendering process, especially the evaluation and award and as such it is intended to remain within the provisions of section 80 of the act which requires the evaluation and comparison to be done using the procedures and criteria set out in the tender documents. Additionally, she deposed that the Professional Opinion is intended to be confined to the issues outlined in the tender document and related issues emerging in the course of the evaluation process.

23. She averred that the Head of Procurement exceeded his powers because no due diligence report was provided as required under section 83 of the Act. Further, she deposed that the Head of Procurement stated that the first Interested Party had failed the eligibility test on account of the Tax Compliance Certificate yet he was aware that the Tender Document provided for the ineligibility criteria, which was bidders involved in corrupt practices, debarred bidders, bidders with conflict of interest or bidders involved in design of the project and added that the first Interested Party did not fall within any of these categories.

24. She also averred that the Head of Procurement misadvised the Accounting Officer regarding section 55 of the Act because the Interested Party had the capacity to participate, has not been debarred and is not insolvent or in the process of winding up, nor is it debarred by the PPRA from taking part in procurement. She also stated that the first Interested Party fulfilled its tax obligation in that it attached the necessary documentation and that it was not guilty of any labour practices nor was it convicted of corruption, and that, it met all the eligibility requirements under section 55 of the act.

25. She averred that due diligence must only be done by the Tender Evaluation Committee and not the Head of the Procurement Unit or any other individual as provided under section 83(1) (3) of the Act, and only prior to the award, hence, the alleged due diligence was illegal and invalid because it was not conducted by the Tender Evaluation Committee. She also deposed that the outcome of the purported due diligence was not signed and initialed by each member of the Tendering Committee and that the due diligence went beyond the scope anticipated in statute which is limited only to confirm and verify the qualification of the tenderer. She further averred that the said Certificate was not part of Tender Documents and in any event its bid passed the preliminary and technical evaluation stages.

26. She averred that previously the first Interested Party was disqualified on account of an invalid Tax Compliance Certificate in December 2018 but in March 2019 the applicant awarded it another tender after the aforesaid disqualification, and, that, it must have undertaken due diligence before the said award. She also deposed that three of the seven persons who evaluated the instant tender were involved in the March 2019 team that recommended the said award.

27. Ms Gatonye deposed that a one Peter Mwangi, the acting Manager, Supply Chain was the Secretary in the team that awarded the tender in March 2019, and, he was also part of the Evaluation Team that recommended the award of the subject tender to the first Interested Party. She averred that having recommended the March 2019 tender, it was insincere for him to recommend otherwise in the instant tender, hence his actions were biased, unreasonable and prejudicial. She also averred that there was no due diligence report on record as required under

section 84 of the Act, hence, the Respondents decision should be up held. She further averred that public interest tilts in favour of upholding the decision.

Submissions

28. The applicants' counsel cited Republic v Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Intergrati[4] in which the court stated the principles for guiding procurement process and held that the court must look at the intention of Parliament under the act which is to promote the integrity and fairness as well as to increase transparency and accountability in public procurement, a position which was reiterated in Hoggers Limited v Public Procurement Administrative Review Board & 2 Others. [5] He also placed reliance on a passage attributed to Lord Reid in Animistic v Foreign Compensation Commission in which his lordship restated the grounds upon which the court can grant judicial review orders, namely, acting without jurisdiction, or where the decision is taken in bad faith, or refusal to take in to account relevant factors.

29. In addition the applicants' counsel relied on Republic v Public Procurement Administrative Review Board & Another ex parte SGS Limited[6] which restated categories of public law wrongs, namely, illegality, fairness, irrationality and proportionality. Counsel also cited Pastoli v Kabale District Local Government Council and Others which stated that to succeed in a judicial review application, an applicant must demonstrate that the decision is tainted with illegality, irrationality and procedural impropriety. He also cited Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology ex parte Cecilia Mwathi and Another[7] for the proposition that judicial review can issue where there is abuse of discretion.

30. The applicants' counsel argued that the impugned decision is ultra vires the act in that the Respondent found that no due diligence report was submitted, hence, as per section 83 of the act, the Respondent ought to have directed that the due diligence be done instead of directing the award to be made to the first Interested Party. He argued that since section 83(1) requires that due diligence report be undertaken, the Respondent acted ultra vires the said provision by skipping the said requirement and directing the tender to be awarded to the Interested Party. Counsel argued that since it was an omission, the Respondent ought to have directed a repeat of the exercise. He argued that the Respondent has no powers to direct the applicant to disregard the said requirement.

31. Counsel cited clause 2.11.2 under section IV of the bid documents dealing with Eligibility and Qualifications which provide that due diligence shall be undertaken and shall form part of the Evaluation Criteria and argued that the decision is ultra vires the bid documents. To buttress his argument, counsel cited Republic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power and Lighting Company Limited[8] for the proposition that a body must operate within its lawful authority. He argued that strict compliance with tender documents is a requirement under section 80(2) of the Act, hence, the Respondent acted contrary the statute. He relied on Macfoy v United Africa Co. Limited[9] for the proposition that if an act is void, it is a nullity in law and every proceeding which is founded on it is also bad and incurably bad and nothing will come out of it. He argued that the Respondent acted beyond its powers. To buttress his position, he cited Republic v Public Procurement Administrative Review Board & 2 others ex parte Kenya Power and Lighting Co Ltd and urged the court to quash the decision.

32. On illegality, counsel argued that the Respondent did not act within the law and argued that it disregarded the requirements of the Bid documents and provisions of the act. He argued that the applicant's head of procurement acted within his powers and cited Republic v Public Procurement Administrative Review Board & 3 others ex parte Saracen Media Limited[10] for the proposition that tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. He argued that there is no provision of the law which permits the Respondent to disregard the requirement for due diligence, hence, the decision is unreasonable.

33. He cited Republic v Attorney General & Another ex parte Waswa & 2 others[11] and submitted that the impugned decision violates the applicants' right to legitimate expectation that tender conditions will be met. He added that section 58 (2) of the Act provides that the tender document should have sufficient information to allow fairness, equitability, transparency, cost effectiveness and competition to those who wish to submit their application. He referred to clause 2.3 of the bid documents which provides inter alia requirement's for integrity and that the tenderer shall sign a declaration that he has not and will not be involved in fraudulent practices.

34. Miss Chilaka cited Kenya National Examination Council v Republic[12] which laid down the grounds upon which orders of certiorari and mandamus can issue. She also cited Associated Provincial Picture House Limited v Wednebury Corporation[13] which stated elements of unreasonableness, abuse of power, irrationality and irrelevance and submitted that the Respondent had the power to make the impugned decision. She argued that the Respondent accorded the applicant a fair hearing, that it considered the party's arguments and decided the issues presented to it.

35. She submitted that the orders sought cannot be granted because the applicants have not demonstrated that the Respondent acted ultra vires or without jurisdiction or that the decision is marred with impropriety. She argued that the applicant is raising merit issues and cited Municipal Counsel of Mombasa v Republic & Umoja Consultants Ltd[14]and Pastoli v Kabale District Local Government Council & others. [15] Citing Republic v Judicial Service Commission ex parte Pareno,[16] she argued that the applicant is raising contested facts which are not amenable to judicial review.

36. The first Interested Party's counsel cited Republic v Public Procurement Administrative Review Board 7 another ex parte SGS Kenya Limited[17]and argued that the application does not meet judicial review grounds of illegality, fairness, irrationality and proportionality. He submitted that the applicant has not demonstrated how the Respondent exceeded its powers. He argued that section 173 of the act clothes the Respondent with power to make the decision it made. He also argued that the Respondent ordered the first Interested Party to be awarded the tender subject to the recommendations of the Tender Evaluation Committee, hence, the decision is grounded in law. He further argued that that the scope of the professional opinion is limited to the provisions of section 84 of the act which limits it to the contents of the evaluation report and to comments in case of dissenting opinion. He argued that no other party can usurp the authority of the Evaluation Committee.

37. Counsel argued that the Respondent ordered the tender be awarded to the first Interested Party as per the recommendations of the

evaluation committee which recommended that the due diligence be done before the award thus restating the mandatory conditions of the bid terms. Additionally, counsel submitted that due diligence is not mandatory under the bid documents, and, that, the same is limited to the ability to perform the tender. He cited *Republic v Public Procurement Administrative Review Board, Kenya Pipeline Company Limited & Another (Interested Party) ex parte Krohne (PTY) Ltd*^[18] for the holding that where the bid document does not mandatorily require due diligence to be done, then the same cannot be construed to be mandatory nor do the Regulations make it mandatory. To support this counsel pointed the use of the word may in the provision.

38. He also argued that the first Interested Party was denied the award on grounds of an activity that had not been proved and that no investigations were conducted by the Director General as envisaged by the law. He submitted that the principles in Article 227 cannot be achieved if the procuring entity is allowed to act on unsubstantiated claims which are not backed by law. Additionally, counsel cited Article 47 of the Constitution and argued that the first Interested Party had a legitimate expectation that before any decision is made, he would be afforded the right to be heard. Counsel argued that there is no law which provides that proceedings before the PPRA for debarment should act as an injunction against a prospective tenderer and cited *Furys (K) Limited v Public Procurement Oversight Authority & 2 Others*^[19] for the holding that debarment is to be done after investigations.

39. Counsel submitted that the Respondent has the powers under section 173 of the Act to issue the orders it in question. To buttress this position, he relied on *Republic v Public Procurement Administrative Review Board; Kenya Pipeline Company Ltd & Another ex parte Krohne (PTY) Ltd*^[20] and *Kenya Pipeline Company Ltd v Hyosung Ebara Company Limited & 2 others*^[21]

40. On the question of ultra vires, counsel argued that, the applicant has not demonstrated that the Respondent acted outside its powers. He cited *Mater Power Systems Limited v Public Procurement Administrative Review Board & 2 Others*^[22] and argued that the impugned decision meets the tenets of Article 227 of the Constitution. Lastly, counsel argued that the subject tender is of great public interest.

Determination

41. *Upon carefully analyzing the diametrically opposed positions presented by the parties, I find that only one issue distils itself for determination, namely, whether the impugned decision is tainted with illegality.* The starting point is that a decision to award a tender constitutes administrative action. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

42. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations or in this case the Tender terms and conditions. A procuring entity is bound to adhere to the terms of the procurement process. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the “four corners” of their powers. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.^[23] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

43. Useful guidance can be obtained from *Council of Civil Service Unions v. Minister for the Civil Service*^[24] in which Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality and procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely; *proportionality*.^[25]

44. What Lord Diplock meant by “*Illegality*” as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term “*Irrationality*” by succinctly referring it as “*unreasonableness*” in *Wednesbury Case*.^[26] By “*Procedural Impropriety*” His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

45. There is ample jurisprudence in this country from our superior courts restating the role of the court in Judicial Review proceedings. In *Republic v National Water Conservation & Pipeline Corporation & 11 Others*^[27] it was held that *once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. It is correct to state that judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was prima facie performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament, then a court will not interfere with the decision. A decision which falls outside that area can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.*

46. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and *errors as to precedent facts*; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill *substantive legitimate expectations* are grounds within the second category.

47. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts’ function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense

the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and also established its limits.

48. The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article 277 (1) of the Constitution. The Article provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

49. The national legislation prescribing the framework within which procurement policy must be implemented is the [Public Procurement and Asset Disposal Act\[28\]](#) and The Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article 47 of the Constitution and the Fair Administrative Action Act[29](herein after referred to as the FAA Act), from which a cause of action for the Judicial Review of administrative action arises, apply to the process.[30]

50. Section 3 of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—(a) *the national values and principles provided for under Article 10*; (b) *the equality and freedom from discrimination provided for under Article 27*; (c) *affirmative action programmes provided for under for under Articles 55 and 56*; (d) *principles of integrity under the Leadership and Integrity Act, 2012*; (d) *the principles of public finance under Article 201*; (e) *the values and principles of public service as provided for under Article 232*; (e) *principles governing procurement profession, international norms*; (f) *maximization of value for money*; (g) *...and ...*

51. With the above legal provisions and principles in mind, I proceed to address the issue under consideration. Section 79 of the Act provides for Responsiveness of tenders. It reads as follows: - (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents. (2) A responsive tender shall not be affected by—(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or (b) be taken into account in the evaluation and comparison of tenders.

52. A contract must be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer. It is common ground that the first Interested Party's bid scored the highest marks. The question is whether there was an objective criteria to justify the award to another tenderer as happened in this case.

53. Briefly, a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. [31] Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. [32] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a *sine qua non* for further consideration in the evaluation process. [33]

54. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment and post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

55. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

56. The constitutional and legislative procurement framework entails prescripts that are legally binding. The fairness and lawfulness of the procurement process and the decision under Review must be assessed in terms of the constitutional dictates and the provisions of the FAA Act. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of Review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under FAA Act has been established.

57. It is uncontested that post qualification is provided for under the law and the tender documents. In fact the Evaluation Committee was clear in its recommendation that due diligence be done prior to awarding to the tender to the first Interested Party. The contestation in my view is twofold. *One*, whether due diligence was done since the Respondent at page 25 of its ruling was clear that there was no document that fits the description of a due diligence report within the meaning of section 83 (3) of the act, *two*, whether the reason cited was a valid ground to deny the first Interested Party the award.

58. *In resolving the above issues, I will seek guidance from the Constitution, the act, the Regulations and the Tender documents. Article 227 of the Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tender. The Article requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be 'fair, equitable, transparent competitive and cost-effective.'*

59. The above position is replicated in section 3 of the act which expressly imports the values in Article 10 of the Constitution to the Act. The values include integrity. As the decision to award a tender constitutes administrative action, it follows that the provisions for the FAA Act apply to the process. The final decision must be infused with the values and principles laid down in the Constitution particularly Article

10 which include integrity. The foregoing is the constitutional and legislative background against which the present matter must be considered. The tender process the subject of these proceedings must be construed against the background of the system envisaged by Article 227 of the Constitution and the jealously guarded constitutional values in Article 10 which include integrity. In other words, whether the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values.

60. It follows that a partial evaluation of tender is not permitted. The Respondent is in law required to conduct a full and complete evaluation of the terms of tender and the law. Complete evaluation includes due diligence. To do otherwise is to engage in an illegality and such a decision will be tainted by an error of the law.

61. In order to give meaning to section 83 of the act, the Regulations and the Tender documents, regard must be had to their wording, read in context, and having regard to the purpose of the entire act and the dictates of Article 227 of the Constitution. Read against this backdrop, the plain wording of the relevant provisions and the scheme of section 83 of the act make it clear that the provisions are meant to ensure a fair, equitable, transparent, competitive procurement process which is consistent with the provisions of Articles 10 and 227 of the Constitution. A faithful interpretation of the above provisions leaves no doubt that a prospective tenderer who has not passed the due diligence test is precluded from being awarded the tender. It is for this reason that the court must read the provision and the entire act and avoid reading one provision to the exclusion of all others.

62. Section 83(1) of the act provides that an evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act. The operative words here is "prior to the award of the tender."

63. The first Interested Party states that it had received a Notification of Award. Section 87(1) of the act provides that before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted. Subsection (2) provides that the successful bidder shall signify in writing the acceptance of the award within the time frame specified in the Notification of award. There is no mention that that the first Interested Party had complied with this sub-section. Sub-section (4) provides that for greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.

64. Consistent with section 83(1) of the act, prior to the award of the tender, conduct of due diligence is legally permitted after which a report in writing is presented to confirm and verify the qualifications of the lowest evaluated responsive tender to be awarded the contract in accordance with the act. The Respondent in the impugned decision was clear that there was no document that fits the description of a due diligence report within the meaning of section 83 (3) of the Act. This finding casts doubts as to whether this important legal process was undertaken. In fact, the applicants counsel seems to buy this position in their submission. He submitted that having found that no due diligence was done, the Respondent ought to have ordered that the due diligence be done.

65. Evaluation criteria is a series of standards and measures used to determine how satisfactorily a proposal has addressed the requirements identified in a bidding opportunity. They also play a major role in identifying the best overall cost effective solution to the proposal requirement. The complete evaluation process consists of:- Establishing appropriate criteria, and respective weights, Placing the criteria in the proposal document, Selecting an evaluation team, Evaluating the proposal using the criteria, and Preparing the evaluation report, including a recommendations. The need for the evaluation process is twofold. *First*, it offers all potential bidders a fair and equitable method of having their proposal reviewed and considered as a potential solution in a consistent and fair manner. *Second*, it provides the evaluators with a clear and concise method of identifying the competent proposals and ultimately the best overall bid.

66. Evaluation criteria are the standards and measures used to determine how satisfactorily a proposal has addressed the requirements identified in the Request for Proposals. Suppliers either meet or do not meet mandatory criteria. *Mandatory criteria* establish the basic requirement of the invitation. Any bidder who is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the *mandatory* criteria that "*competent*" tenders are established. The due diligence was in my view a *mandatory* requirement. The Evaluation Committee is required to conduct a post-qualification of the lowest evaluated responsive Tenderer, to determine the Tenderer's physical capability to perform the contract. Using the criteria specified in the Bidding Documents, this review include an assessment of the Tenderer's technical, financial and physical resources available to undertake the contract, including his current and past similar projects. The process should also be guided by the values and principles in Article 10 of the Constitution which include integrity. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Section 3 of the Act expressly provides that the principles in Article 10 do apply.

67. If the lowest evaluated responsive Tenderer fails post-qualification, his Tender should be rejected, and the next ranked Tenderer should then be subjected to post-qualification examination. If successful, this Tenderer should receive the award. If not, the process continues for the other Tenderers. The rejection of a Tender for reasons of post-qualification requires substantial justification, which should be clearly documented in the attachments to the Evaluation Report. In this regard, I note that the Respondent's finding that no such report was filed casting doubts as to whether due diligence was done.

68. I also note that in its final orders at paragraph (d) the Respondent directed the Procuring Entity to award the Tender in terms of the recommendations made by the Tender Evaluation Committee as contained in the Evaluation Report signed on 17th May 2019 and complete the procurement process, including the signing of the contract, within twenty one days from the date of the decision. A reading of the Evaluation Report leaves no doubt that it recommended that due diligence be done before awarding the tender.

69. In absence of a report showing that due diligence was done, I find no basis to fault the Respondent's decision. I am inclined to agree with the Respondent's findings that the tender be awarded as per the recommendations of the Evaluation Committee which was that the tender be awarded to the first Interested Party subject to due diligence being conducted. My understanding of the Respondent's order is that the due diligence report will determine whether or not the first Interested Party will be awarded the bid. Having so found, and considering that the due diligence will have to be done as ordered by the Respondent, I find no need to comment on the suitability of the reasons given by the applicants. I say no more on this.

Conclusion

70. In view of my analysis and determinations of the issue discussed above, the conclusion becomes irresistible that I find no basis to fault the Respondent's findings, save to reiterate and order in terms of the Respondent's findings that the award of the tender be made in terms of the recommendations of the Tender Evaluation Committee contained in the Evaluation Report signed on 17th May 2019, **subject to due diligence report being done before the award as recommended in the said report.**

71. It follows that the applicants' application fails and the same is hereby dismissed. Each party will bear the costs of its case.

Right of appeal

Signed, Dated and delivered at Nairobi this 5th day of February, 2020

John M. Mativo

Judge

[1] Act No. 33 of 2015.

[2] Cap 486, Laws of Kenya. NOTE: This act was repealed by the Companies Act, Act No. 17 of 2015.

[3] Ibid.

[4] {2008} KLR 728.

[5] {2015} e KLR.

[6] {2017} e KLR.

[7] {2008} e KLR.

[8] {2017} e KLR.

[9] {1961} ALL ER 1169.

[10] {2018} e KLR.

[11] {2005} 1 KLR.

[12] Civil Appeal No. 266 of 1996.

[13] {1974} 2 All ER 680.

[14] Civil Appeal No. 185 of 2001.

[15] {2008} 2 EA 300.

[16] {2007} 1 KLR.

[17] {2017} e KLR.

[18] {2018} e KLR.

[19] {2015} e KLR.

[20] {2018} e KLR.

[21] {2012} e KLR.

[22] {2015} e KLR.

[23] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003),

pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[24] {1985} AC 374.

[25] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[26] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[27] {2015} eKLR.

[28] Act No. 33 of 2015.

[29] Act No. 4 of 2015.

[30] See *Minister of Health and another vs New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-97; *Bato Star Fishing (Pty) Ltd vs Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) paras 25-26.

[31] The concept of bid responsiveness is used most often in relation to compliance with bid formalities.

[32] Hoexter 2012: 295.

[33] *Xantium Trading 42 (Pty) Ltd vS South African Diamond and Precious Metals Regulator and another* {2013} JOL 30148 (GSJ) para 25