



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS CAUSE NO. 312 OF 2018

IN THE MATTER OF AN APPLICATION TO APPLY FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

AND

NAIROBI CITY WATER & SEWERAGE

COMPANY LIMITED.....1ST INTERESTED PARTY

MACHIRI LIMITED.....2ND INTERESTED PARTY

EX PARTE: FOURWAY CONSTRUCTION COMPANY LTD

RULING

The Application

1. The Nairobi City Water & Company Limited, (the 1st Interested Party herein), was the procuring entity in Tender No. NCWSC/26/2017 for the Relocation of Water and Sewer Pipelines along Waiyaki Way in Nairobi, and on 18th June 2018 it notified Fourways Construction Company Limited, the ex parte Applicant herein (“the Applicant”), that its bid had been accepted and it had been awarded the tender. The 2nd Interested Party, Machiri Limited, was another bidder for the tender, and it sought a review of the said award with the Public Procurement Administrative Board (the Respondent herein), resulting in the Respondent annulling the award. This prompted the Applicant to file the present judicial review proceedings by way of a substantive Notice of Motion dated 16th August 2018, after leave was granted by this Court.

2. Upon filing of the substantive Notice of Motion, the 2nd Interested Party filed another application by way of a Notice of Motion dated 7th September 2018, as amended on 21st September 2018. The 2nd Interested Party is seeking the following orders in its Amended Notice of Motion dated 21st September 2018 :

- a) **This Court be pleased to strike out and expunge from the court record the supporting affidavit dated 16th August 2018 sworn by Caroline Muthoni Mureithi**
- b) **This Court be pleased to strike out and expunge from the court’s record the Annexure marked as “CMM1” in the ex-parte Applicant’s supporting Affidavit sworn by Caroline Muthoni Mureithi on 16th August 2018.**
- c) **This Court be pleased to strike out from the court’s record the Annexure marked as “BK -1” in the 1st Interested Party’s affidavit sworn by Benedict Kiema on 19th September 2018**
- d) **This Court be pleased to order the Ex-parte Applicant by itself or its advocates or agents to immediately return to the 2nd Interested Party all copies of the Annexure “CMM 1” in their possession and cease from holding or in any way using the 2nd**

Interested Party tender document marked as Annexure “CMM1”

e) The costs of the application

3. This Court directed that the 2nd Interested Party’s application would be heard and determined before the Applicant’s substantive Notice of Motion, by way of oral submissions. The oral submissions on the 2nd Interested Party’s application were duly made during a hearing held on 18th October 2018, hence this ruling.

4. The 2nd Interested Party gave a brief history of the judicial review proceedings herein in its application, as stated in its supporting affidavit sworn on 21st September 2018 by its Managing Director, James Mbugua Macharia. It was explained that after leave was granted to commence judicial review proceedings, the Applicant filed the substantive Notice of Motion which was supported by an affidavit sworn by one Caroline Muthoni Mureithi on 16th August 2018, who annexed a copy of the 2nd Interested Party’s Tender document as Annexure “CMM1”. In addition, that the 1st Interested Party also annexed the 2nd Interested Party’s tender document as an annexure “BK-2” to its replying affidavit sworn by Benedict Kiema on 19th September 2018.

5. The 2nd Interested Party is aggrieved by the said affidavits, and presented three grounds for his application. First, that the Applicant introduced the 2nd Interested Party’s tender document in its supporting affidavit dated 16th August 2016 as new evidence without leave of the Court, and that the said supporting affidavit therefore has no legal basis as it is not envisaged under Order 53 Rule 3 of the Civil Procedure Rules.

6. Second, that the said Annexures “CCM1” and “BK-2”, which were annexed by the Applicant and 1st Interested Party respectively. are highly confidential documents under section 67 (1) of the Public Procurement and Asset Disposal Act (hereinafter “the Act”), and further that the 1st Interested Party as the procuring entity has maliciously, illegally and unprocedurally disclosed confidential information of the 2nd Interested Party to a competitor. The 2nd Interested Party averred that the filing of its confidential bid document has also exposed its trade secrets and other beneficial information to the general public.

7. Third, that the Applicant obtained the said tender document illegally, as the 1st Interested Party denied releasing the 2nd Interested Party’s bid document to the Applicant by a letter dated 6th September 2018 which was annexed. Therefore, that it is in the interests of justice that the Applicant’s supporting affidavit and the 2nd Interested Party’s tender document that is annexed to the Applicant’s supporting affidavit and 1st Interested Party’s replying affidavit be struck out and expunged from the court record, as the same are oppressive and prejudicial to the 2nd Interested Party.

8. The 2nd Interested Party also filed a further affidavit sworn by the same deponent on the 15th October 2018, wherein it was reiterated that since no permission was issued or obtained from the 1st or 2nd Interested Party on disclosure or issuance of the 2nd Interested Party’s bid document, the Applicant got the said bid document through illegal and unfair means.. Further, that the spirit of confidentiality in section 67 and 176 of the Act is an important tenet of public procurement, if the objectives of fairness, equitability, impartiality and transparency under Article 227 of the Constitution and the Act are to be realised or achieved.

9. The 2nd Interested Party detailed its confidential information and trade secrets that have been exposed as its financial performance and turn over; financial capacity including the long-term financial projections; return on equity and financial ratios; the aggregate performance indicators; historical mobilisation strategies and organisations plan and strategies; the confidential business questionnaire and the site organisation strategy and the mode of doing work.

10. Further, the 2nd Interested Party asserted that the disclosure of its confidential bid document and information is contrary to Article 31 of the Constitution, section 67 of the Public Procurement and Asset Disposal Act, the confidentiality clause in the tender document; and against public interest as it opens bids to possible manipulation and bid rigging, and the procurement process is therefore distorted in the event confidential commercial information is disclosed to a competitor during the procurement process.

11. Mr. Marete, the counsel for the 2nd Interested Party, contended in his submissions that there is an admission by the Applicant in the supporting affidavit by Caroline Mureithi that the tender document was given after leave had been granted, and there is no intimation as to the source of the document. Further, that the impugned annexures ought not to have been filed in court as they are confidential documents, and the 2nd Interested Party’s right to confidentiality under the Act had been breached. Reliance was placed by the counsel on section 67(1) (b) and (d) of the Act for this submission, and also on section 67(3) for the submission that leave of the court would have to be sought if disclosure is contemplated, or if the Applicant was of the view that the bid document was necessary.

12. Mr. Marete referred the Court to the 2nd Interested Party’s Further Affidavit sworn on 15th October 2018 as to the 2nd Interested Party’s confidential financial information and business strategies that have now been exposed. Further, that the breach of confidentiality was also unnecessary and reckless as the ruling of the Respondent showed that the question before it was whether the 2nd Interested Party’s bid was serialised or not, and not the content of the bid. In addition, that the Procuring Entity also provides the Respondent with bids under confidential cover.

13. Mr. Muturi assisted Mr. Marete in making submissions, and urged that under section 67(4) of the Act, the disclosure to an applicant seeking a review is specifically limited to the summary referred to in section 68(2)(d)(iii), which constitutes the summary of the proceedings of the opening tenders, evaluation and comparison quotations of the tenders, proposal or quotations and the evaluation criteria used.

14. He cited various judicial authorities in support of the 2nd Interested Party’s case including the decision in **Blue Sea Service Ltd -vs-**

Public Procurement Administrative Review Board (2016) eKLR which recognized that there is a limitation to transparency for purposes of promoting healthy competition; and in **R. vs Public Procurement & Another Ex parte Hyosung Ebara & Co. Ltd. (2011) e KLR** for the position that there will be prejudice caused to the 2nd Interested Party by the disclosure as the procurement process is ongoing. The decision in **Okiya Omtata Okoiti & 2 Others –vs- Attorney General & 3 Others, (2014) e KLR** was also cited for the submission that as the circumstances in which the 2nd Interested Party's bid was forward by the Applicant is unclear, and to allow them to use it would negate Articles 31 and 35 of the Constitution.

The Responses

15. During the hearing, Mr. Odhiambo, the counsel for the Respondent, informed the Court that he would not be filing any response to the application, and would not take any side on, or participate in the hearing of the same. The Applicant and 1st Interested Party on their parts opposed the application in their responses.

The Applicant's Response

16. The Applicant's response was in a replying affidavit sworn on 2nd October 2018 by its Director, Caroline Muthoni Mureithi . The Applicant contended that after the Respondent delivered its ruling on 23rd July 2018 annulling the award of the subject tender, its Advocate wrote several letters to the Respondent and the 1st Interested Party requesting for a copy of the tender document submitted by the 2nd Interested Party, for the purpose of preferring an appeal by way of judicial review as provided by section 175(1) of the Act. The Applicant annexed the said correspondence.

17. Further, that by the time of filing the application for leave, the subject tender bid submitted by the 2nd Interested Party had not been furnished to the Applicant's Advocate, who was obliged to file the application for leave without the said document to avoid being time barred in law. That as stated in the affidavit sworn on the 16th August, 2018, the Applicant's advocate was subsequently furnished with a full copy of the tender bid presented by the 2nd Interested Party, after the application for leave had already been filed.

18. According to the Applicant, the key issue raised in its application for leave dated 31st July 2018 and its substantive Notice of Motion dated 16th August 2018, is whether the tender/bid document submitted by the 2nd Interested Party was properly serialised and paginated on every page, as required by the mandatory requirements of the tender documents issued by the 1st Interested Party, and in accordance with the provisions of section 74(1)(1) of the Act and regulation 47(1)(a), 47(2) and 48(1) of the Public Procurement and Asset Disposal Regulations, 2006. Therefore, considering the substratum of the Applicant's application, it is not possible for the court to consider and determine the application without perusing the tender document of the 2nd Interested Party. That the instant application is therefore made in bad faith and it seeks to curtail the Applicant's right to fair hearing and its right to pursue a review of the ruling of the Board.

19. On the argument that Applicant's supporting affidavit of 16th August 2018 and the annexures thereto have no legal basis under order 53 Rule 3 of the Civil Procedure Rules, the Applicant responded that under Article 159(2)(d) of the Constitution, judicial authority is required to be administered by this Court without undue regard to procedural technicalities; that the said annexure and affidavit have not introduced any new ground; that nothing in Order 53 Rule 3 precludes the Applicant from filing a supporting affidavit of the substantive Notice of Motion dated 16th August 2018, as long as it does not introduce a new angle into the application; and that any party in the proceedings is ordinarily entitled to file such further affidavits and evidence as he may deem fit in the proceedings before court, as long as they are relevant to the proceedings and not at variance with the grounds in support of the substantive Notice of Motion.

20. Further, that under Article 50(1)(c)(k) of the Constitution, the Applicant has a right to fair hearing which cannot be limited under Article 25 of the Constitution; and that under Article 35(1)b of the Constitution the Applicant has a right of access of information held by the 2nd Interested Party for purposes of exercising its right of review by the Court.

21. The Applicant's response to the arguments made about the confidentiality of the 2nd Interested Party's bid document was that section 67(3)(c) of the Act expressly provides that the prohibition from disclosure of information relating to a procurement in section 67(1)(d) of the said Act does not apply, if the disclosure is for the purpose of a review under section 175 of the Act, and that as such the disclosure of the tender is not irregular, illegal ,malicious or reckless as contended by the 2nd Interested Party. Further, that the subject tender is a public procurement and not a private tender which should be shrouded in mystery as misapprehended by the 2nd Interested Party, and therefore members of the public as well as the court are entitled to access it. Lastly, that no evidence has been tendered to show that the 2nd Interested Party's business and trade secrets have been prejudiced and the allegations are purely a red herring meant to coerce the court into granting the orders.

22. Mr. Kangethe, the counsel for the Applicant, made submissions during the hearing, and reiterated the arguments made in the foregoing. It was his view that section 67(1)(d) of the Act is subject to the proviso in Section 67(3)(b) and (c) that disclosure is allowed if it is for purposes of review or enforcement of the law , and the Applicant is exercising his right of review and enforcing the law.

23. Further, that it mattered not how the document was released to the Applicant, as it is entitled to the impugned document to pursue its rights of review. In any event that the said document were provided by the advocate for the procuring entity, and there is a disclosure in the in the 1st Interested Party's' replying affidavit that their advocate released the document. Therefore, the said document was not stolen or obtained irregularly , nor was there need to make an application to the court for the same document to be availed to the Applicant.

24. The Applicant's right to a fair hearing was also reiterated , and it was submitted that the 2nd Interested Party's rights under Article 31 of the Constitution are only applicable where the information that is being produced is unnecessary, and can only be exercised to the extent that they do not infringe on the Applicant's rights. Reliance was placed on the decision in **Blue Sea Service Ltd -vs- Public Procurement Administrative Review Board (supra)**.

The 1st Interested Party's Response

25. The 1st Interested Party's response to the application was in a Replying Affidavit sworn on 15th October 2018 by Benedict Kiema, its Supply Chain Manager. The 1st Interested Party stated that it did not release the 2nd Interested Party's bid document to the Applicant, and that the letter annexed to the Applicant's affidavit demonstrates that the document was released to the Applicant's advocates by the 1st Interested Party's advocates based on their understanding of the provisions of sections 67(3)(c) of the Public Procurement and Asset Disposal Act 2015.

26. The 1st Interested Party denied that it acted illegally, recklessly or maliciously, and stated that it produced the bid document in its replying affidavit having taken legal advice on the interpretation of section 67 (3)(c) of the Act. Further, that the release of the bid documents to the court and the parties involved in the dispute is in conformity with the provisions of Article 10(2) (a),10(2)(c) and 227(1) of the Constitution, which emphasise values such as transparency, participation and integrity as some of the principles applicable to the conduct of public affairs and the procurement of public goods.

27. Further, that Articles 35 and 50(1) of the Constitution require, as one of the tenets of natural justice and a fair trial, that all parties should have access to the documents and material necessary to enable them effectively advance their cause or defend allegations made against them in the pursuit of their legal rights.

28. In addition, that the 2nd Interested Party is vague as to the exact trade secrets or information he claims are confidential; that the allegation that it has been prejudicially exposed to the general public is also unsupported by any credible evidence and vague; that in this case the issue in dispute revolves around the question as to whether the 2nd Interested Party complied with the mandatory requirement in the tender document to serialise its bid document; and that it would be impossible for the court to fairly adjudicate the real issue without having sight of the said bid document.

29. Mr Macharia , the counsel on record for the 1st Interested Party, submitted that section 67(3) of the Act expressly waives the confidentiality requirement and relied on the decisions in **Blue Sea Service Ltd -vs- Public Procurement Administrative Review Board (supra)** for the position that his client cannot be allowed to keep close its chest the records and reasons for awarding the tender. Further that it was held in in **R v Independent Electoral and Boundaries Commission ex parte National Super Alliance (NASA),(2017) eKLR** that confidentiality is not a constitutional principle, and Articles 10 and 227 of the Court talk about transparency. Therefore that in a contest between transparency and confidentiality, confidentiality must give way. In addition that public procurement proceedings must be conducted in a manner that the public is able to audit the process for greater transparency not confidentiality.

30. Counsel also referred to section 167(3) of the Act and submitted that the proceedings were held in an open forum where all the bid documents were referred to. Therefore, that the court which has a constitutional mandate to review the decisions should also be able to see the bid document. In addition, that the provisions of section 78(6) of the Act on the tender opening process provide what is to be read out including the price, which is therefore not confidential. Lastly, that the tender is for evacuation of pipes and the technical specifications were given by the procuring entity, and no intellectual property issues are involved.

The Determination

31. I have considered the arguments made by the parties, and find that there are two issues before this Court for determination. The first is whether the Applicant can introduce new evidence after being granted leave to file judicial review proceedings. Order 53 Rule 4 (1) and (2) of the Civil Procedure Rules provides as follows in this regard:

“4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.”

32. It is thus permissible for a party to introduce new evidence after being granted leave to commence judicial review proceedings upon application. In the instant application, the Applicant disclosed the reason why the new evidence could not be provided with the affidavits accompanying the application for leave, and this disclosure was also made in the impugned supporting affidavit sworn on 16th August 2018, which is purported to have included the new evidence on the record. This Court thus has the discretion to admit the said supporting affidavit on record given that it would not be unprocedural to do so, and therefore declines to expunge the said affidavit for the foregoing reasons.

33. The second issue for determination is whether the Applicant and 1st Interested Party can disclose the 2nd Interested Party's tender document attached to the supporting affidavit sworn on 16th August 2018 and replying affidavit sworn on 19th September 2018 respectively.

34. The Applicant and 1st Interested Party did explain the manner in which the Applicant obtained the said document, which was by request from, and submission by the 1st Interested Party's Advocate. The Applicant annexed a letter to the 1st Interested Party dated 25th July 2018 requesting to be supplied with the tender document of the 2nd Interested Party in order to facilitate its appeal. The 1st Interested Party's response is contradictory at best, as there is the letter on record from them denying that they provided the Applicant with the said tender document, yet at the same time admitting that it is their advocates who released the tender documents.

35. The Court of Appeal in the case of **Kenya Bus Services Ltd. Vs Susan Muteti, [1996] eKLR** observed that an attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in a cause, and in the instant case there is no averment by the 1st Interested Party that there were contrary instructions to its advocates not to release the 2nd Interested Party's tender documents to the Applicant. It therefore follows that what their advocates did, was on the 1st Interested Party's behalf, as their agents on record. Likewise, the assertion therefore by 2nd Interested Party that the documents were irregularly obtained does not therefore suffice, and the decision in the case of **Okiya Omtatah Okioti & 2 others v Attorney General & 3 others [2014] eKLR** as to expunging of illegally obtained documents is thus not applicable in the present application for this reason.

36. The only valid contestation as regards disclosure of the 2nd Interested Party's tender documents is the one that pits the 2nd Interested Party's interests that its financial and trade secrets in the said tender document be kept confidential, against the Applicant's interest in getting a fair hearing based on full disclosure of all relevant information. The confidentiality provisions of section 67 of the Public Procurement and Asset Disposal Act of 2015, which was cited by all the parties, provides as follows in this regard:

“(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply—

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d) the disclosure is pursuant to a court order; or

(e) the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67(2)(d)(iii).

37. Section 68(2)(d)(iii) which is the section referred to in section 67(4), in this respect provides that the summary shall be of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed. An examination of the said provisions bears out the Applicant's contention to be correct. Whereas indeed section 67(1) (d) prohibits the disclosure of contents of tenders, proposals or quotation, however the same is subject to subsection 3 which list down the applicable exceptions. The exceptions are wide enough to cover the Applicant's arguments as to enforcement of his right to a fair hearing under the Constitution, in addition to the disclosure of the summaries it is allowed for purposes of review.

38. The disclosure of documents relevant to litigation in procurement proceedings arose in the European Court of Justice in **Varec vs Belgian State, Case C- 450/06** in the context of the European Union procurement law, where three principles were laid down. First, that review bodies must have access to the relevant information to determine the case. Second, that the information that the review body has must not be automatically be disclosed to others, including a tenderer who challenges an award decision, since the review body is under a duty to ensure confidentiality of business information. Third, that the decision whether to disclose particular information must be considered by the review body on a case-by-case basis, by balancing tenderers' interests in having access to information to ensure a fair hearing, with interests of commercial confidentiality.

39. This position was also adopted by the English courts in the cases of **Amaryliss vs HM Treasury (No 2), (2009) EWHC 1666** and **Croft House Care vs Durham County Council (2010) EWHC 909**, where it was observed that the aforementioned principles require a balancing exercise as between the right to confidentiality as regards documents that are confidential, and the need for the claims to be disposed of fairly in terms of disclosure of documents which are relevant and necessary to a claim. It was also noted in the **Croft House Care vs Durham County Council** that in making this decision, the Court should consider whether any special measures and safeguards, such as redactions to make documents anonymous or exclude material which it is not necessary for a claimant to see, or hearings in private should be adopted.

40. A similar position was adopted in the Kenyan case of **Blue Sea Service Ltd -vs- Public Procurement Administrative Review Board**

(supra) which was cited by all the parties, where it was held as follows:

“32. If National values and principles including the Rule of Law is an integral principle of Procurement and Asset Disposal, then it goes without saying that a party seeking to challenge a procurement process must be entitled to right to affair hearing. If that be true then such a challenge cannot be reasonably mounted if the procurement entity is allowed to keep next to its chest the records and reasons for awarding a tender to one party in preference to the other. The procuring entity must be seen to act with absolute transparency such transparency only being limited for purposes of protecting healthy competition and genuine privacy and public interest. No wonder section 67 (3) expressly say that disclosure of information is permitted for purposes of enforcement of the law. I am not in doubt that a party seeking disclosure for purposes of Review or a proceeding challenging decision by the Review board seeks to enforce the law and therefore fits squarely within the constitutional enactment under Article 47.”

41. In the instant application, a perusal of the Applicant’s application for leave to commence judicial proceedings shows that the formatting of the 2nd Interested Party’s tender document forms the substratum of the Applicant’s case, as shown in paragraph 12 of the accompanying verifying affidavit by Caroline Muthoni Mureithi sworn on 21st July 2018. Disclosure of the tender document is thus necessary for the Applicant to make out its case. To expunge the entire document would in the circumstances be prejudicial to the Applicant.

42. In addition, the 2nd Interested Party did not point out to this court the specific sections of its tender document that contain financial information or information as to its trade secrets it considered confidential, to enable this Court make necessary orders and measures as to the safeguarding and protection of that information, including redaction if necessary.

43. In the premises I find that the 2nd Interested Party’s application Amended Notice of Motion dated 21st September 2018 is not merited and accordingly fails. The same is hereby dismissed with no order as to costs.

44. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF DECEMBER 2018

P. NYAMWEYA

JUDGE