



**REPUBLIC OF KENYA**

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

**JR MISCELLANEOUS APPLICATION NO. 334 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD....1<sup>ST</sup> RESPONDENT**

**NATIONAL INDUSTRIAL TRAINING AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**CORETECH SOLUTIONS & SYSTEMS LIMITED.....INTERESTED PARTY**

**EX-PARTE**

**MICROHOUSE TECHNOLOGIES LTD**

**JUDGMENT**

1. In these judicial review proceedings Microhouse Technologies Limited is the ex parte Applicant (“the Applicant”) whereas the Public Procurement Administrative Review Board (“the Board”) is the 1<sup>st</sup> Respondent and National Industrial Training Authority (“the Procuring Entity”) is the 2<sup>nd</sup> Respondent. Coretech Solutions and Systems Limited is the Interested Party.

2. These proceeding were commenced by the Applicant after it lost its request for review before the Board in a ruling delivered on 25<sup>th</sup> September, 2015 in Application No. 43/2015 of 2<sup>nd</sup> September, 2015. Through the said request for review, the Applicant had challenged the decision of the Procuring Entity to award Tender No. NITA/29/2015-2016 for Supply, Installation, Implementation, Testing, Training and Commissioning of an Enterprise Resource Planning (ERP) System to the Interested Party.

3. Through the Notice of Motion application dated 23<sup>rd</sup> October, 2015 the Applicant prays for orders as follows:

**“1. An order of certiorari to remove into the High Court for the purpose of it being quashed the ruling made by Public Procurement Administrative Review Board whereby it was ordered on the 25<sup>th</sup> day of September, 2015 the Ex-parte Applicant’s Application for Review No. 43 of the 2015 was dismissed and the 2<sup>nd</sup> Respondent directed to proceed and award the tender subject of the review to Coretech Solutions Systems Limited.**

**2. An order of certiorari to remove into the High Court for the purpose of it being quashed**

any decision or action that may have been made by the 2<sup>nd</sup> Respondent pursuant to the ruling made by Public Procurement Administrative Review Board in the nature of either awarding the said tender or signing any contract with Coretech Solutions and Systems Limited or any other entity or person.

3. An order of mandamus directed to the 2<sup>nd</sup> Respondent to directly award the tender NITA 29/2014/2015 to the Exparte Applicant herein and compel the said 2<sup>nd</sup> Respondent, NITA to act according to the law and to take any other necessary steps required by statute in directly awarding the said tender to the Exparte Applicant.

4. An order of prohibition prohibiting NITA, the 2<sup>nd</sup> Respondent herein from proceeding with the award of tender pursuant to the ruling of the Public Procurement Administrative Review Board or taking any action purportedly aimed at contracting or awarding tender NITA 29/2014/15 to Coretech Solutions Systems, any entity or person.

5. An order of costs.

6. Such further and other relief be granted to the applicant as this court deems fit.”

4. The Applicant’s case cannot be understood without looking at the history of this matter. In regard to the history of this procurement, I will borrow heavily from the decision of the Board in Application No. 36/2015 of 13<sup>th</sup> July, 2015 between Microhouse Technologies Limited and National Industrial Training Authority.

5. The procurement in question started in 2011 through tender number DIT/001/2011-2012 which did not come to conclusion as the Procuring Entity re-advertised the same in February 2013 as Tender No. 02/2012-13.

6. This second tender went through the various stages of evaluation but the tender processing committee did not open the financial proposals, but instead re-advertised the same tender for the third time under tender reference number 16/2013-2014.

7. The third tender did not even take off as one of the bidders upon purchasing the tender documents complained that the Procuring Entity’s ICT Manager had customized the tender documents in favour of one of the bidders. The Procuring Entity cancelled the tender one week after the complaint through an advertisement in the newspaper.

8. The tender was then advertised for the fourth time as Tender No. NITA /04/2014-2015 but once again the tender was cancelled after technical evaluation and re-advertised as tender No. NITA/29/2014-15.

9. Tender No. NITA/29/2014-2015 proceeded to conclusion. The tender was awarded to Coretech Systems and Solutions Ltd, the Interested Party herein. The Applicant being aggrieved by the decision of the Procuring Entity filed the already stated Application No. 36 of 2015 before the Board.

10. On 12<sup>th</sup> August, 2015, the Board allowed the request for review and ordered as follows:

**“In view of the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 98 of the Public Procurement and Disposal Act 2005 the Board makes the following orders on this request for Review:-**

**1. That the Applicant’s Request for Review dated 10<sup>th</sup> July, 2015 and which was filed with the Board on 13<sup>th</sup> July, 2015 is hereby allowed on the following terms:**

**(a) The award of the tender No. NITA/29/2014-2015 for the supply, installation, implementation, testing, training and commissioning of an enterprise resource planning**

**(ERP) system made to M/S Coretech Systems and Solutions Ltd by the Procuring Entity vide its letter dated 3<sup>rd</sup> July, 2015 together with any action taken pursuant to the said award are hereby set aside and annulled.**

**(b) The Procuring Entity is directed to re-evaluate all proposals submitted to it that made it to the technical evaluation stage and conclude the entire process including the making of an award of the subject tender within fifteen (15) days from today's date.**

**(c) The Procuring Entity is hereby directed to reconstitute the tender processing committee which evaluated tender No. NITA/04/2014-2015 which shall carry out the re-evaluation of the tenders starting from the technical evaluation stage in accordance with the criteria set out in tender document and taking into account the findings of the Board on the issues of the application of the evaluation criteria without any interference whatsoever and without bias towards any bidder. For the avoidance of doubt no member of tender processing committee appointed vide the letter dated 4<sup>th</sup> May shall sit in the fresh re-evaluation team.**

**(d) The Procuring Entity is hereby directed to extend the tender validity period and take steps to extend the bid bonds provided by the bidders in order to enable it complete the re-evaluation process within the period set out in order (b) above.**

**(e) The Procuring Entity shall furnish this Board through its Secretary with the evidence of compliance with the above orders at the expiry of the period of fifteen (15) days from the date hereof."**

**2. In view of the Board's finding on the prolonged nature of this procurement and on the issue of conflict of interest, the Board directs the Director General of the Public Procurement Oversight Authority to carry out an investigation to establish whether the Procuring Entity acted in breach of any of the Provisions of the Act and Regulations with a view to taking any such remedial or further action as he may deem fit and appropriate in the circumstances of this case.**

**3. The Procuring Entity shall pay the Applicant the costs of this application which are assessed at the sum of Kshs. 150,000/- within fifteen (15) days from the date hereof."**

11. The Procuring Entity complied with the order of the Board and after re-evaluation of the bids it again awarded the tender to the Interested Party.

12. The Applicant was again aggrieved by that decision and filed Application No. 43 of 2015 before the Board. After hearing the request for review, the Board rendered the decision dated 25<sup>th</sup> September, 2015 dismissing the request for review and directing the Procuring Entity to proceed with the procurement to its logical conclusion. This is the ruling which the Applicant seeks to review through these proceedings.

13. The Applicant's case as gleaned from the statutory statement and the supporting affidavit of its Director Charles Gathii Nganga, which documents were filed together with the application for leave on 2<sup>nd</sup> October, 2015, is that the Applicant has always met the system requirements by the Procuring Entity in all the tenders that have been advertised since 2011 as the contents of the tender had remained the same but had severally been cancelled on issues of integrity and fairness of the procurement process.

14. It is the Applicant's case that its complaint before the Board was in regard to the illegal and unlawful manner in which the Procuring Entity had conducted the re-evaluation of the bids which was in clear breach of the Board's orders issued in Application No. 36/2015. The Applicant contends that it presented to the Board evidence of tampering with its financial bid.

15. It is the Applicant's averment that the Procurement Entity failed to comply with the mandatory

statutory provisions during the evaluation and re-evaluation of the bids particularly the requirement by Section 39(6) of the Public Procurement and Disposal Act, 2005 (PP&DA, 2005) which stipulates that locals be given preferential treatment. It is the Applicant's case that the said failure rendered the Procuring Entity's decision totally illegal *ab initio*.

16. The Applicant contends that the core modules that were of benefit to the Procuring Entity and which had previously been included in Tender No. NITA/O4/2014-2015 were unjustifiably omitted in Tender No. NITA/29/2014-2015 and replaced with non-mandatory modules. The Applicant posits that this was unlawfully done in order to unfairly benefit the Interested Party being the preferred bidder. The Applicant asserts that this fact was demonstrated to the Board but it failed to take cognizance of it.

17. It is the Applicant's case that it has all the products and modules it offered but the Procuring Entity favoured foreign developed applications and did not consider the new regulations that requires that 40% of all new tenders must go to locals or locally developed applications. According to the Applicant, this issue was brought to the attention of the Board but it failed to consider the same.

18. It is the Applicant's case that the Board without any legitimate reason irrationally failed to appreciate the clear violation of the PP & DA, 2005 and unlawfully dismissed its application.

19. It is the Applicant's position that the dismissal of its application by the Board was irrational, unjust and unlawful and is likely to cause it irreparable loss as it has invested heavily in the project since 2012 to the tune of approximately Kshs. 10 million.

20. The Applicant accuses the Board for allegedly refusing to supply it with its ruling of 25<sup>th</sup> September, 2015. According to the Applicant, the Board's action was meant to deny it an opportunity of seeking redress from the court and at the same time allow the Interested Party to enter into a contract with the Procuring Entity.

21. The Applicant contends that the Board never bothered to find out how far the investigation it had ordered the Public Procurement Oversight Authority to conduct had gone but instead dismissed its request for review and ordered the award of the tender to the Interested Party. The Applicant asserts that this was a clear violation of its legitimate expectation.

22. In summary, the Applicant bases its application on irrationality, illegality and breach of legitimate expectation.

23. The Board opposed the application through a replying affidavit sworn on 18<sup>th</sup> November, 2015 by its Secretary Henock Kirungu. It is the Board's view that its decision was rational, reasonable, logical, lawful, impartial and in compliance with the rules of natural justice and the same should not attract any judicial review orders.

24. The Board contends that it only took into consideration the facts that were presented before it and which were relevant in deciding the issues it had identified. A summary of the Board's findings is found in paragraph 8 of the replying affidavit where Henock Kirungu deposes as follows:

**“8. That the 1<sup>st</sup> Respondent's decision was based on its findings that:**

**a) On Issue No. 1, that the 2<sup>nd</sup> Respondent carried out the re-evaluation of the tender under review as ordered by the Board;**

**b) That the said orders of the Board confined the re-evaluation to the technical and financial evaluation only;**

**c) With regard to orders issued in Review case No. 36/2015 of 13<sup>th</sup> July, 2015, the Board finds that the 2<sup>nd</sup> Respondent complied with its orders;**

**d) The scoring criteria found at Appendix 1 of the tender document which provided for award of marks for every item listed was adopted by the committee that carried out the re-evaluation of the tenders;**

**e) The 2<sup>nd</sup> Respondent, in re-evaluation, observed the Provisions of Section 66(2) and or 82 of the Act which enjoin it to evaluate tenders in accordance with the criteria asset out in the tender document and compiled a report that complies with the provisions of Regulation 16 of the Regulations;**

**f) The allegation of tampering has not been proved and if tampering took place, the same could not have been for purposes of benefitting the successful bidder whose financial proposal had been opened earlier;**

**g) The Board observed that it had pronounced itself, in application 36 of 2015, on issues raised in grounds 14, 15, 16, 17, 18, 20, 21, 22 and 23 of the Applicant's Request for Review and was barred from re-visiting the same issues unless on the orders of the High Court in a judicial review or an appeal."**

The Board therefore urged this court to dismiss the Applicant's case stating that it had acted within its mandate and the law.

25. The Procuring Entity opposed the application through a replying affidavit sworn by its Director General Paul Kosgei on 9<sup>th</sup> November, 2015. Through the said affidavit, Paul Kosgei gave a chronology of Tender No. NITA/29/2014-2015 from the time it was advertised in April, 2015. He concedes that the Applicant had not raised the issue of preference in Request for Review No. 36 of 2015 and the Board did not therefore make a finding on the same.

26. Paul Kosgei deposes that upon receiving the orders of the Board in Request for Review number 36 of 2015, he reconstituted the tender processing committee which evaluated Tender No. NITA/04/2014-2015 and directed them to implement the directives of the Board. He also directed the committee to comply with the provisions of the PP&DA,2005 and the regulations made thereunder.

27. It is the Procuring Entity's case that all the bidders who had passed the preliminary evaluation were all subjected to fresh technical evaluation. Four bidders qualified for the next round and they were allowed to proceed to pitch presentation where three out of the four bidders participated. At the conclusion of the exercise the Interested Party had the lowest evaluated bid and the committee recommended the award of the tender to the InterestedParty.

28. The Procuring Entity discloses that when the Applicant's challenge of the award of the tender to the Interested Party was dismissed by the Board it proceeded to execute a contract with the Interested Party. It is its case that this application is brought in bad faith.

29. Urging the Court to dismiss the Applicant's case, the Procuring Entity asserts that judicial review is concerned with the decision making process and the Court cannot interfere with the decision of the Board since it acted reasonably, within the law and in compliance with the rules of natural justice. The Procuring Entity also contends that an order of mandamus compelling it to award the tender to the Applicant cannot issue as that would amount to usurping its role as the Procuring Entity. The Procuring Entity also asserts that the Applicant's financial bid was high and awarding the tender to the Applicant will be in contravention of the law.

30. The Interested Party opposed the application through a replying affidavit sworn on 22<sup>nd</sup> January, 2015 by its Chief Executive Officer, Engineer Tobias Otieno. The affidavit is largely a restatement of the history of the tender process which is already captured in this judgment.

31. It is the Interested Party's case that the Procuring Entity complied with the orders issued by the Board in Request for Review No. 36 of 2015 and at the conclusion of the re-evaluation exercise it was again

awarded the tender. The Interested Party confirmed that it had entered into a contract with the Procuring Entity and the Applicant's application should not be allowed to further delay the procurement process.

32. The Interested Party avers that the requests for review filed by the Applicant disclosed its misconception of the procurement process and its unfounded believe that it is the only entity entitled to be awarded the tender hence the prayer to compel the Procuring Entity to award it the tender.

33. According to the Interested Party, these proceedings are a disguised appeal by the Applicant and the court should protect the integrity of the judicial review process by disallowing the application. The Interested Party contends that all the allegations of fraud, bias, illegality and impropriety which the Applicant has made in these proceedings were addressed by the Board which found that the Procuring Entity had re-evaluated the bids as directed and there was no evidence of fraud, bias, illegality and impropriety in the procurement process.

34. According to the Interested Party, the Applicant's claim that its financial bid was tampered with was dismissed by the Board for being unsubstantiated. The Interested Party urges the court to find that the decision of the Board was lawful and rational thus not capable of attracting any judicial review orders.

35. On the question of the alleged failure by the Procuring Entity to extend preference to local entities, the Interested Party avers that it is a local company registered under the Companies Act and was thus entitled to similar treatment with the Applicant. It is the Interested Party's view that failure to include the issue of preference in the tender document does not reflect any procedural impropriety or illegality.

36. It is the Interested Party's contention that the Applicant willingly submitted its bid knowing very well that it would be evaluated in accordance with the tender document. Further, that the Applicant did not raise any queries regarding the tender document and in particular the issue of local preference and it cannot be heard to complain about the tender document at this stage. It is the Interested Party's case that the Applicant is attempting to appeal against the decision of the Board and the Procuring Entity and its actions fall outside province of judicial review and as such no orders should issue to the Applicant. The Interested Party therefore prays that the application be dismissed with costs.

37. Looking at the pleadings filed in this matter, it becomes clear that the issue for the determination of this court is whether the Board acted legally, rationally and within the confines of the rules of natural justice in arriving at its decision in Application No. 43 of 2015.

38. Parties filed written submissions which they adopted on 20<sup>th</sup> April, 2016 and asked the Court to give a judgment based on those submissions.

39. On the issue of the need to give preference to local enterprises, the Applicant submitted that the Procuring Entity had a legal obligation to comply with Section 39 (8) of the PP & DA, 2005 and Regulation 28(2) of the Public Procurement and Disposal Regulations, 2006. In support of that contention the Applicant cited the decision in **Republic v Public Procurement Administrative Review Board and 3 others[2014] Eklr** where it was noted that the Board had allowed a request for review because of **"the failure by the 1<sup>st</sup> Interested Party to take into account the margin of preference stipulated under section 39(8) of the Act and Regulations 28(2) as interpreted in Miscellaneous Civil Application No. 540 of 2008 – De La Rue v Kenya Revenue Authority, Application No. 24 of 2008"**.

40. I have reviewed the decision of the Board and note that at pages 19 to 20 the Board stated that:

**"The Applicant alleged that the Technical and Tendering Committee deliberately failed to consider and comply with the provisions of Section 2(f) and 39(8) of the Act obligating preferential treatment and consideration on locally manufactured or developed products since it (Applicant) had locally developed modules which have been tested and are used by both local and international companies and organizations in the country and yet the evaluation was skewed in favour of Microsoft Dynamics from Microsoft Products from Coretec and Attain."**

41. Although the Board did not capture the response of the Procuring Entity and the Interested Party, the Board again recaptures the issue in the Applicant's reply to the Procuring Entity and Interested Party's submissions at page 24 as follows:

**“On the application of the preference and reservation principle, the Applicant argued that it is based on the law and not left to the decision of the Procuring Entity.”**

42. The Interested Party's response on this issue is not captured in the decision of the Board. The Interested Party did however respond to the issue through paragraph 48 of its Memorandum of Response dated 14<sup>th</sup> September, 2015 by stating that:

**“The Honourable Board will further note that the Applicant does not generate and/or manufacture any of the systems sought by the PE as the same are generated and produced by known industry players like Microsoft and Oracle.”**

43. I have looked at the Procuring Entity's Memorandum of Response dated 8<sup>th</sup> September, 2015, the replying affidavit of Paul Kosgei sworn on 8<sup>th</sup> September, 2015 and the affidavits of Peter Njiru, Purity Mwirigi, Thomas Nakitare and Jeremiah Mugambi all sworn on 8<sup>th</sup> September, 2015 and I do not find any response to the issue of preference and reservations. I will come back to this issue later in this judgment.

44. The other issue raised by the Applicant is that the Board was wrong in reaching the conclusion that its financial bid had not been tampered with. According to the Applicant, it had tendered sufficient evidence before the Board showing that its financial bid had been tampered with in order to aid the Interested Party.

45. This issue was addressed by the Board at length. At pages 37 to 38 of its decision, the Board held as follows:

**“The Board notes that the tender opening for the financial proposal of the Applicant was conducted on 25<sup>th</sup> August, 2015. The Applicant's financial proposal was the only one that was opened the other bids having been opened in earlier evaluation that culminated in Request for Review No. 36 of 2015. During the hearing, the Board examined the envelope that contained the financial proposal of the Applicant and noted that the envelope was opened on one side. There was no indication that the envelope was opened on both sides. The Board further notes that there was no adverse observation or remarks made in the minutes of the financial proposal opening meeting dated 25<sup>th</sup> August, 2015 to the effect that the envelope had been tampered with. The attention of the Board was drawn to an affidavit by Mr. Peter Njiru, the Chairman of financial proposal opening committee who stated that the bid was opened in the presence of Mr. David Gathii, the Managing Director of the Applicant on 25<sup>th</sup> August, 2015. According to Mr. Njiru, Mr. Gathii did not make any complain on the security of the envelope nor did he raise the issue that the envelope had been tampered with adding that had Mr. Gathii made such allegations at the meeting it would have been captured in the minutes.**

**In the absence of evidence to the contrary the Board finds that the allegation of tampering with the Applicant's tender is unproven.”**

46. The Board went ahead to consider another issue related to the alleged tampering and stated as follows:

**“On the issue that the Procuring Entity and/or its agents tampered with the Applicant's tender and thus availed the Applicant's bid price to the successful bidder, the Board notes that the financial proposal of the successful bidder was opened on 2<sup>nd</sup> June 2015. The bid price for the successful bidder was Kshs. 16,914,760.00. The bid for the Applicant was not opened at the time since the tender for the Applicant had been disqualified at the technical**

evaluation stage. The Applicant's bid was opened on 25<sup>th</sup> August 2015 and revealed a tender sum of Kshs. 23,636,384.00. The Board finds that allegation of tampering has not been proved and if tampering took place, the same could not have been for purposes of benefitting the successful bidder whose financial proposal had been opened earlier.

The Board in its ruling in Application No. 36 of 2015 made a number of observations in reference to the tender which had been tendered and re-tendered more than four times. The Applicant had been declared competitive in one of the re-tenders implying that its financial proposal had been read before and this may have exposed its tender and thereby created room for undercutting in the subsequent re-tenders. That may explain, in the Board's view, the Applicant's allegation in ground 10 that the successful bidder's sudden drop of the bid price from Kshs. 45 million in its previous bid to about Kshs. 16,914,760 is suspicious.

**In view of all the foregoing findings this ground of the Applicant's Request for Review also fails and is therefore disallowed."**

47. The Board went ahead and noted that the issues raised in grounds 14, 15, 16, 17, 18, 20, 21, 22 and 23 had been addressed in the Applicant's Request for Review No. 36 of 2015.

48. In my view, the Board exercised its mandate in arriving at its decision. This Court would indeed be crossing its boundaries were it to substitute its opinion for that of the Board. Judicial review is meant to check whether a public body's impugned decision is lawful, rational and has complied with the rules of natural justice - see **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300** and **Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd, Civil Appeal No. 185 of 2001**.

49. Although it is usually stated that judicial review is about the decision making process and not the merits of the decision, the truth of the matter is that judicial review is available where the decision made is so unreasonable that no reasonable authority could ever come to it - see **Associated Provincial Pictures House Limited v Wednesbury Corporation [1947] 2 All E.R. 680**. In such a situation, one would say that the court has gone into the merits of the decision.

50. In the case at hand, I do not find anything untoward in the decision of the Board that can make mereach the decision that its findings were so unreasonable that no reasonable authority could ever reach such findings. I do not therefore find reason for issuing judicial review orders in respect to the Board's decision on the issues addressed therein. The question as to whether the Applicant's financial proposal was tampered with was sufficiently addressed by the Board.

51. However, there was the issue of preferences and reservations which the Applicant raised and which was never addressed by the Board. No explanation was offered by the Board as to why this question was not resolved. It was an important matter as it touched on clear provisions of the procurement laws.

52. Some of the instances in which judicial review is available is where an administrative body has acted outside its jurisdiction, has taken into account irrelevant factors or has failed to consider relevant facts - see **Associated Provincial Pictures House Limited** (supra)

53. The question of preferences and reservations was an important issue. It is conceded by the Interested Party, and I have also confirmed it, that the issue was never raised in Application No. 36 of 2015. It could not therefore have been among the issues that had been addressed by the Board previously. It goes without saying that the issue of preference and reservations is one provided for by the procurement laws - see Section 39(8) of PP&DA, 2005 and Regulation 28 of the Public Procurement and Disposal Regulations, 2006. The Board was under a duty to consider the question and make a determination. Its ultimate decision was therefore made without taking this very relevant question into consideration.

54. The objectives of the PP & DA, 2005 as stated in Section 2 must be reflected in the decisions of the Board.

55. In **Civil Appeal No. 228 of 2003 Joram Mwenda Guantaivs The Chief Magistrate, Nairobi**, the Court of Appeal held that:

**“The appellant further avers that the learned judge failed to decide whether the criminal charges preferred against him were oppressive and an abuse of the process of the court. We have in the early part of this judgment observed that the learned judge did not resolve the issue; and yet this was the crux of the application before him. His failure to do so was indeed improper ....”**

Applying that statement to this case, I find that the failure by the Board to make a determination on the question of preference and reservations rendered its decision incomplete.

56. What orders are then appropriate in this matter? I have found that the decision rendered by the Board cannot attract judicial review orders. However, it was tainted by the fact that the Board failed to consider the issue of preference which had been placed before it by the Applicant. If this was an appeal I could have easily resolved the issue. However, this is a judicial review application. Any attempt to determine that issue would amount to usurping the statutory mandate of the Board.

57. In the circumstances of this case, I will remit the undecided issue to the Board for its determination. Since the parties had filed their pleadings and presented their submissions, the Board is directed to make a determination on that issue within 15 days from the date of this judgement. The fate of the decision of the Board made on 25<sup>th</sup> September, 2015 will be determined by the decision of the Board on the issue of preference. For now, the said decision is only suspended but will be reinstated if the Board decides against the Applicant or quashed if the Board decides in favour of the Applicant.

58. I am aware that under Section 93(2)(c) of the PP&DA, 2005, the Board has no jurisdiction to entertain a request for review where a contract is already signed under Section 68 of the Act. There is undisputed evidence before this Court from the Procuring Entity and the Interested Party that they have already entered into a contract in regard to the procurement in question. In order for the Board to regain jurisdiction, I suspend the said contract. The contract will eventually be re-instated or quashed depending on the decision of the Board on the question of preference.

59. In short, the Applicant's prayers in this application are answered as follows:

a) Prayer No. 1 asks for two orders. The first order seeks to quash the decision of the Board dated 25<sup>th</sup> September, 2015. The decision of the Board is not quashed but suspended awaiting the outcome of the decision of the Board on the question of preference. If the Board holds in favour of the Applicant, then the decision of the Board shall stand quashed. However, if the Board holds against the Applicant then the decision of the Board shall be re-instated. The second part of prayer 1 is for an order directing the award of the tender in question to the Interested Party (Coretech Solutions System Limited). I presume this is an error and what the Applicant wants from the Court is an order directing the award of the tender to it (the Applicant). Whatever the case, this is an order that cannot be granted. The award of tenders is the role of a procuring entity. The Court should not usurp the role of a procuring entity. The second part of prayer No. 1 therefore fails.

b) In prayer No. 2 the Applicant prays for the quashing of the award of the tender or any contract already signed. The said prayer is amended so that the award of the tender to the Interested Party and the signing of the contract between the Procuring Entity and Interested Party is suspended awaiting the outcome of the decision of the Board on the issue of preference. The award of the tender and the contract shall be reinstated if the decision of the Board goes against the Applicant. However, the award of the tender and the contract shall stand quashed should the Board decide in favour of the Applicant.

c) The 3<sup>rd</sup> prayer for an order of mandamus compelling the Procuring Entity to award the tender to the Applicant is dismissed. It is not the duty of the court to award tenders. That role belongs to procuring entities.

d) Prayer No. 4 for an order of prohibition to prohibit the Procuring Entity from awarding the tender to the Interested Party or any other entity or person has been overtaken by events as the tender was awarded to the Interested Party and a contract signed. This prayer cannot therefore be granted. It is however noted that the Applicant's interests have been taken care by the orders already issued.

e) On the question of costs, I direct each party to meet own costs of the proceedings.

60. For record purposes, it is noted that although the PP&DA, 2005 was repealed upon the coming into force of the Public Procurement and Asset Disposal Act, 2015, this matter has proceeded under the PP & DA, 2005 and its regulations by virtue of Section 1 of the Third Schedule of the Public Procurement & Asset Disposal Act, 2015 which requires procurement proceedings that had been commenced under the repealed PP& DA, 2005 to be completed under that Act.

Dated, signed and delivered at Nairobi this 1<sup>st</sup> day of July, 2016.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**