



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 17 OF 2012**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**THE KENYA BUREAU OF STANDARDS.....2<sup>ND</sup> RESPONDENT**

**SGS KENYA LIMITED.....INTERESTED PARTY**

**EX-PARTE**

**INTERTEK INTERNATIONAL LIMITED**

**JUDGEMENT**

By way of a notice of motion application brought under Section 9 of the Law Reform Act and Order 53 Rule 3(1) of the Civil Procedure Rules, Intertek International Ltd, the ex-parte applicant who will henceforth be simply referred to as the applicant prays for orders that:-

- 1. AN ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the decision of the Public Procurement Administrative Review Board dated 11<sup>th</sup> January 2012 dismissing the Request for Review No. 48/2011 of 13<sup>th</sup> December 2011 by the Applicant and directing the Kenya Revenue Authority to proceed with the tender process in respect of the Tender No. KEBS/TO55/2011/2012.**
- 2. An ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the decision of Kenya Bureau of Standards as set out in the letter dated 1<sup>st</sup> December 2011 to award Tender No. KEBS/TO55/2011/2012.**

**3. AN ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the contracts, if any, signed pursuant to the decision of the Public Procurement Administrative Review Board dated 11<sup>th</sup> January 2012 and the decision of the Kenya Bureau of Standards dated 1<sup>st</sup> December 2011.**

**4. AN ORDER OF MANDAMUS do issue directed to the Kenya Bureau of Standards to re-tender for pre-shipment verification of conformity to standards services and to award the said tender in compliance with the provisions of the Public Procurement and Disposal Act, the Public Procurement and Disposal Regulations and the tender documents issued by the Kenya Bureau of Standards.**

**5. The costs of this application be provided for.**

The application is supported by grounds on its face; a statutory statement and a verifying affidavit sworn by Douglas Nyamori on 17<sup>th</sup> January, 2012 in support of the chamber summons application for leave. The Public Procurement Administrative Review Board (PPARB) hereinafter simply referred to as the Board is the 1<sup>st</sup> respondent whereas the Kenya Bureau of Standards (KEBS) is the 2<sup>nd</sup> respondent. Bureau Veritas S.A. is the 1<sup>st</sup> interested party whereas SGS Kenya Limited is the 2<sup>nd</sup> interested party.

Before proceeding further, I must point out some glaring errors in the substantive notice of motion. In the said application which is dated 9<sup>th</sup> February, 2012 prayer No. 1 refers to Kenya Revenue Authority instead of KEBS. The notice of motion also names the ex-parte applicant as De La Rue Currency and Security Print Limited instead of Intertek International Ltd. I will not make any comments on these errors save to state that the decision in this matter will be based on the substantive issues placed before this court by the parties herein.

In summary, the applicant's case is that it participated in tender No. KEBS/TO55/2011/2012 for Pre-shipment Verification of Conformity to Standards Programme. KEBS was the procuring entity. The applicant had applied to provide inspection services in various regions of the world including Region 16 which covered Egypt, Tunisia and Libya.

On 22<sup>nd</sup> November, 2011 the financial tenders were opened by KEBS in the presence of the applicant's representative Mr. Douglas Nyamori. As the financial proposals were read out, it was announced that the applicant had been disqualified from Region 16 and would not be considered for an award of the tender for that region. Through a letter dated 1<sup>st</sup> December, 2011 KEBS informed the applicant that its bid had led to its being awarded four regions under the programme.

The applicant, for various reasons, was dissatisfied with the decision of KEBS and filed Request for Review Application No. 48/2011 of 13<sup>th</sup> December, 2011 with the Board. On 11<sup>th</sup> January, 2012 the Board rendered its decision dismissing the application for review and directed that the tender process proceeds to conclusion. The said decision of the Board is what has brought the applicant to this court.

According to the statutory statement, the grounds upon which the applicant seeks relief are:-

**1. The Board failed to consider the submissions of the Applicant that the evaluation of financial bids could not be conducted fairly where one of the bids included royalty deductible elements, contrary to the Act, the Regulations and the procuring entity's own tender documents. The Procuring Entity has acted in breach of Sections 34, 82 and 85(2) of the Public Procurement and Disposal Act, 2005 and Clauses 2.11.2 and 2.22.2 of the Appendix to Instructions to Tenderers as contained in the Request for Proposals.**

**2. The disqualification of the Applicant from Region 16 was done in breach of Section 31(6) of the Act which sets out the only conditions for disqualification of a bidder from a tender process.**

**3. The Board erred by failing to make a determination of whether the reasons cited for**

**disqualification of the Applicant and the awarding of no marks for certain portions of the technical evaluation was correct, given that the information provided by the Applicant in its bid was adequate and sufficient.**

**4. The evaluation of tenders in tender No.KEBS/TO55/2011/2012 was under taken without paying heed to the provisions of the tender documents, the Act and the Regulations and as such was in breach of Section 66 of the Act.**

**5. The Applicant had a legitimate expectation that the Authority would apply the criteria for evaluation as advised in the tender documents and as required under the law. This is a basic tenet of the rule of law and good governance. This expectation was breached by KEBS and by the Board in failing to consider the unfair exclusion of the Applicant from consideration, and the unfair evaluation of the financial proposals which did not take into account royalty deductible items, as well as the additional container sealing fees which are payable by the public, proposed by Bureau Veritas in its financial proposal.**

As can be seen from the above grounds, it is clear that the applicant has brought various issues to the table. The applicant attacks the decision of the Board as well as the way KEBS conducted the award of the tender.

The application did not go unopposed. KEBS opposed the application through a replying affidavit sworn by its Managing director, Evah A Odour on 23<sup>rd</sup> April, 2012. Through the said replying affidavit, KEBS gave background information on the tender in question. KEBS informed the court that on 23<sup>rd</sup> September, 2011 it advertised for provision of Pre-export Verification of Conformity (PVOC) to Standards Tender No. KEBS/TO55/2011/2012. The same was to be conducted by way of expression of interest and competitive bidding. On 7<sup>th</sup> October, 2011 ten bids, including that of the applicant, were opened. The evaluation of the bids was done in two phases namely technical and financial. The successful and unsuccessful bidders at the preliminary stage were notified through a letter dated 25<sup>th</sup> October, 2011 and the successful bidders were invited to tender their requests for proposals. The requests for proposals were opened on 8<sup>th</sup> November, 2011 and technical evaluation done based on the criteria provided in the requests for proposals. The applicant submitted requests for proposals for eleven regions and ten bids passed the technical evaluation stage and on 14<sup>th</sup> December, 2011 KEBS' Tender Committee awarded four regions (Nos. 7, 10, 12 & 13) to the applicant as recommended by the evaluation committee. Region 16 was awarded to a different bidder. KEBS contended that the applicant being dissatisfied filed an application for review with the Board and the Board, after hearing the application, dismissed the same. KEBS argues that these judicial review proceedings are a disguised appeal against the decision of the Board. It is KEBS' case that the applicant's averment that the process was unfair is totally unfounded since the bidders were being scored on the basis and adequacy of the documents submitted. As for Region 16, KEBS contended that the applicant was the outgoing contractor for this particular region but during the technical evaluation stage it failed to meet the cut off mark that was set in Clause 2.22.1 of the tender documents and could not therefore proceed to the financial evaluation stage. KEBS points out the fact that the applicant was successful in four regions to demonstrate that there was fairness in the process. In paragraph 14 of the verifying affidavit KEBS accuses the applicant of dishonesty in the following words:-

**“The 2<sup>nd</sup> Respondent avers that the Applicants have not approached this Honorable Court with clean hands as when submitting their documents for the request of proposals they combined their financial proposals for all the regions. The gist of this is captured in clause 2.22.1 of the request for proposal, “Tenderers who do not receive at least 50 points out of the maximum 70 points in the evaluation of their technical proposals shall be disqualified and their financial proposals returned unopened.” The purpose of that was to ensure the bidders who don't meet the criteria set in the technical evaluation are automatically disqualified and their financial proposal remain unopened, thus the applicants blatantly disregarded that provision to create confusion and give them consideration in the financial evaluation even in the event they would have failed the technical evaluation as their financial proposals were combined.”**

KEBS avers that it followed the law and procedure in awarding the said tender. KEBS also contends that the applicant had claimed before the Board that an unnamed bidder had allegedly submitted a bid which was non-responsive by improperly including fees for hardware and training as well as an extra charge for container sealing in contravention of Clause 5.2.7 thus leading to a situation where bidders may have gained an advantage over others. KEBS submitted that the applicant failed to disclose the bidder and the region they were complaining about to the Board but have before this court named the 1<sup>st</sup> interested party, Bureau Veritas as the bidder whose non-responsive bid was considered. KEBS accused the applicant of amending its complaints with a view to accusing the Board of having acted in error. Finally, KEBS contended that the Board considered every issue raised by the applicant in the Request for Review and the applicant has therefore not established any grounds which can make this court grant judicial review remedies to the applicant.

The 1<sup>st</sup> interested party (Bureau Veritas S.A.) opposed the application through the replying affidavit of its Deputy Chief Executive Officer, Mr. Charles Ochieng. It is the 1<sup>st</sup> interested party's case that the applicant is asking for a consideration of the merits of the decision of the Board in the Request for Review and the application before this court is therefore not an application for judicial review. The 1<sup>st</sup> interested party also contends that this court has no jurisdiction to grant the orders of prohibition and mandamus sought by the applicant in that although the proceedings have been taken out against the decision of the Board, the reliefs are directed at KEBS. The 1<sup>st</sup> interested party further contends that the relief in form of an order of prohibition is no longer available since contracts have already been signed and they are already being executed even as this matter proceeds before this court. It is the 1<sup>st</sup> interested party's case that the Board fully considered the issues canvassed by the applicant and reached a conclusion that the applicant's Request for Review had no merit.

The 2<sup>nd</sup> interested party opposed the application through the affidavit of its Managing Director, Gerald Van Aswegen. The applicant's case is faulted for focusing on the process conducted by KEBS instead of focusing on any shortcomings in the process leading to the decision of the Board. It is the 2<sup>nd</sup> interested party's case that the applicant has not established that the Board exceeded its jurisdiction but has instead focused on the merits of the decision which is a subject of appeal and not judicial review. The 2<sup>nd</sup> interested party argues that the tender was for offer of PVOC to Standard Services in 18 regions and the tender for each region was to be evaluated and points awarded separately. The 2<sup>nd</sup> interested party submitted that the fact that the applicant passed the technical evaluation for the other regions it tendered for does not mean that it passed the technical evaluation for Region 16. The 2<sup>nd</sup> interested party contends that the grievances of the applicant as regards Region 16 cannot form the basis for this court to nullify the tenders for all the other regions considering that the applicant only submitted bids for 11 out of the 18 regions.

Having gone through the pleadings and submissions of the parties herein, I find that the issues for the determination of this court are:-

1. Whether the Board committed an error of law or fact in relation to the applicant's Request for Review;
2. Whether judicial review is, at this stage, available to the applicant in respect of the actions of KEBS;
3. Whether the remedies sought are available to the applicant; and
4. Who will meet the costs of the application?

In my view, the starting point is to establish the law relating to review of the decisions of tribunals. In the case of **KENYA PIPELINE LIMITED VS HYOSUNG EBORA COMPANY LIMITED & 2 OTHERS [2012] eKLR** the Court of Appeal in overturning a decision of the High Court which had allowed judicial review orders in respect of a decision made by the Public Procurement Administrative Review Board observed that:-

**“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg.89, it has power to engage an expert to assist in the proceedings in which it feels it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of the powers given to the Review Board including annulling anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by the procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.....”**

**So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.”**

As earlier stated, the applicant directed its firepower on both the actions of the Board and KEBS. I will start by looking at the applicant’s attack on the decision of the Board. I have perused the decision of the Board dated 11<sup>th</sup> January, 2012. Before the Board, the applicant had raised four grounds of review. The first ground was that:

**“The procuring entity in carrying out its evaluation would appear to have considered a non-responsive bid that was not in accordance with the specific requirements of the Request for Proposal dated 26<sup>th</sup> October, 2011 (“the RFP”). The RFP was clear that any financial evaluations were to be conducted on the basis of royalties payable only and no other fees. In considering and acting on such proposals, the procuring entity has acted in breach of Sections 34, 82 and 85 (2) of the Public Procurement and Disposal Act, 2005 and Clauses 2.11.2 and 2.22.2 of the Appendix to instructions to Tenderers as contained in the RFP.”**

The Board considered the evidence and submissions presented in respect of this ground and held that:-

**“The Board notes that the issue for determination on this ground is whether the Procuring Entity conducted the financial evaluation in accordance with the criteria set out in the Request for Proposal.**

**At the outset, the Board notes that the first part of this ground is vague and speculative. The Applicant states that the Procuring Entity appears to have considered a non responsive bid. The Applicant has not identified the bidder it is referring to. It is important to note that the tender was divided into 18 regions. The Bidders were free to participate in any or all the regions. Indeed, the Applicant participated in eleven regions and was successful in regions number 7, 10, 12 and 13. The question that begs an answer is which bidder and region is the applicant complaining about?”**

The Board then went ahead and considered another issue namely:-

**“The other issue raised by the Applicant is that the Procuring Entity did not conduct the financial evaluation on the basis of royalties payable only. It is alleged that the Procuring Entity took into account other fees that were not provided in the tender document.”**

After considering sections 34, 82 and 85(2) of the Public Procurement and Disposal Act and clauses 2.11.2 and 2.22.2 of the Request for Proposal which KEBS was alleged to have breached, the Board rendered itself thus:-

**“The Board has carefully perused the tender documents of the Applicant and Successful Bidders. The Board observes that the Applicant bided for eleven regions and was evaluated equally on all those regions based on the criteria provided in the Appendix to instructions to Tenderers. Upon examination of the technical evaluation results, the Board has noted that the Applicant bided for regions No. 1, 3, 4, 7, 10, 11, 12, 13, 14, 16 and 18. It was successful and passed the technical evaluation stage in all regions apart from region No. 16. Upon financial evaluation, the**

**Applicant was successful and was awarded the tender in regions number 7, 10, 12 and 13.**

**The Board notes that from the submissions made at the hearing it is clear that the Applicant is aggrieved with the results of region No. 16 where it is the current contractor. The technical scores for that region shows that the Applicant scored 48.7 marks which is less than the cut off marks of 50 points out of the maximum 70. As a result, the Applicant's financial proposal for region 16 could not be considered as the Applicant did not meet the minimum mark as set out in clause 2.22.1. It is therefore clear that the Applicant's contention that the financial proposals were not evaluated properly is misplaced. The Applicant did not reach the financial evaluation stage in region No. 16 because it failed at the technical evaluation stage.....**

**The Board has also noted that the Applicant had submitted a combined financial proposal and therefore it had to be invited for the opening of the financial proposals as it was successful in certain regions.”**

The Board then went ahead to critically consider KEBS' technical evaluation of the applicant's bid in respect of Region 16 and concluded that KEBS followed the criteria set out in the Request for Proposal in the evaluation process. The Board then proceeded to consider grounds 2 and 3 in the Request for Review. The grounds are:-

**“Ground 2:**

**The Applicant was disqualified from certain portions of the tender and this was verbally announced during the opening of financial proposals on 22<sup>nd</sup> November, 2011. This disqualification was stated in the presence of all the bidders in the room but has not been captured in the minutes of the financial proposals opening. As such, the Procuring Entity has acted in breach of Section 31(6) of the Act.**

**Ground 3**

**The Applicant has been denied the tender award in a manner contrary to the provisions of the Public Procurement and Disposal Act and despite having submitted a highly competitive proposal given its experience in the PVOC program. This has compromised the integrity and fairness of these tender proceedings and is contrary to the specific objectives of the Act as stated at Section 2 thereof.”**

The Board summarized the applicant's case on these two grounds of review as follows:-

**“The Applicant stated that there was lack of fairness in the tender process and that it was excluded from the tender process contrary to the provisions of Section 31(6) of the Act. It stated that it was excluded from certain regions on 28<sup>th</sup> November, 2011 when the financial proposals were being opened.**

**The Applicant alleged that the minutes provided by the Procuring Entity were not a true reflection of the proceedings of the financial opening.....**

**The Applicant asserted that it provided all the required information and documents in its technical proposal. It further asserted that the letter dated 17<sup>th</sup> November 2011 inviting it to witness the opening of financial proposals was clear that its technical proposal had been deemed satisfactory.”**

After considering the rival arguments on the two grounds of review the Board identified the two issues for its determination as follows:-

**“(i) Whether the Applicant was disqualified at the time of the opening of financial proposals on 22<sup>nd</sup> November, 2011; and**

**(ii) Whether the financial evaluation was done fairly and in a manner that promotes integrity and fairness in the tender proceedings as contemplated by Section 2 of the Act.”**

The Board analyzed the arguments and concluded that:-

**“The Board notes that the evaluation criteria were elaborate and objective. Having examined the tender documents of the Applicant and those of the Successful Bidders, the Board is satisfied that the evaluation was done fairly and objectively. Bidders were being scored on the adequacy and on the basis of the documents submitted. As the Board has already noted in ground 1, the 18 regions were evaluated separately and the fact that a bidder was successful in one region is not a basis to argue that it should have succeeded in the other regions. As already noted in ground number 1 the Applicant’s complaint is based on region No. 16, where it is the current contractor. However, the Board notes that this region like the other regions was open to competition. The Applicant failed to meet the cut off mark that was set in clause 2.22.1 of the tender documents and it did not proceed to financial evaluation in this region. That notwithstanding, the Board has examined the financial evaluation and it is evident that the financial evaluation was done using the criteria which was set out in the tender document.....”**

The Board then went ahead to consider the 4<sup>th</sup> ground of review. I do not find the 4<sup>th</sup> ground of review relevant to these proceedings and I will therefore not reproduce it.

Earlier in this judgement I reproduced the grounds upon which the applicant seeks relief. Looking at those grounds it becomes clear that they are the same with the grounds of review which the applicant had presented to the Board. As can be seen from the decision of the Board which I have intentionally reproduced at length, the Board critically considered each and every issue raised and made a finding. The Board found that the applicant’s bid for Region 16 was evaluated using the criteria set out in the tender documents and it failed to muster the cut off mark at the technical evaluation stage. By the time the financial evaluation was being done, the applicant’s bid for Region 16 was no longer under consideration.

As for the allegation that a certain bidder’s non-responsive bid had been allowed, the Board found that the applicant had not disclosed the bidder and the region so that it could critically look at that particular bid. The applicant attacks this finding of the Board. Before this court the applicant revealed that the non-responsive bid it was alluding to was that of the 1<sup>st</sup> interested party in respect of Region 16. The respondents and interested parties have submitted that the Board cannot be crucified for allegedly failing to make a determination on information that had not been placed before it. I agree. The Board could not have been expected to try and find out which non-responsive bid KEBS had allowed in the 18 regions. It was upon the applicant to place all the relevant information before the Board so that the Board could consider the material and make a finding on the same.

Having carefully gone through the decision of the Board, and after considering the grounds upon which the applicant seeks judicial review remedies against the said decision, I come to the conclusion that the applicant is attacking the merits of the decision of the Board. This court cannot be of much help to him. Judicial review is not an appeal. Among other things, judicial review considers whether a tribunal had jurisdiction to hear a matter. It also considers whether an applicant was subjected to a fair process before the tribunal. There is no dispute that the Board had jurisdiction to hear the matter. It has also emerged from the Board’s decision that all the issues raised before it by the Applicant were addressed. The applicant was therefore subjected to a fair process by the Board. In short, the applicant has not established grounds for grant of judicial review orders.

The second issue for consideration is whether judicial review, is at this stage, available against KEBS. It is the applicant’s case that if KEBS is found to have breached the law when awarding the tender in question, then this court should not hesitate to issue the necessary orders to correct such an illegality. In support of this position the applicant’s counsel cited the decision of Nyamu, J (as he then was) in **NAIROBI H.C. MISC. CIVIL APPLICATION NO. 540 OF 2008 REPUBLIC VS THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & KENYA REVENUE AUTHORITY**

where the learned Judge not only quashed the decision of the Board but also proceeded to quash the award of a tender by Kenya Revenue Authority which was the procuring entity. I have perused the said decision but I do not find any comments by the learned Judge as to why he proceeded to quash both the decisions of the Board and that of the procuring entity. I will therefore not make any comment on the said decision.

In my view, the applicant before me is trying to get a second bite of the cherry. The applicant presented its grievances against the procuring entity (KEBS) to the Board. The Board considered those grievances and came up with its decision. The applicant had an obligation to present all its grievances against KEBS to the Board. This court can only consider the decision of the Board and cannot look at the shortcomings, if any, of the tendering process by KEBS since the Board has already done so. If the applicant had succeeded, the only remedies available in the circumstances of this case would have been an order of certiorari quashing the decision of the Board and an order remitting the case back to the Board for consideration in accordance with the law. Any attempt by this court to bypass the Board and quash the decision of KEBS would amount to usurping the statutory powers vested on the Board by Parliament. I think it is only when a procuring entity acts illegally unreasonably, unfairly, ultra vires or in breach of the rules of natural justice that a party can directly approach the court for judicial review. This is, however, a slippery and narrow path which a party should consider carefully before taking action. In my view therefore, judicial review orders are not available to the applicant in respect of the decision of KEBS. Thankfully, there is nothing placed before this court to show that KEBS' decision in regard to the tender in question is deserving of judicial review orders.

In all fairness, this application must fail and the same is hereby dismissed. The applicant will meet the cost of the respondents and the interested parties.

**Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of May , 2013**

**W. K. KORIR,**

**JUDGE**