



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 89 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

MINISTRY OF HOUSING2ND RESPONDENT

EX PARTE

UTO CREATIONS STUDIO LIMITED

JUDGMENT

Introduction

1. The *ex-parte* applicant, Uto Creations Studio Limited (“Uto Creations”) has moved the court by a Notice of Motion dated 20th March 2013 for the following orders;
1. That an order of certiorari do issue to remove to the High Court for purposes of quashing the entire proceedings and decision of the 1st respondent dated 22nd February 2013 that: “the Procuring Entity (the 2nd respondent herein) may re-tender the Provision of Architectural Consultancy Services for Design, Documentation and Supervision of Construction of the Proposed Housing, Park Road, Nairobi.”
2. That an order of certiorari do issue to remove to the High Court for purpose of quashing the entire proceedings and the award by the 2nd respondent of the Request for Proposals for Provision of Architectural Consultancy Services for Design, Documentation and Supervision of Construction of the Proposed Housing, Park Road, Nairobi (Tender No. MH/CSHSF/04/2012-2013) to Trioscape Consultancy Services.
3. That an order of prohibition do issue to prohibit the 2nd respondent from re-tendering the Provisions of Architectural consultancy services for Design, Documentation and Supervision of Construction of the Proposed Housing, Park Road, Nairobi.
4. That an order of mandamus do issue to compel the 2nd respondent to award the Request for

Proposals for Provision of Architectural Consultancy Services for Design, Documentation and Supervision of Construction of the Proposed Housing, Park Road, Nairobi (Tender No. MH/CSHSF/04/2012 – 2013) to the Ex-parte applicant in accordance with:-

- a. *Clause 7.2.2 and 80 of the Request for proposals document; and*
 - b. *Section 2, 82(1), (2) and (5), 84 and 85 of the Public Procurement and Disposal Act, 2005 read together with regulation 58 of the Public Procurement and Disposal Regulations, 2006.*
5. *That the costs of the Request for Review at the 1st Respondent be awarded to the Ex-parte Applicant.*
 6. *That the costs of this application be awarded to the Ex-parte applicant.*

Factual Background

2. This matter concerns a challenge to a decision of the Public Procurement Administrative Review Board, (“the Board”) which is established under the **Public Procurement and Disposal Act, (Act No. 3 of 2005)**.
3. The genesis of this matter can be traced to a Request for Proposals issued by the Ministry of Housing (“the Ministry”) for the Design Documentation and Supervision of Proposed Housing Project, Park Road, Nairobi (Tender No. MH/CSHSF/04/2012-2013).
4. Ten firms on a prequalification list approved by the Ministry Tender Committee in May 1998 were invited by telephone to collect Requests for Proposal Documents. Out of the ten firms invited, five including Uto Creations and the interested party, Trioscape Planning Services Limited (“Trioscape”) submitted their bids.
5. An Evaluation Committee was constituted on 12th October 2012 to prepare a comprehensive breakdown on the scoring criteria for the design proposal and team’s capability and to open proposals, evaluate and recommend for awarding the consortium with the highest combined design proposals and team capability scores. Uto Creations, having achieved the highest technical proposal score, was recommended for the award. Trioscape came in second in the evaluation.
6. The Tender Committee discussed the submission by Evaluation Committee and after considering the same, it approved Trioscape as the most responsive proposal. The successful bidder, Trioscape and the unsuccessful bidders including Uto Creations were informed of the Tender Committee’s decision. Uto Creations filed **Application No. 05 of 2013** before the Board to review the Tender Committee’s decision.
7. In the application for review before the Board, Uto Creations sought the following orders;
 1. *That the procurement proceedings be suspended forthwith and the procuring Entity be barred from proceeding to enter into contract with the said awardee.*
 2. *That the Procuring Entity to be compelled to release authentic documents of procurement proceedings as stipulated in Section 45 subsection 3 which will then proof beyond reasonable doubts who the deserving entity in this particular tender was.*
 3. *That Section 82, sub section 5 of the public procurement and disposal Act, 2005 be followed strictly and the highest scoring proposal be awarded the bid.*
 4. *That the complainant be awarded damages and the costs of the review.*
8. Although, Uto Creations was successful on the grounds for review, the Board declined to award the tender to the highest scoring proposal. It is this part of the decision that is subject to these proceedings for judicial review. In its decisions, the Board appreciated its task thus, “*The Board noted the Applicant’s prayers and notes that it has requested the Board for an order that, inter alia, section 85(5) of the Act be followed strictly and that the highest scoring proposal be awarded the contract. For the Board to be able to make such an order, the Board needs to determine*

whether the tender evaluation was carried out in accordance with the Tender Document, The act and its attendant Regulations.”

9. After examining the Tender Evaluation Report and the Tender Committee Minutes, the Board concluded as follows;

From the foregoing, the Board finds that the criteria as set was not quantifiable with respect to the criteria of Costs Estimates; and further it could not be able to accommodate fairly or without discrimination the Tender Committee’s concerns if these were to have been referred back to the Evaluation Committee for review.

Further, the Board has noted that the Bidders that were invited to in this tender were selected from a list of bidders prequalified in the year 2008. That list was more than five years old and there is no explanation why it has not been updated. Five years is a long time and to ensure fair competition, the Procuring Entity should carry out a fresh prequalification. In five years it is highlight possible that the character and capacity of the bidders that were prequalified have changed. In addition, it is not clear why bidders were invited through phone calls and not in writing.

Accordingly, the Board finds that even though the Appeal has succeeded, it cannot grant the Applicant its prayer to order the Procuring Entity to award the bid to the highest ranking proposal because the criteria as set in the Tender documents was not quantifiable or objective as required by Section 66(3) of the Act.

Accordingly, the Board orders, pursuant to Section 98 of the Act, that the award to be successful Bidder, M/s Trioscape Planning Services, is hereby annulled. The Procuring Entity may retender using objective and quantifiable criteria in accordance with Section 66(3) of the Act. Further it should use an updated list of prequalified bidders to allow fair competition.

With regard to the Applicant’s prayers to be awarded damages and the costs of the instant Request for Review, the Board has held severally that tendering costs are commercial business risks taken by the parties in the course of doing business and as such, each party should bear its own costs.

Ex-parte Applicant’s Case

10. Uto Creations has challenged the decision on the ground that there is an error of law on the face of the record by failing to give effect **section 98(c)** of the Act, which empowers the Board upon completing a review to substitute the decision of the Review Board for any decision of the processing entity in the procurement proceedings.
11. The applicant’s case is the subject of the procurement was a Request for Proposals (“RFP”) governed exclusively by **sections 78 to 86** of the Act as **section 77** of the Act provides that, “Sections 78 to 86 set out the procedure for a procurement using a request for proposals.” The applicant founded its case on **section 81(2)(e)** which provides that the RFP shall set out “the procedures and criteria for evaluating the technical proposal which shall include a determination of whether the proposal is responsive.” That **sections 82(1)** and **(2)** of the Act provide that the procuring entity is required to examine the proposal received in accordance with the RFP and for each proposal, the procuring entity shall determine if it is responsive and if it is, score it in accordance with the procedures and criteria set out in the RFP.
12. In light of the foregoing, Counsel for Uto Creations, Mr Gachuba submitted that the application of **section 66(3)** of the Act was not only an error but it was illegal and irrational. He submitted that **section 66(3)** of the Act is part of the **part V** of the Act which governs the procedure under the Open Tendering procurement method and that only tenders submitted and evaluated under

section 66(3) of the Act are evaluated based on objective and quantifiable evaluation criteria.

13. The applicant's case is that valuation of proposal under **section 82** of the **Act** is conducted on the basis of technical proposals submitted by candidates in accordance with the requests for proposals. The applicants contended that the RFP provided for the evaluation and award procedures and in completion of its task, the tender Committee could not look outside the RFP which provided the evaluation and award procedure.
14. The applicant contended that by refusing to substitute the award by the Ministry to Trioscape with an award to it, the decision of the Board was irrational. It further contended that its economic interests protected by **Article 46(1)** were prejudiced and as such, it ought to be set aside.

1st Respondent's Case

15. The 1st respondent submitted that the Board has the powers and mandate under the Act and the Rules to review a decision of the procuring entity where a party claims to have suffered or risks suffering, loss or damage arising from a decision of the procuring entity. That under **section 98** of the Act, the Board has wide powers to review and examine whether the procuring entity complied with the laid down procedures, laws and rules in the procurement process. The respondent contends that the Board properly exercised its powers in nullifying the process as **section 66(3)** was not complied with.
16. The respondent contends that the Board found as a fact that the Ministry failed to adhere to the procurement rules in the process and therefore the entire process was nullified under **section 98** of the Act. Ms Masaka, counsel for the respondents, submitted that no case had been made out for the grant of orders of certiorari and mandamus and as such, the application should be dismissed.

Interested Party's Case

17. Trioscape supported the decision of the Board. Mr Wandabwa, its counsel, added that the Board applied the provisions relating to open tendering as it was required to do so by dint of **Regulation 54** of the **Public Procurement and Disposal Regulations, 2006** and in so doing, its decision requiring that evaluation criteria be quantifiable and objective, the Board was rational and reasonable and acted within the law.

Determination

18. All the parties are agreed on the scope of orders of judicial review which was aptly summarised by Githua J., in **Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012]eKLR** where she stated; *"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."*
19. Having considered the pleadings, depositions and submissions the following two issues fall for determination;
 - a. Whether the Board's decision constituted an error of law on the face of the record and whether it

- was irrational or illegal in so far as the Board relied on the provisions of **section 66(3)** of the Act to the procurement of consultancy services instead of applying **sections 76 to 87** of the Act.
- b. Whether the refusal by the Board to substitute the award by Ministry to the interested party with an award was irrational in view light of the findings by the Evaluation Committee that the *ex-parte* applicant was the highest scorer.
20. Under **section 29** of the Act, the Procurement entity is entitled to use open tendering under **Part V** of the Act or an alternative procedure under **Part VI** of the Act. **Part V** of the Act (**sections 50 to 71** (inclusive)) deal with open tendering procedures. Alternative Procurement Procedures are dealt with under **Part VI** of the Act (**sections 72 to 92** (inclusive)). The Alternative Procurement procedures identified are as follows; restricted tendering, direct procurement, Request for Proposals, Request for Quotations, Procedures for low-value procurements and specially permitted procedures.
21. It is not in doubt that the procurement which was subject of dispute was by Request for Proposals governed by **sections 76 to 87** of the Act. The evaluation criteria for RFP are to be found in **section 81(2)(e)** which provides as follows;
- (e) the procedures and criteria to be used to evaluate and compare the proposals including—*
- (i) the procedures and criteria for evaluating the technical proposals which shall include a determination of whether the proposal is responsive;*
- (ii) the procedures and criteria for evaluating the financial proposals; and*
- (iii) any other additional method of evaluation, which may include interviews or presentations, and the procedures and criteria for that additional method.*
22. The manner of evaluation of RFP is dealt with by **section 82** of the Act which provides as follows;
- 82. (1) The procuring entity shall examine the proposals received in accordance with the request for proposals.*
- (2) For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals.*
- (3) For each proposal that is determined, under subsection (2), to be responsive, the procuring entity shall evaluate and assign a score to the financial proposal, in accordance with the procedures and criteria set out in the request for proposals.*
- (4) If the request for proposals provides for additional methods of evaluation, the procuring entity shall conduct such methods in accordance with the procedures and criteria set out in the request for proposals.*
- (5) The successful proposal shall be the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4). [Emphasis mine]*
23. The collectivity of **sections 81** and **82** of the Act which I have set out above show that the evaluation procedures and criteria are set out in the RFP. It therefore becomes clear that the Board by referring to **section 66(3)** of the Act to evaluate the RFP fell into error by misapplying the law. **Part V** and **Part VI** of the Act are mutually exclusive as they apply to separate modes of procurement. The Board could not evaluate the RFP in accordance with provisions relating to

- Open tendering. Thus, by insisting on “*objective and quantifiable evaluation criteria*” set out in **section 66(3)** of **Part V** instead of **section 82(1)** and **(2)** of **Part VI** of *the Act*, the Board acted outside the law and its decision was illegal. In the case of *Council of Civil Service Unions v Minister for Civil Service [1984] 3 All ER 935*, Lord Diplock defined the term ‘illegality’ in the following terms, “By “illegality” as a ground for Judicial Review, I mean that the decision-making maker must understand correctly the law that regulated his decision-making power and must give effect to it”
24. As a RFP was the mode of procurement used, and the procedures dealt with provided specifically under **Part VI**, there was no recourse to be had to **Regulation 54** of the **Public Procurement and Disposal Regulations, 2006** as urged by the interested party. In any case, the subsidiary legislation could not be used to veto clear provisions of the principal Act.
25. The Board came to the conclusion that the procurement could not be sustained because the criteria as set in the Tender documents was not quantifiable or objective as required by **section 66(3)** of the Act cannot stand. However that is not the end of the matter.
26. The second issue deals with the scope of reliefs the Board is entitled to grant. In the case *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited and Others Nairobi CA Civil Appeal No. 145 of 2011 (Unreported)*, the Court of Appeal stated that “[28] *The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. “S. 98 of the Act confers wide powers on the Review Board. It is clear from the nature of 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... It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”*”
27. **Section 98** of the Act provides as follows;
98. Upon completing a review the Review Board may do any one or more of the following—
- (a) annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;
- (b) give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;
- (c) substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and
- (d) order the payment of costs as between parties to the review.
28. I agree with the respondent’s submission that in light of the powers granted to the Board under **section 98** of *the Act*, the Board is entitled to conduct a review not only the allegations made in the application for review before it but also review of the entire procurement process to see that it complies with the prescribed procedures and ensure that the objects of the Act are fulfilled.
29. The reliefs set out in **section 98** are within the discretion of the Board. The Court will be reluctant to interfere unless the decision is irrational, illegal or lacks propriety. As observed in by the Court of Appeal in *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others (supra)*, “[21] *Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order(certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter.*” The court further noted that, “Lastly, it

is important to appreciate that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant.”

30. In my view, the Board was not obliged to award the tender to Uto Creations. The Board found that fair competition would be undermined as the bidders invited to the tender were selected from a list of bidders prequalified in the year 2008 and as a result of the lapse of time from the time of pre-qualification to the time of the RFP, it was possible that the character and capacity of the bidders that were prequalified would have changed.

31. Even if the Board's decision was illegal in so far as it failed to apply the sections of the Act which apply to RFP, the setting aside of the entire process was grounded on the need to fulfil the objects of the Act, that is to ensure fair competition.

Disposition

32. In the circumstances, I am inclined to dismiss the Notice of Motion dated 20th March 2013. It is dismissed with no Order as to costs.

DELIVERED and DATED at NAIROBI this 4th day of October 2013

D.S. MAJANJA

JUDGE

Mr Gachuba instructed by Onyoni Opini and Gachuba Advocates for the ex-parte applicant.

Ms Masaka, Litigation Counsel, instructed by the State Law Office for the respondent.

Mr Wandabwa instructed by Wandabwa Advocates for the interested party.