

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 12/2009 OF 31ST MARCH, 2009 (AWARD OF COSTS)

BETWEEN

PERMA STRUCTURAL ENGINEERING CO.....APPLICANT

AND

RIFT VALLEY WATER SERVICES BOARD.....PROCURING ENTITY

Review against the decision of the Review Board in the matter of Tender No. RVWSB/WC/NN/03 for Augmentation and Improvement of the Ol-kalau Town Water Supply Project.

BOARD MEMBERS PRESENT

Mr. P.M. Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Ms. Natasha Mutai	-	Member
Amb. Charles Amira	-	Member
Mrs. Loise Ruhiu	-	Member

IN ATTENDANCE

Mr. Nathan Soita	-	Holding brief for Secretary
Ms. Shelmith Miano	-	Secretariat.

PRESENT BY INVITATION

Applicant - M/s Perma Structural Engineering Co.

Mr. C.M. Muoki - Muoki & Co. Advocates

Procuring Entity - Rift Valley Water Services Board

Mr. Victor Omwebu - Odhiambo & Odhiambo Advocates

BOARD'S DECISION

The Request for award of costs was lodged on 28th September, 2012 against the decision of the Review Board dated 29th April, 2009 in the matter of Tender No. RVWSB/WC/NN/03 for Augmentation and improvement of the Ol-kalau Town Water Supply Project.

The Applicant was represented by Mr. C.M. Muoki, Advocate while the Procuring Entity was represented by Mr. Victor Omwebu, Advocate.

Before the Board is Notice of Motion dated 28th September 2012 in which the Applicant prays for the following orders.

- 1. That this Honourable Board do review its ruling dated 29th April, 2009 and order payment of costs to the Applicant.*
- 2. That this Honourable Board do award costs to the applicant and the annexed Bill of Costs be used as a guideline in awarding such costs.*

OR

3. *That this Honourable Board do declare that the Applicant is entitled to costs and the same if not agreed by the parties be taxed by the high Court of Kenya.*
4. *That the Procuring Entity do pay the costs of this application.*

At the outset, it is necessary to set out the background to this Application which is as follows;

1. On 31st March, 2009 the Applicant filed a Request for Review challenging the award of the Tender No. RVWSB/WC/NN/03 to another bidder.
2. The Orders sought in the Request for Review were as follows;
 - (a) *The Procurement Proceedings may be suspended pending the review.*
 - (b) *The successful tender be issued to the rightful tenderer M/s Perma Structural Engineering Co.*
3. On 29th April 2009, the Board delivered the decision in this matter and made the following orders;
 - (a) Nullified the award of the tender to Penelly Construction & Engineering Ltd.
 - (b) Ordered for re-evaluation of all the bids in line with the provisions of the Act, Regulations and the tender documents.
 - (c) Directed the Procuring Entity to extend the tender validity period, if need be, as provided for under Section 61 of the Act.
4. No Judicial Review or appeal was filed and therefore this file was closed as no further action was required on the part of the Board.

The Applicant has now filed this Application and submitted as follows;

1. **THAT** it was successful in the Request for Review and that it should have been awarded costs since as a general rule costs follows the event.
2. **THAT** upon delivering of the decision by the Board it has engaged the Procuring Entity in correspondence in an attempt to settle the issue of costs.
3. **THAT** the Procuring Entity has failed to pay costs of the Request for Review and that in the interest of justice the Board should make an order for costs in its favor.
4. **THAT** the issue of winding up raised by the Procuring Entity was irrelevant. It stated that the Applicant was a firm and not a limited liability company. It further stated that the Entity which the Procuring Entity alleged was wound up is a different entity from the Applicant.

The Applicant relied on a decision of the *Environment Tribunal No. 8 of 2006 between Gitiririko Wainaina and another -vs- Kenafric Industries and Another*. It submitted that, that decision states that even where a statute fails to give a tabulation of costs, the Tribunal can nevertheless assess and award reasonable costs.

On its part, the Procuring Entity opposed the Request for Review and submitted as follows;

1. **THAT** the Application was misconceived and has no merit.
2. **THAT** upon delivering of the decision on 29th April 2009, the Board became *functus officio* and therefore has no jurisdiction to award costs as prayed.
3. That the Applicant has taken more than three years to file this Application and that the Board has no power to Review its decisions prayed by the Applicant.
4. **THAT** the Applicant never prayed for costs in the Request for Review and that since a party is bound by its pleadings this Application is belated.
5. **THAT** pursuant to the decision of the Board that was delivered on 29th April 2009 the Applicant was awarded the tender. However, in the course of execution a suit was filed thereafter by the Applicant being *Nakuru HCCC NO 178 OF 2011*. It stated that the suit has been referred to the Arbitration and is still pending.
6. **THAT** the Applicant does not exist as a legal Entity as an order for winding up has been issued in *Winding Up Cause No 13 of 2011 Milimani Commercial Courts at Nairobi*.
7. **THAT** the Application was brought in bad faith and that the Applicant had not demonstrated the reasons why the Board should vary the decision made on 29th April 2009.

The Board has carefully considered the submissions of the parties and the documents that were presented.

The questions for determination are whether the Board has jurisdiction to review its decision made on 29th April 2009 and whether it can now award costs to the Applicant.

The jurisdiction of the Board is provided by Section 93 of the Public Procurement and Disposal Act, 2005. The said section provides as follows;

Section 93 (1): *“Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.”*

Further, the procedure for approaching the Board is set out in Regulation 73 which states as follows;

73 (1) *“A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these regulations.*

73(2) *The request referred to in paragraph (1) shall –*

(a)

(b)

(c) Be made within fourteen days of –

(i) the occurrence of the breach complained of where the request is made before the making of an award; or

(ii) the notification under sections 67 or 83 of the Act;”

It is also clear that the Board has powers to award cost as provided in Section 98 which provide as follows;

Section 98: *“Upon completing a review the Review Board may do any one or more of the following:*

(a)

(b)

(c)

(d) order the payment of costs as between parties to the review.”

The other relevant provisions where the Board exercises its powers are Sections 97 and 100 which provides as follows;

Section 97 (1): *“The Review Board shall complete its review within thirty days after receiving the request for the review.*

(2): In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in the Act or the regulations.”

Section 100 (1): *“A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.*

(2): Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court and the decision of the High Court shall be final.”

The Board agrees with the Applicant that it has powers to award costs. However, in this case the Board notes as follows;

1. The Board rendered its decision in the Request for Review on 29th April 2009. This Application was filed on 28th September 2012 which is more than three years from the date of the decision. The affidavit by the Applicant is framed in very general terms. It does not even attempt to explain the long delay in filing the Application. Further, the affidavit does not address the fact that the Applicant did not pray for costs in the first instance.

In view of the foregoing, ever assuming for purposes of argument that the Board had powers to review its decision, there are no proper grounds or reasons, why such a discretion should will be exercised in favor of the Applicant.

At the hearing the Applicant produced letters dated 31st August, 15th September and 25th September, 2009 addressed to Humphrey & Company Advocates (the Procuring Entity's Advocates during the review) on the issue of costs. The said letters were done more than three years ago.

2. It is trite law that a party is bound by its pleadings. The Applicant did not pray for costs when it filed its Request for Review. The Applicant succeeded and the Board granted the prayers that the Applicant had sought. It is now too late for the Applicant to try to revive the issue of costs. The Applicant has not cited the law that confers powers of reviewing its decision on the Board. The Board

is a creature of statute and the Act does not confer powers of Review.

3. Under Section 97 of the Act, the Board is required to render its decision within 30 days upon the filing of a Request for Review. This Request for Review was filed on 31st March, 2009 and decision rendered on 29th April 2009.

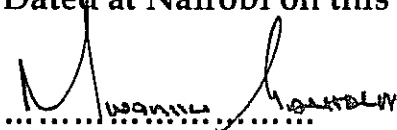
The Board notes that no Appeal or Judicial Review was filed under Section 100 of the Act.

Consequently, upon rendering of its decision the Board became functus officio. The issues that arose for determination were concluded on 29th April 2009.

Further in view of the Board's observation and findings it is not necessary for us to deal with the issue of winding up.

Therefore, this Application is misconceived both on facts and on the law. Consequently, the only order that is available in this matter is the dismissal of the Application. The Board so orders. In the premises, this Application is dismissed and each party shall bear their own costs.

Dated at Nairobi on this 6th day of November, 2012.



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**CHAIRMAN
PPARB**



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**SECRETARY
PPARB**

