

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 154/2020 OF 21ST DECEMBER 2020

BETWEEN

VAGHJIYANI LIMITED.....APPLICANT

AND

THE PRINCIPAL SECRETARY,

THE ACCOUNTING OFFICER,

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS,

STATE DEPARTMENT FOR HOUSING & URBAN

DEVELOPMENT.....1ST RESPONDENT

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS,

STATE DEPARTMENT FOR HOUSING & URBAN

DEVELOPMENT.....2ND RESPONDENT

Review against the decision of The Principal Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development & Public Works, State Department for Housing & Urban Development with respect to Tender No. MTIHUDDPW/SDHUD/SUD/010/2020-2021 for the Proposed Construction of Out Buildings for Social Housing Project at Meteorological Site.

BOARD MEMBERS

1. Ms. Faith Waigwa

-Chairperson

2. Mrs. Irene Kashindi -Member
3. Dr. Joseph Gitari -Member
4. Qs. Hussein Were -Member

IN ATTENDANCE

1. Mr. Philemon Kiprop -Holding brief for Secretary

THE REQUEST FOR REVIEW

Vaghjiyani Enterprises Limited (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 21st December 2020 together with a Statement in Support of the Request for Review sworn and filed on even date, through the firm of Wacira Wambugu & Co. Advocates LLP, seeking the following orders: -

- a. An order declaring that the Respondents are in breach of the provisions of Article 227 (1) of the Constitution of Kenya, 2010 and section 63 (2), (3) & (4) of the Act;***
- b. An order annulling and setting aside the decision of the Respondents in the letter of 10th December 2020 terminating the procurement proceedings with regard to Tender No. MTIHUDPW/SDHUD/SUD/010/2020-2021 for the Proposed Construction of Out Buildings for Social Housing Project at Meteorological Site;***

- c. An order quashing and setting aside forthwith the invitation to tender vide the re-advertisement of the subject tender and the subsequent re-tendering process;***
- d. An order directing that the procurement process be completed and the Applicant be evaluated as per the provisions of section 86 and 87 of the Act;***
- e. An order awarding the Applicant the Tender No. MTIHU DPW/SDHUD/SUD/010/2020-2021 for the Proposed Construction of Out Buildings for Social Housing Project at Meteorological Site;***
- f. An order compelling the Respondents to pay costs of the instant application for review to the Applicant;***
- g. Any such and further orders as the Honourable Board may deem fit and appropriate, in the circumstances, in ensuring that the ends of justice are fully met.***

The Procuring Entity was notified of the existence of the Request for Review vide a letter from the Board Secretary dated 21st December 2020. However, the Procuring Entity only lodged a Response on Notification of Appeal No. 154 of 2020 dated 29th December 2020 on 7th January 2021.

Notably, the Procuring Entity submitted confidential documents to the Board relevant to the subject tender in accordance with section 67 (3) (e) of the

Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act") which were delivered to the Board Secretariat on 29th December 2020.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. However, none of the parties to the Request for Review filed any written submissions.

BOARD'S DECISION

The Board has considered the Request for Review filed by the Applicant together with the Statement in Support of the Request for Review and finds that the following issue calls for determination: -

Whether the Procuring Entity terminated the subject tender in accordance with section 63 of the Act.

In addressing the above issue, the Board observes that the Applicant filed the Request for Review on 21st December 2020. Thereafter, the Procuring

Entity was notified of the existence of the Request for Review Application vide a letter dated 21st December 2020, which was served on the Procuring Entity on 22nd December 2020, together with a copy of the Request for Review and Circular No. 2/2020 dated 24th March 2020 specifying the timelines for filing a response.

The Procuring Entity submitted confidential documents to the Board relevant to the subject tender in accordance with section 67 (3) (e) of the Act which were delivered to the Board Secretariat on 29th December 2020 by a representative of the Procuring Entity, but at that time failed to file a response to the Request for Review. The Procuring Entity subsequently lodged a response on 7th January 2021, sixteen (16) days after it was served with a notice of a Request for Review which was outside the five (5) days' timeline stipulated in the Board's Circular No. 2/2020 and Regulation 205 (3) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the "Regulations 2020").

Notably, the letter conveying the Procuring Entity's response to the Request for Review is clearly dated 29th December 2020, and thus it is unclear why the Procuring Entity elected to file its response nine (9) days later on 7th January 2021.

Article 50 (1) of the Constitution states that: -

"(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." [Emphasis by the Board]

The right to a fair hearing is a fundamental human right recognized in our Constitution, which guarantees every person the opportunity to be heard before a court or any other decision-making body.

The Court of Appeal expounded on the right to a fair hearing in **Civil Application Nai. 224 of 2006 Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR** as follows: -

"Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal declaration of Human rights (UDHR), and Article 6 of the International Convention on Civil and Political Rights (ICCPR) among other International conventions, which this country has ratified. Article 25 (c) of the Constitution 2010 elevates it to an inderogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which

the rule of Law and public faith in the justice system would inevitably collapse. A fair trial has many facets, and includes the right to have one's case heard by an independent, impartial and unbiased arbiter or judge."

Further, the High Court in its interpretation of Article 50 of the Constitution opined as follows in **Civil Case No. 21 of 2017 Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR: -**

"While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time.

From these specific precepts born out of criminal procedure protections account for guarantees to due process and right to a fair hearing in Civil administration of justice. The doctrine of fairness of the procedure ultimately shall as the case may

be the precise architect implied under Order 3, 7 and 11 of the Civil Procedure rules.

Deriving support from the leading principles of criminal justice on disclosure in the case of Dennis Edmond Apaa and 2 Others v Ethics and Anti-Corruption Commission and another Petition No. 317 of 2012 the court observed as follows:

"The Cholmondeley case does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of Republic v Word cited by the Court of Appeal is clear on the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2) (j) that guarantees the right to be informed in advance cannot be read restrictively to mean in advance of the trial, the duty imposed on the court is to ensure a fair trial for the accused or a party in a civil proceeding and the right of disclosure is protected by the accused or adverse party in a civil case being influenced of the evidence having reasonable access to it. Their right is to be read together with other rights that constitute the right to a fair trial."

From the above discourse the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 50 of the Constitution would not

correspond with the purposeful interpretation of the aforesaid Article on the concepts of the right to a fair hearing which it was designed to protect. The aim of the right is to ensure the fair administration of justice and adherence for one to be given an opportunity to be heard by an independent tribunal without any obstacles laid on the way. As a minimum guarantee the right to a fair trial includes fair trial rights in civil cases.

According to the High Court, the right to a fair hearing as espoused under Article 50 of the Constitution applies in civil proceedings and *inter alia* ensures a person is granted the opportunity to be heard by a court or decision making body and the right to adduce and challenge evidence.

Due to the late filing by the Procuring Entity in which the Procuring Entity breached Regulation 205 (3) of the Regulations 2020, it is the Board's considered view that the Applicant was denied the opportunity to prepare a rejoinder to the Procuring Entity's response, if it chose to do so, in violation of its right to a fair hearing as espoused under Article 50 (1) of the Constitution.

As explained by the Court of Appeal in **Evans Thiga Gaturu & another v Naiposha Company Ltd & 13 others [2017] eKLR: -**

"...It cannot be overemphasized that Article 50 of the Constitution guarantees every party to a dispute that can be

resolved by the application of law a fair and public hearing by a court or other independent and impartial tribunal or body. Implicit in the fair hearing guaranteed by the Constitution is the right of a party to know in advance the allegations against him and a reasonable opportunity for rebuttal.

In addition, the Board is required to hear and determine a request for review application within twenty-one (21) days of filing pursuant to section 171 of the Act. Due to this statutory timeline, the Board strictly relies on documentation filed before it within the timelines specified in Circular No. 2/2020 in order to render its decision within twenty-one days.

In the case of **Petition 5, 3 & 4 of 2013 Raila Odinga & 5 Others v Independent Electoral Boundaries Commission and 3 Others [2013] eKLR** the Supreme Court stated as follows on the correct legal position where the court has to consider whether to admit or reject evidence and/or pleadings filed outside the stipulated statutory timelines:

"The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the

court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence.”

In the Supreme Court’s view, parties have a duty to ensure they comply with their respective time lines which duty must also be adhered to by the court or decision making body in question. It therefore follows that there must be a fair and level playing field so that neither the party nor the court or decision making body loses the time entitled to, and further no extra burden should be imposed on any party or on the court or decision making body in question as a result of omissions or characteristics which were foreseeable or could have been avoided.

In the instant case, the Applicant lodged the Request for Review on 21st December 2020. In this regard therefore, the Board is required to render a decision in the said review application on or before 11th January 2021. Since

the Procuring Entity filed its response to the Request for Review on 7th January 2021, this leaves only one official working day prior to the expiry of the twenty-one (21) days within which the Board has to render a decision in the said Request for Review, noting that 9th and 10th January 2021 are non-working days, that is, Saturday and Sunday respectively. The Board is therefore constrained for time to serve the Applicant with the Procuring Entity's response and further consider the Procuring Entity's response before delivering a decision in this Request for Review, posing an extra burden on not only the Applicant but the Board as well.

Accordingly, the Board finds that the Procuring Entity's Response on Notification of Appeal No. 154 of 2020 dated 29th December 2020 and filed on 7th January 2021 is filed out of time and is hereby struck out from the record of these proceedings.

In view of the above finding, it therefore follows that the Applicant's Request for Review Application remains undefended and the issues therein uncontroverted. This notwithstanding, the Board still has a duty to determine the Request for Review Application and establish whether or not the Applicant has proven its case in this respect.

The Applicant avers in paragraph 6 of its Statement in Support of the Request for Review that it submitted its bid to the Procuring Entity in response to the subject tender on 13th October 2020. Subsequently

thereafter, the Applicant received from the Procuring Entity a letter of notification dated 10th December 2020 terminating the subject procurement proceedings.

The Applicant depones in paragraph 10 thereof that the said letter of notification merely stated that the subject tender was non-responsive thus terminated in accordance with section 63 (1) (f) of the Act and that the Procuring Entity intended to re-advertise the subject tender. The Applicant argues that the Procuring Entity failed to disclose its reasons for terming the subject tender as non-responsive contrary to section 63 of the Act. Moreover, it is the Applicant's contention that the Procuring Entity is in breach of section 63 of the Act for failure to comply with the statutory pre-conditions prescribed therein during the termination of a tender and its actions therefore ran contrary to the public procurement principles as espoused under Article 227 (1) of the Constitution.

Further, it is the Applicant's contention that the Procuring Entity's re-advertisement of the subject tender without adherence to due procedure denied the Applicant and any other aggrieved party the opportunity to challenge the Procuring Entity's decision to terminate the subject tender.

In view of the Applicant's averments, the Board examined the letter of notification of termination of the subject tender dated 10th December 2020

annexed to the Applicant's Request for Review marked Exhibit 'RVV3' which read as follows: -

"I refer to the above mentioned tender which you submitted on 13th October 2020. Kindly note that the tender was non-responsive as per the Public Procurement and Asset Disposal Act, 2015, and was therefore terminated in accordance with section 63 (1) (f). The process will be re-advertised soon..."

According to the above letter, the Procuring Entity terminated the subject tender in accordance with section 63 (1) (f) on the basis that the subject tender was non-responsive.

The Board observes that even though an accounting officer may exercise its discretion under section 63 (1) of the Act to terminate a procurement process, such discretion must be exercised in accordance with the substantive and procedural requirements for termination of procurement proceedings.

In **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR** (hereinafter referred to as 'the Leeds Equipment case'), the High Court held as follows: -

"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015". [Emphasis by the Board]

Accordingly, a procuring entity invoking section 63 of the Act must put forward sufficient evidence to justify and support the ground of termination of the procurement process relied on.

The requirement of real and tangible evidence supporting the ground of termination of the procurement process relied on supports the provision of Article 47 of the Constitution of Kenya, 2010 which states that: -

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

With the foregoing precedent in mind, the Board notes that, for one, section 63 (1) of the Act provides that a procuring entity may terminate procurement or asset disposal proceedings at any time, prior to notification of tender award. Further, a procuring entity may only terminate procurement proceedings where any of the reasons cited in section 63 (1) of the Act applies, as cited hereinbefore.

In addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") within fourteen days.

It is also worth noting that, section 63 (4) of the Act requires the accounting officer of a procuring entity to notify all tenderers of the termination within fourteen days of termination with reasons for the said termination.

In the Board's considered view, the mere reliance by the Procuring Entity on section 63 (1) (f) of the Act in terminating the tender without informing the Applicant why its own bid was non-responsive was insufficient and not in line with the substantive and procedural requirements for termination of a tender as stipulated under section 63 of the Act. The Procuring Entity ought to have

notified the Applicant and other bidders of the specific reasons why their respective bids were found to be unresponsive.

As mentioned hereinbefore, section 63 (4) of the Act bestows an obligation on the Procuring Entity to notify all tenderers of termination within 14 days of the said termination specifying the reason for the same. Upon receipt of notification of termination, bidders have fourteen (14) days to seek administrative review challenging a decision on termination, if they wish to do so, pursuant to section 167 (1) of the Act which states as follows: -

"Subject to the provisions of this Part, a candidate or a tenderer, 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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

It is therefore the Board's finding that there is no real and tangible evidence to support termination of the subject tender on the ground of 'all evaluated tenders are non-responsive' that meets the threshold under section 63 of the Act.

In the absence of any proof to the contrary, the Board finds that the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act which not only provides a procedure for termination, but grounds which require real and tangible evidence to support a termination process, rendering the said termination null and void.

In determining the appropriate orders to issue in this review application, the Board observes the Applicant's averment in paragraph 13 of its Statement in Support of the Request for Review of the Procuring Entity's re-advertisement of the subject tender. In light of this averment, the Board examined the excerpt annexed to the Applicant's Request for Review marked as Exhibit 'RVV4' which the Board observes is undated with the heading 'Section I: Invitation to Bid Re-advertisement' and from its contents therein, it appears that the Procuring Entity is inviting bids from eligible tenderers for the following tenders: -

No	Tender Number	Tender Description	NC A	Bid Security (Kshs)	Category (Local Contractors)
1	MTIHU DPW/SDHUD/SUD/009/2020-2021	Proposed Civil & Other Associated Works for Social Housing Project at Meteorological Site (Lot 1)	NC A 1	10,000,000	Open
2	MTIHU DPW/SDHUD/SUD/010/2020-2021	Proposed Construction of Out	NC A 2	10,000,000	Open

		Buildings for Social Housing Project at Meteorological Site			
3	MTIHU DPW/SDHUD/SUD/004/2020-2021	Proposed construction of Gikomba Quarry Road Market Block D in Nairobi county	NC A 1	10,000,000	Open

Further, the Board takes Judicial Notice that the tender re-advertisement as annexed to the Applicant's Request for Review Application was cancelled vide a notice in the local dailies dated 22nd December 2020.

It is therefore evident that the Procuring Entity re-advertised the subject tender and subsequently cancelled the re-advertisement vide a notice in the local dailies dated 22nd December 2020.

In view of this finding, the Board notes, any action undertaken by a procuring entity consequent to an improper and/or unlawful termination process renders such an action null and void. It therefore follows that the Procuring Entity's re-advertisement process with respect to the subject procurement proceedings is null and void.

However, in view of the subsequent cancellation of the tender re-advertisement notice on 22nd December 2020, the Board would like to point

out that once a request for review application is filed, all procurement proceedings are suspended forthwith.

This was explained by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** as follows: -

"section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point, at least for any deadlines defined by reference to a period of time, which in this case included the tender validity period. It would also be paradoxical and

absurd to find that procurement proceedings cannot proceed, but that time continues to run for the same proceedings.”

This means that upon filing of a request for review application, an automatic stay of proceedings takes effect which suspends all procurement proceedings and prevents any further steps from being taken in the tender in question. Further, procurement proceedings shall resume at the point they were, when the stay comes to an end, once the request for review has been heard and determined by the Board.

In this regard therefore, the Board finds that the Procuring Entity's Notice of Cancellation of its 'Tender Notice – Re-advertisement' dated 22nd December 2020 was undertaken after filing of the Request for Review on 21st December 2020, which filing stayed any further steps being taken with respect to the subject procurement process as from 21st December 2020, rendering the said notice of cancellation null and void.

In totality, the Request for Review succeeds in terms of the following specific orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders in the Consolidated Request for Review: -

- 1. The Accounting Officer of the Procuring Entity's Re-advertisement of Tender No. MTIHU DPW/SDHUD/SUD/010/2020-2021 for the Proposed Construction of Out Buildings for Social Housing Project at Meteorological Site, be and is hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Termination of Tender No. MTIHU DPW/SDHUD/SUD/010/2020-2021 for the Proposed Construction of Out Buildings for Social Housing Project at Meteorological Site in Nairobi City County dated 10th December 2020 issued to all bidders, including the Applicant herein, be and are hereby cancelled and set aside.**

- 3. The Accounting Officer of the Procuring Entity is hereby directed to ensure the procurement proceedings in Tender No. MTIHU DPW/SDHUD/SUD/010/2020-2021 for the Proposed Construction of Out Buildings for Social Housing Project at Meteorological Site proceed to its logical conclusion, including issuance of notification letters to tenderers within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**

4. Given that the procurement process is not complete, each party shall bear its own costs in the Request for Review.

Dated at Nairobi this 11th day of January 2021

CHAIRPERSON

SECRETARY

PPARB

PPARB