

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 40 OF 2016 DATED 30TH JUNE 2016

BETWEEN

TRANSCEND MEDIA GROUP LIMITED.....APPLICANT

AND

THE KENYA POWER AND LIGHTING

COMPANY LIMITED.....PROCURING ENTITY

BOARD MEMBERS PRESENT

- | | |
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| 1. Paul Gicheru | - Chairman |
| 2. Rosemary Gituma | - Member |
| 3. Peter Ondieki, MBS | - Member |
| 4. Nelson Orgut | - Member |
| 5. Hussein Were | - Member |

IN ATTENDANCE

- | | |
|--------------------|-------------------------------|
| 1. Philemon Kiprop | - Holding brief for Secretary |
| 2. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION- TRANSCEND MEDIA GROUP LIMITED

Applicant –

Mwaniki Gachuba - Advocate

Procuring Entity – THE KENYA POWER AND LIGHTING COMPANY LIMITED

- 1. Linda Aluvale - Advocate
- 2. Ralia Mohamed - Intern

Interested Party – SCANAD KENYA LIMITED

- 1. Donald B.Kipkorir - Advocate
- 2. Reuben Mwangi - Advocate

BACKGROUND OF THE BOARD'S DECISION

The Applicant filed this Request for Review on 13th June, 2016 challenging the decision of the procuring entity to award Tender No. KP1/9AA-2/OT/46/CS/15-16 for the provision of advertising and media services to the interested party herein M/s Scanad Kenya Ltd. The Applicant sought for the following orders:-

- 1. The tender award to Scanad Kenya Limited be annulled.
- 2. The procuring entity be directed to award the tender to the Applicant.
- 3. In the alternative to (2) above, the procuring entity be compelled to re-tender for the services under the supervision of the Public Procurement Regulatory Authority in order to promote fairness and competition.
- 4. Costs of the Applicant plus interest thereof be borne by the procuring entity.

Upon hearing the Request for Review for the first time, the Board allowed the same and made the following orders in a decision given on 4th July, 2016.

- a) **The Request for Review dated 10th June, 2016 and which was filed by the Applicant with the Board on 13th June, 2016 in respect of tender No. KPI/9AA-2/OT/46-CS/15-16 be and is hereby allowed.**
- b) **The award of the said tender to M/s Scanad Kenya Limited be and is hereby annulled.**
- c) **The Board hereby directs that the decision of the procuring entity awarding the said tender to M/s Scanad Kenya Limited be substituted with a decision awarding the said tender to the Applicant M/s Transcend Media Group Limited.**
- d) **In view of the nature of the orders made above, the Board orders that each party shall bear its own costs of this Request for Review.**

The procuring entity was however dissatisfied with the decision of the Board given on 4th July, 2016 and lodged an application for judicial review before the High Court being application No. Nai HC JR Appl. No. 302 of 2016: Republic =vs= The Public Procurement Administrative Review Board Exparte Kenya Power and Lighting Company Ltd and Others wherein it inter-alia sought to have the decision of the Board quashed.

The Judicial Review application proceeded for full hearing and in a judgment given by the High Court on 29th May, 2017, the court set aside award of the tender to the Applicant and directed as follows:-

“101: In the premises I hereby set aside the Respondent’s decision awarding the tender for the Provision of media and advertising services under Tender NO. KP1/9AA-2/OT/46-CS/15-16 to the 1st interested party herein Transcend Media Group and remit the matter back to the Respondent to give appropriate directions to the Applicant on how to proceed with the tender”.

This decision therefore relates to that part of the court’s judgment that remitted the dispute back to the Board to give appropriate directions to the procuring entity on how to proceed with the procurement process herein.

THE PARTIES PROPOSALS ON THE NATURE OF THE DIRECTIONS TO BE GIVEN

During the hearing of the remitted issue of directions, the Applicant was represented by Mr. Mwaniki Gachuba from the firm of M/s Onyoni, Opini & Gachuba Advocates while the procuring entity was represented by M/s Linda Aluvale Advocate. Mr. Donald Kipkorir Advocate appeared on behalf of the interested party herein M/s Scanad Kenya Ltd.

Before giving any directions in the matter, the Board gave the Advocates for all the parties an opportunity to put forward their respective proposals/arguments on the nature of the directions to be given and the

following were the positions taken by the parties on the nature of the directions to be given.

Mr. Mwaniki Gachuba advocate for the Applicant stated that the High Court had considered all the issues that had been determine by the Board and had upheld the Board's decision on all the findings save for that part of the Board's decision where the Board made a direct award of the tender to the Applicant.

Counsel for the Applicant argued that the Board had wide powers under the provisions of Section 173 of the Act including the power to substitute the decision of the accounting officer for a decision of it's own.

Mr. Gachuba therefore urged the Board to exercise it's powers under the provisions of Section 173 of the Act and substitute the decision of the accounting officer and award the tender to the Applicant. He further argued that there was nothing in the court's judgment which precluded the Board from making an order of substitution inview of what he referred as the wide powers conferred on the accounting officer of the procuring entity under the provisions of Section 44 of the Act.

Turning to the submissions made by both Counsel for the procuring entity and Counsel for the interested party, Mr. Gachuba stated that the issues raised by the two parties and more particularly the issue of the tender validity period having lapsed and the tender having been for the 2015-2016 financial year were *Res-judicata* since they had been dealt with by the

Board in its decision given on 4th July, 2016 and by the High Court in Judicial Review application number 302 of 2016.

Counsel for the Applicant therefore submitted that the Board was precluded by the said doctrine from dealing with any new issue at this stage.

He therefore urged the Board to make a direct award of the said tender in favour of the Applicant.

M/s Linda Aluvale Advocate for the procuring entity while conceding that the High Court had remitted back the matter to the Board for directions stated that where a matter is remitted back to the primary decision maker for reconsideration, the decision maker was under an obligation to make a fresh decision after taking into account all factors including any new material that was not before the decision maker on the date it made the original decision which was flawed.

M/s Aluvale therefore urged the Board to find that the time lapse between the date when the dispute between the parties was first lodged before the Board and subsequently before the High Court had taken the tender outside the tender validity period and that the said tender had died a natural death. She additionally stated that the tender in issue was for the 2015-2016 financial year and was not therefore for the current financial year.

In addition to the above submissions, Counsel for the procuring entity argued that the Board lacked the jurisdiction to hear and determine the Request for Review under the provisions of the Act since a period of 21 days had lapsed between the date of filing of the Request for Review, namely on 30th June, 2016 and the date of the hearing of the Request for Review pursuant to the High Court's order given on 29th May, 2017.

She alternatively argued that even if the period of 21 days was to start running from the date when the judgment was delivered on 29th May, 2017, the period of 21 days lapsed on 19th June, 2017 and that the Board had no power to hear and determine the Request for Review after 19th June, 2017.

Turning to the Applicant's Counsel's proposal that the Board makes a direct award in favour of the Applicant, Counsel for the procuring entity submitted that the court had specifically held that a direct award could not be made in favour of the Applicant in the circumstances of this case and that the Board would be acting in contempt of court if it made a direct award of the tender to the Applicant since this would be in conflict with the judgment given by the High Court on 29th May, 2017.

On the applicability of the doctrine of *Res-judicata*, Counsel for the procuring entity stated that the doctrine was not applicable in this case since the matter before the Board was not afresh suit and it was not raising the issues which had been raised and determined by the Board in its decision given on 4th July, 2016.

She therefore urged the Board to dismiss the Applicant's Request for Review on the grounds set out above.

Mr. Donald Kipkorir advocate for the interested party Scanad Kenya Ltd associated himself with the submissions made by Counsel for the procuring entity and stated that in its judgment delivered on 29th May, 2017, the High Court had quashed the Board's decision in its entirety and that the only direction that the Board could give in the circumstances of this case was in his words to tell the procuring entity that it ought to comply with the law in future when tendering.

Mr. Kipkorir additionally strongly objected to the proposition by Counsel for the Applicant that the Board makes a direct award of the tender in favour of the Applicant and stated that such an action would amount to contempt of court since the High Court had specifically held that the Board could not make a direct award of the tender to the Applicant.

Counsel for the interested party additionally urged the Board to apply the principle of interpretation that provides that while interpreting the law, one of the cardinal principles of interpretation was that it must not be in conflict with the Constitution and more particularly Article 260 of the Constitution which is to the effect that a financial year in Government runs from June to June of the next financial year. He further stated that the tender before the Board was for the financial year 2015/2016 which was past and the tender had therefore been overtaken by events.

He therefore urged the Board to dismiss the Applicant's Request for Review with costs.

THE BOARD'S DECISION

The Board has considered the written and the oral submissions made before it by the parties herein and the judgment of the court in the case of **the Republic =vs= The Public Procurement Administrative Review Board & 2 Others Exparte Kenya Power and Lighting Company Ltd (Nai HC Misc. JR NO. 302 of 2016)** and finds that this matter was remitted back to the Board for the sole purpose of giving appropriate directions to the procuring entity on how the procurement process herein should proceed.

Several issues however arose during the course of the hearing of the submissions on the issue of the directions. One of such issues and which takes precedence since it relates to the issue of jurisdiction was the objection by Counsel for the procuring entity that the Board lacks the jurisdiction to hear and determine the remitted issue of directions because a period of 21 days had lapsed from the date when the Request for Review was filed and the date when the Request for Review was heard afresh. She alternatively argued that a period of 21 days had lapsed between the date when the High Court delivered its decision and the date when the matter was heard afresh.

The Board has considered the above objection and is of the respectful view that the procuring entity's objection cannot stand for the reason that the period of 21 days within which a Request for Review must be heard and be

determined only applies where the Request for Review is being heard for the first time by the Board but not in the case where the Request for Review has been remitted back to the Board by the court for further consideration as was the case in the matter before the Board.

The Board has perused all the provisions of the Public Procurement and Asset Disposal Act and the Regulations made thereunder and finds that neither the Act nor the Regulations impose any limitation on the period within which a Request for Review which has been remitted back to the Board ought to be heard and in the absence of such a limitation, the Board finds that there would be no basis for limiting the said period to a period of 21 days.

The Board further notes that in his judgment delivered on 29th May, 2017, the Honorable judge did not direct the Board to give directions or to hear the remitted matter within a particular period of time. The Board would therefore have no basis for imposing any period of time for the hearing and determination of the remitted issue of directions save to state that the issue ought to be heard and be determined within a reasonable period of time from the date of the court's judgment.

Turning to the nature of the directions to be given, it is clear from the submissions made by the parties that whereas the Applicant urged the Board to substitute the decision of the accounting officer of the procuring entity and make a direct award in favour of the Applicant, both Counsel

for the procuring entity and Counsel for the interested party sought to have the Request for Review dismissed on various grounds.

On the issue of making a direct award to the Applicant, the Board has read the court's judgment in Judicial Review Appl. No. 302 of 2016 and more particularly the finding no. 98 at page 24/26 of the court's judgment where the court specifically held as follows:-

"98: It is therefore my view that the Review Board was properly entitled to review the whole procurement process, annul the same and give directions on how to proceed; it however had no powers to substitute the decision of the Applicant with that of its own with respect to whom to award the tender. I, however, am unable to interfere with the factual findings of the Review Board."

The implication of the above holding is therefore that the Board cannot substitute the decision of the procuring entity with its own decision to make a direct award of the tender to the Applicant herein and holding otherwise would run contrary to the High Court's judgment which is binding on the Board.

The prayer by Counsel for the Applicant that the Board makes a direct award in favour of the Applicant is therefore not tenable in view of the court's decision.

On the nature of the directions to be given, the Board notes that the court declined to interfere with the findings of fact arrived at by the Board but set

aside the Board's decision awarding the tender to the Applicant and remitted back the matter to the Board for directions.

It is therefore apparent on the face of the earlier decision of the Board and the judgment of the court that neither the Applicant nor the interested party has a subsisting award made in it's favour either by the Board or the procuring entity. This therefore implies that the procurement process herein has not been concluded either through the making of an award or through the signing of a contract between the procuring entity and any of the parties to this review.

The Board therefore finds that the appropriate order of directions to make in the circumstances is to refer back the procurement process to the procuring entity's tender evaluation committee to enable it complete the evaluation process after taking into account all the relevant factors.

Some of the relevant factors which the procuring entity's tender evaluation committee should take into account are:

- i) Whether the subject tender is still within the tender validity period.**
- ii) Whether the procurement process herein was for a particular financial year and whether it is still alive or has been overtaken by events.**

Arising from all the foregoing, the Board therefore orders and directs as follows:-

FINAL ORDERS

In the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act and pursuant to the Judgment and the order given by the High Court in J. R. Misc. Appl. 302/2016: Republic =vs= The Public Procurement and Administrative Review Board & 2 Others Exparte Kenya Power and Lighting Company Limited the Board orders and directs as follows:-

1. The procurement process herein is remitted back to the procuring entity's tender evaluation committee to complete the procurement process herein including the making of an award but subject to the following conditions.
 - a) Before making any award in respect of the procurement process herein, the procuring entity's tender evaluation committee shall first determine the following two issues:-
 - i) Whether the subject tender is still within the tender validity period.
 - ii) Whether the procurement process herein was for a particular financial year and whether it is still alive or has been overtaken by events.
 - b) The procuring entity's tender evaluation committee shall determine the two issues set out in 1(a) above within a period of seven (7) days from today's date and should it determine that the tender is

still valid and current, the procuring entity shall complete the entire evaluation process including the making of an award within fourteen (14) days from today's date.

2. The Board makes no orders as to costs as relates to the issue remitted back to the Board by the High Court for consideration.

Dated at Nairobi on this 4th day of July, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB