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1. Bura Enterprises (Applicant) Vs. Bura Secondary School (P.E)

Decision No 1 of 2014

Summary

Appeal against the decision of the P.E in the tender for the supply of foodstuffs and other items and supply of meat/ goat.

Practice Areas

- **Evaluation criteria:** Whether the P.E evaluated the tenders using an evaluation criteria that was not provided in the RFP.
- **Notification of award:** Whether the P.E failed to notify the Applicant of the outcome of the tender according to the provisions of Section 67 (2).

Issues

- i. The Applicant claimed that the P.E breached the provisions of Section 89 (4) by failing to evaluate the tenders using the criteria set out in the T.D
-This ground succeeded. The Board read and interpreted the provisions of the aforementioned statute which states that the successful proposal will be that with the lowest price and which conforms to the requirements under the RFP. The Board held that the RFP did not provide any other requirements hence the P.E ought to have carried out evaluation based on the price. Seeing as the P.E failed to do so, it acted in breach.
- ii. A claim by the Applicant that the P.E breached the provisions of Section 67 (2) as amended by Regulation 19 (2) of Legal Notice No. 106 of 2013 by failing to carry out simultaneous notification to the S.B and the other bidders.
-This ground failed. The Board held that the Applicant had not suffered any prejudice from the notification as it had managed to file its Request for Review on time.

Held

The Board allowed the Request for Review. It further made orders that the P.E make an award to the Applicant as it had submitted the lowest priced proposal. No orders were made as to costs.

2. Masti Health & Beauty Limited (Applicant) vs. Kenya Airports Authority (P.E)

Decision No 2 of 2014.

Summary

An Appeal against the decision of the P.E in the Tender for the development and management of an airport spa and beauty salon at JKIA International Airport.

Practice Areas

- **Appeal window:** Whether the Request for Review had been filed out of time; Whether the P.E rightly notified the Applicant of the results of the Tender
- **Contract signing:** Whether the signing of a procurement contract between the S.B and the P.E ousted the jurisdiction of the Board.
- **Evaluation of tenders:** Whether the P.E evaluated the tenders in accordance to the provisions of the Act -Whether the extension of the tender evaluation period was done in accordance with the law.
- **Statement of loss:** Whether the P.E and the Applicant had incurred loss in the procurement thus viable to be awarded costs of the application.

Issues

Preliminary Issues

- i. Breach of Regulation 73 (2) (c) by the Applicant in filing its Request for Review outside the fourteen day appeal window.
-This ground failed. The Board in looking into this issue considered the notification of award made to the Applicant. It begun by noting that the issue of filing within the appeal window is not an issue of technicality but a jurisdictional one. Having clarified this, it stated that the burden of proof for notification rests with the P.E and therefore seeing as the P.E had failed to prove that it had carried out notification in accordance to Section 67 of the Act, this ground failed.
- ii. An objection raised by the S.B that the Board lacked jurisdiction to hear the RFR as a contract had already been entered into between itself and the P.E.
This ground failed. The Board in looking at the documents submitted noted that the contract was not entered after the lapse of fourteen days permitted by Section 68 of the Act.

Substantive Issues

- i. Breach of Section 66 of the Act. The Applicant claimed that the evaluation criteria applied by the P.E was not the one contained in the T.D. The Applicant also claimed that the P.E had breached Regulation 46 by failing to evaluate the tenders within fifteen days of the date of tender opening.
-This ground failed. The Board held that the P.E had evaluated the tenders using an evaluation criteria as set out in the T.D. On the issue of failing to evaluate the tenders within fifteen days, the Board noted that the P.E invoked the provisions of Regulation 14 (2) in extending the tender evaluation period thus the evaluation was done soundly.
- ii. The Applicant and the P.E both raised issues as to the costs of the application both claiming that they deserved to be awarded the same.
-This ground failed. The Board held that the procurement process was a competitive one and thus no party could claim to have incurred losses.

Held

The Board in view of all the above, dismissed the Request for Review with no order as to costs.

3. Hewlett-Packard Europe BV, Haier Electrical Appliances Corporation (Applicant) Vs. Ministry of Education, Science and Technology (P.E) Decision Nos 3 and 4 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the supply, delivery installation and commissioning of ICT integration in education devices and solutions for primary schools in Kenya: Lot 1 supply of laptops for learners and teachers.

Practice Areas

- **Jurisdiction of the Board:** Whether the two Requests for Review meet the threshold as under Section 93 of the Act.
- **Capacity:** Whether the P.E acted in breach by awarding the Tender to the S.B despite it lacking the financial, technical and production capacity to carry out the tender.
- **Joint ventures:** Whether the S.B had met the requirement under the T.D for tendering as a joint venture.
- **Bid price:** Whether the P.E acted in breach by awarding the Tender to the S.B on a price other than the one contained in the form of tender.
- **Evaluation criteria:** Whether the P.E applied an evaluation criteria other than that contained in the T.D in awarding the Tender to the S.B.
- **Notification of award:** Whether the notification of award as done by the P.E was done under the provisions of the Act and Regulations.
- **Submission of evaluation reports:** Whether the P.E acted in breach by failing to submit evaluation reports to the Applicants upon being requested to do so.
- **Public interest:** What orders should be given by the Board considering the public interest issues associated with the subject tender.

Issues

- i. An allegation raised by the P.E that the Board did not have jurisdiction to hear the matter as the Applicant had not managed to show that the P.E had breached any provisions of the Act contrary to Section 93.
-This ground failed. The Board, in looking at the grounds for the Request for Review held that the Applicant had made allegations to specific provisions of the Act and Regulations.
- ii. The Applicant alleged that the S.B had not been responsive at the preliminary evaluation stage.

- This ground succeeded. The Board held that the S.B had indeed not been responsive on grounds of providing an annual turnover that was below the threshold specified in the T.D and failing to show experience of five years in providing similar services. The Board also noted that the P.E had neither sworn any affidavits to deny the allegations brought by the Applicant nor adduced any evidence to the contrary. The Board thus held that the P.E had acted in breach by allowing the S.B to proceed beyond the preliminary evaluation stage despite it not meeting mandatory requirements for the same stage.
- iii. An allegation raised by the Applicant that the S.B had not met the requirement under the Tender that tenderers had to bid as joint ventures.
- This ground succeeded. The Board held that the S.B had not adduced any evidence to indeed show that it had tendered as a joint venture and thus had not met the criteria.
- iv. The Applicant alleged that the P.E had also acted in breach by awarding the Tender to the S.B at a price other than that contained in its form of Tender.
- This ground succeeded. The Board held that an addition of price had indeed occurred. The Board held that this addition of price to the S.B's bid was contrary to the provisions of the T.D as well as Sections 59, 62, 63 and 66 of the Act.
- v. Breach of Sections 34, 35 and 39 of the Act by the P.E in employing an evaluation criteria that was not envisioned under the T.D in awarding the Tender to the S.B. The issue in contention here was whether the S.B was an O.E.M (Original Equipment Manufacturer) as envisioned in the T.D.
- This ground succeeded. The Board in determination of this issue had to determine the definition of an O.E.M as provided for in the T.D. In finding this definition the Board was of the view that the S.B had not met the criteria under the T.D as had not been an O.E.M
- vi. Alleged breach of Section 67 (2) of the Act, Regulation 66 and 19 of the Regulations and the provisions of the T.D by the P.E in the form of notification made to the Applicant.
- This ground failed. The Board held that the P.E had indeed faulted in its notification of the outcome of the Tender. It however noted that this had not prejudiced the Applicant in any way as it was still able to lodge its Request for Review on time.
- vii. The 1st Applicant claimed that since it had been the lowest bidder during the financial evaluation stage, it ought to have been given first opportunity to negotiate with the P.E at the best and final offer stage.
- This ground failed. The Board held that the bidders all consented to subjection to the best and final offer stage. The P.E was thus within its rights to carry out the same and the Board saw no breach by it.
- viii. Alleged breach of Article 22 and Sections 44 and 45 of the Act. The Applicants claimed that the P.E had denied them information on the evaluation reports thus denying them the opportunity to best prepare for their case.
- This ground failed. The Board held that the provisions of Section 44 of the Act do not allow the P.E to disclose the evaluation reports of any of the bidders unless a contract has been entered into. Request of the same by the Applicants was thus premature.

- ix. The P.E raised the question as to what orders the Board would make taking into consideration the public interest issues associated with the Tender in question. The P.E urged the board to rely on a previous precedent where it had waived quashing the tender due to the public interest questions involved.¹
- The Board too in relying on precedent,² held that questions of public interest varied on a case to case basis and thus the Board having already held that the S.B was non responsive, applied its discretion to the effect public interest would best be served by upholding the law and allowing the procurement process to proceed.

Held

The Board allowed the Requests for Review as filed by the two applicants. It made further orders that the award of Tender made to the S.B be annulled. It also ordered that the P.E conduct the procurement process and carry out due diligence in accordance to the criteria set out in the T.D. Orders were also made that the P.E reduce the costs added to the S.B's bid and that the P.E add the tender validity period to that effect. No orders were made as to costs.

¹ Mea Limited Vs. The National Cereals and Produce Board (2012) PPARB 4.

² Hermanus Phillipus Steryn vs. Govann Gneach- Ruscome (2012) Supreme Court of Kenya Application 4.

4. Apex Communication Limited (Applicant) Vs. Ministry of Health (P.E) **Decision No 5 of 2014**

Summary

An appeal against the decision of the P.E in the Tender for the supply of communication consultancy services for the Health Sector Services Fund (HSSF).

Practice Areas

- **Filing out of time:** Whether the Request for Review had been filed out of time.

Issues

Preliminary Issues

- i. Breach of Regulation 73 as amended by Legal Notice 106 by the Applicant in filing the RFR outside the seven day appeal window.
-This ground succeeded. The Board in applying precedent,³ held that where the RFR had been filed out of time, the Board did not have jurisdiction to entertain the matter.

Held

The Request for Review was dismissed for being filed out of time. No orders were made as to costs.

5. Transcend Media Group Limited (Applicant) vs. Kenya Airports Authority (P.E) **Decision No 6 of 2015**

Summary

Appeal against the decision of the P.E in the Tender for the provision of Advertising Agency and Public Relations services.

Practice Areas

- **Mandatory requirements:** Whether the requirements of membership to a professional body and to have five years of good standing in professional organizations are discriminatory in nature.

³ Voith Hydro GmbH & Co vs. Kenya Electricity Generating Co. Ltd. (2009) PPARB 55; Auto Express Limited vs. Kenya Ports Authority (2013) PPARB 37; Airport Research Centre vs. Kenya Airports Authority (2008) PPARB 3

Issues

- i. A claim by the Applicant that the P.E acted in breach in requiring bidders to be members of professional organizations and another requiring tenderers to have five years of good standing in a professional organization were discriminatory in nature.
-This ground failed. The Board quoted the provisions of Section 36 and 52 of the Act on participation in procurement and composition of the tender documents respectively. It found that the requirement of bidders to be members of professional organizations was not discriminatory. The Board stressed this position by quoting precedent where it had held that requirement of bidders to be part of a professional organization was in order to reap benefits available to the tenderers through these organizations.⁴ The Board on the other hand found that the requirement of having five years of good standing in said professional organizations was discriminatory in nature and intended to lock out bidders who may not have reached the five years threshold.

Held

The Board dismissed the Request for Review. It also held that the P.E should waive the requirement of five years of good standing in a professional organization and proceed to evaluate the Tenders accordingly. No orders were made as to costs.

6. BCX Kenya Ltd and Lantech (Africa Ltd) (Applicants) Vs. Nairobi City Council (P.E)

Decision No 7 and 10 of 2014

Summary

An Appeal against the decision of the P.E in the Tender for the supply, installation, configuration and implementation of Data Centre and structured cabling infrastructure.

Practice Areas

- **Filing out of time:** Whether the Applicant filed its Request for Review within the seven day appeal window; Whether the P.E acted in breach by failing to notify the Applicant that its bid had been unsuccessful.
- **Request for Proposal:** Whether the P.E awarded the tender in accordance to the criteria prescribed for RFPs.

⁴ Samo Security Vs. Masinde Muliro University of Science and Technology (2013) PPARB 40

Issues

Preliminary issues

- i. An objection raised by the P.E that the Applicant had filed its Request for Review outside the seven day appeal window.
-This objection failed. The Board held that the Applicant had filed its Request for Review within the appeal window. The Board also noted the submissions of the Applicant that it had not received any notification from the P.E. To this, the Board held that the Applicant had not suffered any prejudice from the notification as it had still managed to file its Request for Review within the appeal window.

Substantive Issues

- i. Breach of Section 82 (5) of the Act and the Tender Documents by the P.E. The Applicant averred that the P.E had acted in breach by awarding the Tender in accordance to a criteria not prescribed for Request for Proposals.
-This ground succeeded. The Board noted that the Tender Evaluation Committee had initially recommended the award of the Tender to the Applicant as it had been the bidder with the highest combined technical and financial proposals in accordance with the T.D. The Tender Committee on the other hand failed to heed this recommendation and instead substituted the award with an award to the Interested Party which had been the lowest evaluated tenderer in accordance to Section 66 of the Act. The Board in faulting this decision by the Tender Committee, applied the provisions of Regulation 11 noting that the same precluded the Tender Committee from rejecting the recommendations of the evaluation committee and if so a good reason had to be availed to the Accounting Officer. Seeing as the Tender Committee had not adhered to this provisions, the Board faulted the award made to the S.B. In addition to this, the Board relied on precedent to the effect that a tender undertaken as an RFP is exclusively governed under Sections 76-87 of the Act and not Section 66.⁵ Moreover the Board cited a previous case where it was held that the parameters of evaluation must be set out in the T.D and once set out cannot be waived. The Board additionally added in the case in question that the tender committee could not modify the submissions of the tender evaluation committee.⁶

Held

The Board allowed the RFR and went on to award the Tender to the Applicant after finding that it had been the bidder with the highest combined technical and financial proposals. It further ordered that the P.E enter into negotiations with the Applicant within fifteen days and to make way for the orders by extending the tender validity period accordingly.

⁵ Landor Associates Vs. Kenya Power and Lighting Company (2009) PPPARB 42, Runji & Partners Consulting Engineers Limited Vs. Kenya Rural Roads Authority (2010) PPARB 35

⁶ Richardson Company Ltd Vs. The Registrar of the High Court of Kenya (2008) PPARB 43

7. Sheribiz Supplies Ltd (Applicant) Vs. Kenya Airports Authority (P.E)

Decision No 8 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the development and management of an airport spa and beauty salon at JKIA. This tender had been subject to review prior to this in application No. 2 of 2014 where the Board made orders that the RFR was dismissed and that the P.E was at liberty to proceed with the procurement process.

Practice Areas

- **Compliance with orders of the Board:** Whether the P.E acted in breach by not complying with the orders of the Board.
- **Termination of tenders:** Whether the Board acted in breach by terminating the tender despite the entering into a contract with the S.B
- **Statement of loss:** Whether the Board could award costs to the Applicant under the RFR.

Issues

- i. The Applicant claimed that the P.E acted in breach of the Act by purporting to carry out a due diligence after the award of contract had already been made. The Applicant also claimed that the P.E defied the orders of the Board in the previous RFR to continue with the procurement process with the Applicant but instead terminated the contract.
-This ground succeeded. The Board held that the P.E had acted outside the orders passed by it. It further held that the P.E had acted in breach of Article 227 of the COK 2010 and Section 2 of the Act by terminating the Tender after awarding the contract to the Applicant. In quoting precedent, the Board held that Section 36 of the Act did not mandate a P.E to terminate a tender after an award had already been made.
- ii. A claim by the Applicant that it should be awarded costs of the suit. The Applicant based its assertion on Section 98 of the Act which allows for the Board to award costs.
-This ground succeeded. The Board relied on precedent to the effect that costs normally follow the event.⁷ Seeing as the Applicant had already made payment to the P.E in relation to the contract and the delay by the P.E in executing the contract, the Board conceded that the Applicant should be awarded costs in this matter.

Held

The Board made orders that the letter of annulment of the contract awarded to the Applicant is null and void. It further ordered that the P.E formalize the contract with the Applicant and pay a sum of Kshs. 140,000 to the Applicant within 14 days.

⁷ Joreth Ltd Vs. Kigano & Associates (1999) Civil Appeal No 66 (Unreported)

8. Mwagho Company Ltd (Applicant) Vs. Coast Institute of Technology (P.E)

Decision No 9 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the proposed sewerage, drainage and rehabilitation works.

Practice Areas

- **Jurisdiction of the Board:** Whether the Board had jurisdiction to entertain the matter despite the existence of a contract between the S.B and the P.E
- **Preliminary Evaluation:** Whether the P.E acted in breach by failing to carry out a preliminary evaluation of the Tenders and failing to disqualify bidders on failing to meet mandatory requirements under the T.D
- **Loss and damages:** Whether the Applicant stood to incur heavy losses if not awarded the tender- Whether the P.E and the general public stand to incur losses for the P.E's actions.
- **Award Criteria:** Whether the Tender Committee of the P.E acted in breach by rejecting the recommendations made by the Evaluation Committee of the P.E.

Issues

Preliminary Issues

- i. An objection raised by the P.E that the Board lacked jurisdiction to hear the RFR seeing as a contract had already been entered into between itself and the S.B thus ousting its jurisdiction as under Section 93 (2) (c) of the Act.
-This ground failed. The Board held that the contract entered into between the P.E and the S.B was null and void as it had not been entered into after the lapse of fourteen days as in Section 68 of the Act.

Substantive Issues

- i. The Applicant claimed that the P.E breached the provisions of the Tender Documents, Section 64 (1) and Regulation 48 (1) by failing to carry out a preliminary evaluation of the Tenders.
-This ground succeeded. The Board quoted a previously decided case,⁸ in noting that the preliminary evaluation stage is just as important as the technical and financial evaluation stages and that it could not be surpassed. In quoting Section 66 (2) of the Act on evaluation criteria, the Board thus held that the P.E had erred in not disqualifying bidders who failed to meet the mandatory requirements under the T.D. The Board however also noted that the P.E had carried out two preliminary evaluations. The P.E however stated that it had failed to disqualify the bidders who had failed to meet the requirements as the same had amounted to minor deviations as anticipated by Section 64 (2) and Regulation 48 (2). The

⁸ Hatari Security Guards Ltd. Vs. Kenya National Examination Council (KNEC) (2012) PPARB 53

Board in scrutinizing the requirements held that the same were not minor deviations but were key to the performance of the contract.

- ii. The Applicant claimed that it would suffer severe loss and damage if it were not awarded the Tender.

-This ground failed. The P.E as it has always done, held that the Applicant took a commercial risk in participating in the Tender and there was thus no guarantee that it would be successful.

- iii. The Applicant further alleged that the general public and the P.E would stand to suffer severe loss and damage as a result of the P.E's actions.

-This ground failed. The Board held that the Applicant had failed to demonstrate that it was the only contractor available that would provide the requisite skill to adequately complete the works.

Obiter Dictum

The Board noted that the Tender Committee changed the recommendation of the Evaluation Committee on award of the Tender in breach of Regulation 11. In quoting the provisions of the said Regulations, the Board faulted the Tender Committee for failing to report the rejection of the recommendation of the Evaluation Committee to the head of the P.E or the Accounting Officer as under Regulation 11 (2) (c). Further to this it found that the Tender Committee erred in modifying the recommendation of the Evaluation Committee. It thus held that the award made to the S.B was not in accordance with Regulation 11.

The P.E justified the above action by quoting the provisions of Regulation 52 (1) which allow for the P.E may check the qualifications of the lowest evaluated bidder, having provided for the same in the T.D. The Board held that this provision could not apply as the same had not been provided for in the T.D. Moreover the Tender Committee had carried out the confirmation of qualifications on all tenderers and not only the lowest evaluated bidder as premised in Regulation 52.

Held

The Board annulled the award of the Tender to the S.B, the contract signed between the S.B and the P.E and substituted the decision of the P.E with that of its own awarding the Tender to the Applicant. It further held that the P.E make necessary arrangements to extend the validity of the Tender and the Applicant's bid bond. No orders as to costs

9. Leadstar Company Ltd (Applicant) Vs. Kenya Medical Supplies Authority (P.E)

Decision No 11 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the provision supply of Non Pharmaceuticals (Surgical tubes, Blades and Cannulaes & Safety Boxes).

Practice Areas

- **Samples:** Whether the P.E acted in breach by evaluating the samples submitted using an evaluation criterion not in the T.D
- **Evaluation period:** Whether the P.E exceeded the period afforded for evaluation of tenders.

Issues

- i. Alleged breach of Sections 2 (b), (c), (d), and (e), 66 (2) of the Act and Regulation 16 (5) (a) as read together with Article 227 of the COK by the P.E in evaluating the Applicant's tender document contrary to the provisions of the ITT and the T.D in general. The Applicant alleged that the P.E had not specified how samples were to be labelled and that the T.D did not explain how the manufacturers' details were to be affixed.
-This ground failed. The Board held that the details on the T.D concerning the samples were specific and that the Applicant had failed to comply with the requirements under the T.D in submitting samples that had some literature imprinted on the package while the manufacturer details were affixed using a removable sticker contrary to the specifications under the T.D. The Board quoted precedent,⁹ in holding that the labeling parameters were part of the evaluation criteria. The Applicant had thus failed to comply with the mandatory tender requirements.
- ii. Breach of Section 2 (a) of the Act and Regulations 16 (5) as amended by Regulation 5 (4) (b) and 14 (b) of the Regulations 2013 by failing to evaluate the tender within 15 days of the opening date.
-The Board quoted the provisions of Regulation 5 (4) which allows the Accounting Officer or the head of the P.E to extend the period for tender evaluation for a further period of 30 days from the date of expiry where the tender is complex or has attracted a high number of bidders. In assessing the Tender in question, the Board held that it was both complex and had attracted a high number of bidders (70). Seeing as the extension was done within the tender validity period, the Board held that the Accounting Officer was right in extending the Tender Evaluation period. It further referred to precedent to affirm this position,¹⁰ and stated that the Applicant had suffered no prejudice and cannot seek to be treated differently from the other tenderers.
- iii. The Applicant claimed that the P.E breached the provisions of Article 27 (1), 46 (I), 47(i) and 227 (1) of COK.

⁹ R vs. PPARB & 2 others Ex Parte Hyosung Ebara Company Limited (2011) eKLR, R vs. PPARB & Another Ex parte Selex Sistemi Intergrate (2008) eKLR

¹⁰ Hatari Security Guards Limited vs. Kenya College of Communications Technology (2008) PPARB 30

-This ground failed. The Board examined the arguments of the Applicant on the two above grounds and concluded that it had failed to show any breach of the Act or Regulations. It could therefore not claim a breach of its constitutional rights.

Held

The Board dismissed the Request for Review and held that the P.E be at liberty to proceed with the procurement process. No orders were made as to costs.

10. Mnagoni Trading Company Ltd (Applicant) vs. Ministry Of Defense (P.E) **Decision No 12 of 2014**

Summary

Appeal against the decision of the P.E in the Tender for the supply of fresh meat (beef) on- bone and white/ brown bread to Mombasa based units.

Practice Areas

- **Bid price:** Whether the price quoted by the S.B was unreasonable as it did not conform to the market price.
- **Evaluation reports:** Whether the P.E acted in breach by delaying to furnish the Applicant with a summary of the evaluation reports.
- **Delay of the procurement process:** Whether the P.E purported to delay the procurement process by delaying in preparing and filing its response to the Request for Review.

Issues

- i. The Applicant claimed that the price quoted by the S.B was way below the market prices. The Applicant thus claimed that the award was unreasonable and in breach of Article 47 of the COK and Section 66 (4) of the Act in awarding the tender to the lowest bidder and not the lowest evaluated bidder.
-This ground failed. The Board held that the P.E had correctly awarded the Tender to the lowest evaluated bidder. It stated that the P.E could not opt for a higher price when the Applicant has clearly shown how it intends to meet the deficit amount thus its low quoted price. The Board further stated that a bidder that quotes a lower price than which he is able to meet will have to meet its obligations and if not will have to face the legal consequences. On the comments that the P.E ought to award the Tender to the Applicant seeing as it was from Mombasa, the Board held that the Citizens of Kenya or any other person unless otherwise barred or there be any rule on preference that prevents him/ it from participating in any tender is entitles to participate in any tender process within the Republic of Kenya. It thus averred that tenders should be evaluated purely on its merits but not on any irrelevant ground such as tribal affiliation or regional affiliation.

- ii. The Applicant claimed that the P.E failed to furnish it with copies of evaluation reports upon demand. This in breach of Section 45 (3) (4) of the Act
-This ground failed. The Board held that the Applicant had not been prejudiced by the delay by the P.E to furnish it with the evaluation reports. It held that the opportunity to be heard had been afforded to the Applicant to argue its case fully and that the Board had given it the liberty to pursue the request for documents in conformity with the provisions of the Act, if it so desired.
- iii. The Applicant stated that a deliberate attempt to delay the procurement process would not have any beneficial interest to the Applicant. It stated that in the contrary it was the P.E that wished to delay the process by failing to provide reasons for the rejection of the Applicant's bid. It further faulted the P.E in delaying its response to the RFR and termed such as unwarranted delays.
-This ground failed. The Board however noted that the Applicant had been studious in its preparations and noted that the P.E had indeed delayed in submission of its documents, not meeting the deadlines under the Regulations. It reprimanded the P.E and stated that in future it would not hesitate to strike out or apply sanctions on any P.E that breaches the law. It noted that it, inter alia has powers to among other sanctions, award costs or direct investigation by arms of the PPOA or any other agency.

Held

The Board upheld the award of the Tenders made to the S.Bs and affirmed that the prices quoted would be the applicable prices. It further ordered that the Secretariat through the Director General of the PPOA shall circulate a copy of this decision and the necessary Regulations on time for filing responses to all P.E via email for the purposes of information and compliance in future. Regarding costs, though the P.E had succeeded in the Review, the Board declined to award to it costs for the reasons set out in the last ground for Review.

11. Liberty Eagle Kenya Ltd (Applicant) vs. Kenya Airports Authority (P.E)

Decision No 13 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the development and management of a catering outlet, pizza and subs at Jomo Kenyatta International Airport (JKIA), Nairobi.

Practice Areas

- **Jurisdiction of the Board:** Whether the Board has jurisdiction to hear the Request for Review.
- **Notification of award:** Whether the P.E acted in breach by delaying the release of the notification letter to the Applicant.

- **Objectives of the P.E:** Whether the P.E acted in breach by going against its own objectives under the T.D.
- **Evaluation criteria:** Whether the evaluation committee of the P.E acted in breach by evaluating the tenders in a manner which was did not promote fairness and competition among the bidders.
- **Seeking clarifications:** Whether the P.E in failing to seek clarifications to the Applicant's Tender acted in breach of the Act.

Issues

Preliminary Issues

- i. The Board first considered the issue of jurisdiction, which although not directly raised by the P.E, was mentioned in the Applicant's submissions. The Board observed the date of award of the Tender, the date on the notification letter and the date of email of the notification letter and noted that the P.E had not met the requirements of Regulation as regards notification of award as per Regulation 73 (2) of the Regulations.
-This issue failed. The Board however noted that the Applicant had not suffered any prejudice as a result of the same as the Applicant was still able to file its Request for Review within the stipulated seven day window.

Substantive Issues

- i. Alleged breach of Regulation 66 (2) by the P.E in delaying the release of the letter of notification to the Applicant.
-This ground succeeded. The Board held that the P.E had drafted and dated the letters of notification. It however delayed in releasing the same and emailed it to the Applicant on a far later date contrary to the provisions of Regulation 66 (2) of the Regulations.
- ii. The Applicant alleged that the P.E had breached the provisions of Section 34 (1) of the Act in its award, by going against its own objectives of engaging a firm that was internationally reputable.
-This ground failed. The Board held that the firm could have international repute without necessarily having international presence. Therefore in awarding the Tender to the S.B the P.E did not go against its own objectives as alleged by the Applicant.
- iii. An allegation by the Applicant that the P.E breached the provisions of Section 2 (b) of the Act. The Applicant claimed that the P.E failed to conduct evaluation in accordance to the Evaluation Criteria thereby failed to promote and ensure fairness among competitors.
-This ground succeeded. The Board in looking at the requirements to which the Applicant's bid was disqualified at the preliminary evaluation stage held that the Evaluation Committee of the P.E had taken a narrow approach to the requirements under the T.D. It further held that the Evaluation Committee had failed to seek clarifications as permitted under Section 62 of the Act but instead opted to disqualify the Applicant's bid at the preliminary stage.

Held

The Board annulled the decision of the P.E to award the Tender to the S.B. It then ordered that the P.E re-evaluate the tenders afresh taking into account the issue of bank statements under which the Applicant had been disqualified and complete the entire process within 15 days. Further to this, the P.E was to extend the validity period to allow for the award to be made within the tender validity period. No orders were made as to costs.

12. Gillys Security & Investigation Services (Applicant) Vs. Maseno University (P.E)

Decision No 14 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the provision of Security guarding Services.

Practice Areas

- **Evaluation of Tenders:** Whether the P.E applied an evaluation criteria which was impartial to the bidders.
- **Composition of the Evaluation Committee:** Whether the P.E incorporated members of the Tender Committee into the Evaluation Committee.
- **Tender evaluation period:** Whether the P.E had evaluated the Tenders outside the stipulated period of 15 days.
- **Notification of award:** Whether the P.E acted in breach in failing to notify the Applicant of the result of the Tender simultaneously with the S.B.

Issues

- i. Breach of Section 65 and 66 of the Act and Regulation 16, 47, 48 and 66 (2) by the P.E. The Applicant claimed that the P.E had failed to carry out the evaluation of tenders in an impartial manner. The Applicant alleged that the P.E carried out technical site visits on all the other bidders except itself, which was not visited at its head office in Nairobi.
-This ground failed. The Board in deciding on this issue stated that the evaluation of bidders is normally carried out in accordance with, inter alia, Section 66 (2) of the Act, Regulations 48 and 49 of the Regulations and the stipulation under the T.D. It then went on to state that the T.D provided for site visits at the nearest site and the head office of the Applicant was not the nearest site available. Further to this it reasoned that this being a tender for the provision of security services, upon alarm, the Applicant could not send dogs and personnel to the P.E from Nairobi as this was irrational. It then held that the evaluation criteria applied by the P.E was not extraneous and was in full conformity with the criteria set out in the T.D

- ii. Alleged breach of Regulation 16 by the P.E. The Applicant claimed that the P.E had allowed for incorporation of members of the Tender Committee into the Tender Evaluation Committee contrary to the aforementioned Regulation.
-This ground failed. The Board acquiesced that Regulation 16 (4) indeed prohibits a member of the tender committee from being appointed into or taking part in the tender evaluation process. It however found that the Applicant had not established that the P.E had appointed a member of the Tender Committee to take part in the evaluation process.
- iii. Breach of Regulation 46 of the Regulations as amended, by the P.E. The Applicant alleged that the P.E had failed to carry out the evaluation of the Tender within the period of 15 days as set out in the Regulations.
-This ground failed. The Board however, in reviewing the provisions of Regulation 14 and 14(2) on the extension of the tender evaluation period held that the P.E had not only evaluated the tenders way past the evaluation period but had not met the threshold set out under subsection 2 on the extension of tender evaluation period. It held that a looming industrial strike was not one of the reasons to extend this period under law. Nevertheless, the Board in quoting precedent,¹¹ stated that the Applicant had to show that it had suffered prejudice as a result of this breach by the P.E.
- iv. Breach of Section 67 of the Act. The Applicant claimed that the P.E had failed to notify it of the results of the Tender simultaneously with the notification given to the S.B.
-This ground failed. The Board found that the letters of notification to the S.B and the other bidders were all dated the same date. However no evidence was produced of how this letters were dispatched. The Board found that in spite of this evidence of service of the notification, the Applicant was not prejudiced and was still able to file its RFR on time and raised substantive grounds for review which it ably argued on merit.

Held

The Board dismissed the Request for Review and ordered that the P.E was at liberty to proceed with the procurement process. No orders were made as to costs.

13. Guardforce Group Ltd (Applicant) vs. Chemilil Sugar Company Ltd (P.E)

Decision No 15 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the provision of Security Services.

Practice Areas

- **Mandatory requirements:** Whether the P.E acted in breach in disqualifying the Applicant's tender for failing to fulfil a mandatory requirement under the T.D.
- **Evaluation criteria:** Whether the P.E failed to carry out tender evaluation in accordance to the evaluation criteria set out in the T.D.

¹¹ Hatari Security Guards Limited vs. Kenya College of Communications (2008) PPARB 30.

- **Notification of award:** Whether the P.E failed to notify the unsuccessful bidders of the result of the tender within the stipulated time –Whether the P.E failed to indicate reasons as to why the bidders’ tenders were unsuccessful in the notification letters.
- **Tender evaluation period:** Whether the P.E failed to carry out the evaluation of the tenders within the stipulated period.

Issues

- i. A claim by the Applicant that the P.E breached the provisions of Section 66 (2) in disqualifying its bid on account of fulfilment of the mandatory requirement of membership of a security providers association.
-This ground succeeded. The Board found that the Applicant was indeed a member of the security providers association.
- ii. The Applicant also claimed that the P.E breached the provisions of Section 66 (2) of the Act in failing to carry out the tender evaluation in accordance with the evaluation criteria set out in the T.D.
-This ground succeeded. The Board having already found that the P.E erred in disqualifying the Applicant on account of professional membership, also found that the P.E had awarded the Tender to two bidders. This was contrary to the provisions of Section 34 (1) (2) of the Act as the same had not been provided for in the T.D.
- iii. Breach of Section 67 (2) of the Act by the P.E in failing to notify the award of tender to unsuccessful bidders within the stipulated time.
-This ground succeeded. The Board found that the P.E did not notify the losing bidders immediately it notified the successful bidders of award of Tender. The P.E also did not inform the unsuccessful bidders of the reasons why their bid was unsuccessful in contravention to Section 67 (2) and Regulation 66 (2) as amended.
- iv. The Applicant also raised a claim that the P.E failed to carry out the evaluation within the set timelines contrary to Regulation 46.
-This ground failed. The Board referred to the provisions of Regulation 18 (2) as amended to ascertain the period within which a tender award has to be made (30 days from tender opening) and Regulation 5 (4) (b) as amended which provide for the tender evaluation period of 15 days after tender opening. It then found that the P.E had evaluated the tenders well outside the tender evaluation period. Moreover, the evaluation committee had not sought approval of the Accounting Officer in extending the evaluation period contrary to Regulation 14 (2). Nevertheless, the Board held as it always does that seeing as the evaluation was done within the tender validity period, this ground is not sufficient enough to warrant nullification of a tender in the absence of proof of prejudice as this would amount to waste of tax payers’ money in restarting a process which is almost at an end and would not amount to promoting the objectives of the Constitution and the Act.

Held

The Board annulled the award made to the two S.Bs. It further ordered that taking into account the issue of the membership to a professional association, the P.E to reevaluate the tenders in respect of all the bidders including the Applicant and complete the entire process within 15 days to date of the decision and award the tender to only one lowest evaluated bidder. The P.E was also to take steps to extend the tender validity period. No orders were made as to costs.

14. Suzan General Trading JLT (Applicant) vs. Kenya Airports Authority (P.E) **Decision No 16 of 2014**

Summary

Appeal against the decision of the P.E in the Tender for the Development and Management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport (JKIA), Nairobi.

Practice Areas

- **Financial evaluation:** Whether the P.E acted in breach by not carrying out the financial evaluation of the bids in accordance to the T.D.
- **Technical evaluation:** Whether the P.E acted in breach in the manner in which it awarded marks to the different bidders in the technical evaluation stage.
- **Evaluation criteria:** Whether the P.E failed to carry out tender evaluation in accordance with the evaluation criteria set out in the T.D.
- **Misrepresentation of facts:** Whether the S.Bs misrepresented facts in their bids to result in their consequent award of the Tender.

Issues

- i. A claim by the Applicant that the P.E violated Sections 2 and 66 of the Act through erroneous assessment of its concession fee.
-This ground succeeded. The Board in deciding on this matter found that the P.E's evaluation criteria also erred on evaluating the cash flow statements which were also mandatory requirement under the T.D submitted by the bidders for the next 5 years. The Board faulted the P.E in awarding similar marks for all bidders despite submitting different cash flows. It stated that the cash flows affected the concessions and thus faulted the criteria applied by the P.E. The Board also noted that the conversion rate that had been applied by the P.E when calculating the concession fee was erroneous and effectively set the concession fee of the Applicant to be lower than that of the S.B.
- ii. Breach of Section 2, 31 and 66 of the Act as well as the ITT by use of wrong conversion rate of USD of the Applicant's bid.
-This ground succeeded. The Board in looking at the ITT found that the concession fees in the event of a foreign currency, would be converted in accordance with a conversion rate of the CBK. This criteria was not applied by the P.E and thus the concession fee of the Applicant came below that of the S.B which was ideally not the case.

- iii. Violation of Sections 31, 66 and 86 of the Act by the P.E in failing to properly and objectively give sufficient weighting to the Applicant's bid.
-This ground succeeded. The Board found that the P.E had awarded equal marks to all bidders who had proceeded to the technical evaluation stage based solely on the submission of certain required information. It held that this did not promote competition among the bidders. The Board also quoted the provisions of Section 86 of the Act which requires in international tenders that the technical requirements be based on international standards. Seeing as the same was not done and the similar weighing of the parties for evaluation purposes rendered the evaluation in breach of section 2 and 66 (3) of the Act.
- iv. Alleged breach of Section 66 (2) of the Act by the P.E in failing to carry out tender evaluation in accordance with the evaluation criteria set out in the T.D. The Applicant claimed that the S.B submitted a profit and loss statement instead of a cash flow statement contrary to the T.D.
-This ground failed. The Board noted that the S.B had submitted a cash flow statement but the same had been in a different format. It then quoted Section 64 (2) of the Act in stating that this amounted to a minor deviation.
- v. The Applicant alleged that the S.B was guilty of misrepresentation of facts to pass off as an internationally reputed firm in breach of the ITT.
-This ground failed. The Board did not find any evidence of misrepresentation of facts by the S.B.

Obiter Dictum

The Board noted that the evaluation process undertaken by the P.E in evaluating the tenders was not objective. It faulted the same as being absurd as all bidders could not score the same marks in all technical and financial evaluation areas while having demonstrably varying capabilities. It further stated that where the score sheet states that a score is based on a maximum scoring method, the P.E should always ensure that the criteria enables the P.E to award graduating marks based on a comparison of the information provided.

Held

The Board annulled the award of the Tender to the S.B. The Board further ordered the P.E to re-evaluate the tenders of the three most responsive bidders for both technical and financial evaluation in accordance with the criteria set out in the T.D. The P.E directed that the entire process be completed within 7 days. No orders were made as to costs.

Notes

The Board on the issue of the concession rate dismissed arguments of the P.E that the cash flow had nothing to do with the concession rate stating that just like price alone cannot be a

determining factor in a tender evaluation process, the percentage of concession rate on its own cannot be the determining factor to evaluate the worthiness of a tender proposal in the financial evaluation.

15. Deloitte and Touche (Applicant) vs. Salaries and Remuneration Commission (P.E)

Decision No 17 of 2014

Summary

Appeal against the decision of the P.E in the Tender for Consultancy for undertaking a comprehensive job evaluation for jobs in the public service.

Practice Areas

- **Candidature:** Whether the Applicant had been a candidate in the Tender and thus competent before the Board.
- **Competence of the Request for Review:** Whether the Applicant had claimed a breach of the Act or Regulations and thus whether the RFR as filed was competent before the Board.
- **Financial evaluation:** Whether the P.E had undercut the financial bid of the S.B making it lower than that of the Applicant.
- **Costs:** Which party ought to be awarded costs to the Request for Review?

Issues

Preliminary Issues

- i. An objection as to whether the Applicant was a candidate in the Request for Proposal as defined under Section 3 of the Act.
-This ground failed. The Board stated that the Act defined a candidate as a person who submitted a tender to a P.E.
- ii. Whether the Applicant had met the threshold set out in Section 93 of the Act to entitle it to any reliefs that the Board can grant under the provisions of Section 98 of the Act.
-This objection succeeded. The Board quoted the provisions of Regulation 73 stating that the accompaniment of the RFR with statements is couched in mandatory terms. It stated that these form the pleadings of an application for review. The Board then perused the RFR and the accompanying statements thereof and found that the statements make general allegations without stating which provisions of the Act and Regulations were breached by the P.E. It found that the Applicant had only mentioned a breach in its submissions but held that it is the pleadings and not the submissions which form the foundation of any dispute and that submissions can only be based on pleaded issues and not vice versa. The Applicant had thus not met the threshold under Section 93 of the Act. The Board however in fear of being wrong decided to proceed with the other issues.

Substantive Issues

- i. An allegation by the Applicant that there was financial under-cutting on the bid by the S.B and the financial bid was formulated to deny it the award of the Tender since it had the highest technical scores resulting into an unfair competitive practice. The Applicant further alleged that the technical proposal of the S.B was questionable and required to be interrogated in order to determine the accuracy of the results of the technical evaluation against the RFP document.
-This ground failed. The Board in considering the provisions of Section 82 of the Act governing the evaluation of RFPs held that the Applicant had not shown any evidence of how the P.E had acted in breach. The Board further in quoting precedent,¹² in stating that the lowest evaluated bidder is the bid that is most advantageous to the P.E when all factors including the price are considered. As such the price alone is not the only factor to be considered when awarding a tender and thus the Board in finding that the Applicant in the case in question had lower standards of professional service than the S.B aside from a price differential of 148 million shillings, disqualified this ground.
- ii. This was an issue on the costs to be awarded as a result of the review. The Board invited all three parties to submit on the issue of costs having already decided on the substantive issues to the review.
-The Board after considering all the parties conceded that any party that files a RFR before the Board must do so on the basis of sound grounds. The Board was however sensitive to the fact that procurement is a matter of great public importance and that the Board in making any determination on costs should not be seen to discourage parties having genuine complaints from approaching the Board due to prohibitive orders on costs. It thus decided the issue objectively holding that the P.E and the S.B had been successful on both grounds and thus awarded Kshs. 100,000 to each of them.

Held

The Board dismissed the RFR filed by the Applicant. It ordered that the P.E be at liberty to proceed with the procurement process and enter into a contract with the S.B within 14 days.

Notes

The Board quoted two notable precedents on the issue of jurisdiction.¹³ In the case of Samuel Kamau Macharia & another vs. KCB & 2 Other [2012] eKLR where the Supreme Court stated;

'we agree with counsel for the 1st and the 2nd Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of

¹² H. Young (EA) Ltd vs. East African Portland Cement Ltd (2009) PPARB 23

¹³ Samuel Kamau Macharia & another vs. KCB & 2 Other [2012] eKLR; Interim Independent Electoral Commission [2011] eKLR

mere procedural technicality, it goes to the very heart of the matter for without jurisdiction, the Court cannot entertain any proceedings'

In the matter of the Interim Independent Electoral Commission [2011] eKLR the Supreme Court declared;

'Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution by statute law and by principles laid out in judicial precedent'

16. Insta Pumps Engineering Ltd (Applicant) vs. Michuki Technical Training Institute (P.E)

Decision No 18 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the construction of a sewer line, septic tank and soak pit.

Practice Areas

- **Mandatory requirements:** Whether the P.E had failed to disqualify the S.B's bid despite failing to provide a copy of its T.D contrary to the requirements of the Tender.
- **Corruption:** Whether the P.E had colluded with the S.B.
- **Correction of errors:** Whether the P.E had acted in breach in the manner in which it corrected the S.B's Tender.
- **Mandatory requirements:** Whether the P.E had erred in disqualifying the Applicant's bid for failing to provide a bid bond and tender security for the period specified in the T.D
- **Costs:** Who should be awarded the costs of the Request for Review?

Issues

- i. The Applicant claimed that the S.B had failed to supply a copy of its Tender contrary to the T.D and Section 64 of the Act. The Applicant thus stated that the P.E acted in breach by failing to disqualify its bid.
-The Board noted that the ITT posed a requirement on the bidders to submit the original tender document alongside a copy of the same. It however also noted that the advertisement of the Tender contained no such requirement. Seeing as the Applicant had not provided an addendum from the P.E correcting this it held that the S.B could not be faulted for an error on the part of the P.E. Moreover the Applicant had failed to show how the S.Bs original tender affected the evaluation of the Applicant's bid.
- ii. An allegation by the Applicant that there was a collusion between the S.B and the P.E.
-This ground failed. The Board held that the Applicant had failed to prove the same. It reiterated that collusion and corruption are serious offences and any allegation of such practices must not only be set out in the RFR with particularity but that it must be strictly

proved. It stated that it was not enough for an applicant to allege collusion without any factual basis.

- iii. The Applicant alleged that the P.E had erred in the manner in which it had upwardly corrected the S.B's bid.
 - The Board noted that indeed the S.B's bid had been corrected. It also noted that the same correction had been warranted as there were indeed arithmetic errors in its bid. It however faulted the process in which the same had been done, quoting the provisions of Section 63 (1) of the Act. The Board stated that this provision was couched in mandatory terms, stating that the P.E had acted in breach by failing to give notice of the correction promptly. The Board also noted that in any event, the S.B's bid was still the lowest even after the correction.
- iv. The Applicant also claimed that the P.E had acted in breach in disqualifying its bid for being non-responsive.
 - This ground failed. The Board found that the P.E had rightly disqualified the Applicants bid for failure to provide bank statements and a bid bond that covered the specified period under the T.D.
- v. The Applicant requested the Board to award to it costs of this Request for Review. This was followed by the P.E's response which stated that the Applicant's case lacked merit and that it should be awarded costs of the application.
 - This ground failed. The Board noted that the claim by the P.E amounted to a claim for special damages which was not pleaded and particularized. It further held that the Applicant had proven some elements of breach on the part of the P.E. It was therefore hesitant to award costs claimed as doing so might discourage parties with meritorious claims from requesting for review and in this case would not award costs as claimed by the other party.

Held

In light of the issue of notification of correction of errors, the Board ordered the P.E to immediately comply with the provisions of Section 63 on correction of errors. It however allowed the P.E to proceed with the procurement process. In light of these it held that in absence of compliance with these conditions, the notification of award to the S.B would automatically stand set aside and nullified and the P.E would have to re-tender. Each party was ordered to bear its own costs.

17. Kalpataru Power Transmission Ltd vs. (Applicant) Vs. Kenya Pipeline Company (P.E)

Decision No 19 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the procurement, construction, testing and commissioning of line 1 Pipeline Replacement Project.

Practice Areas

- **Bid Bond:** Whether the P.E had wrongly disqualified the Applicant's bid for failure to comply with the requirements of the T.D on the provision of a bid bond.
- **Mandatory requirements:** Whether the P.E had breached the provisions of Article 227 of the COK in disqualifying the Applicant's bid for failing to meet mandatory requirements under the T.D.

Issues

- i. The Applicant alleged that the P.E had wrongly disqualified its bid for failure to comply with the T.D as regards the bid bond and stated that the same amounted to a minor deviation.
-This ground failed. The Board held that the period of validity of the bid bond submitted by the Applicant was not congruent to the requirements under the T.D. It noted that the same was a mandatory requirement of the Tender and further quoted precedent in affirming the same.¹⁴ It further quoted the provisions of Regulation 57 stating that the procedure for preliminary evaluation of open tenders set out in Regulation 47 also applied to evaluation of RFPs under Section 82 of the Act. The Board also held in view of the clear and unambiguous requirement of Regulations 57 and 41 of the Regulations and Section 53 and 60 of the Act, where any period for in a tender is extended the bid bond must be similarly extended. It thus relied on precedent to hold that where the validity period for the bid bond lapses the tender dies once the validity period lapses and no award can flow from a "dead" tender.¹⁵ It thus held that the Applicant should have taken the necessary measures, as all the other bidders had done, to extend its bid bond seeing as the tender submission date had been moved.
- ii. The Applicant also claimed that the P.E breached the provisions of Article 227 of the COK by disqualifying it for failing to meet the requirements of Certificate of incorporation and certificate of registration as a contractor in the country of operation for foreign firms.
-This ground failed. The Board held as it had in the previous ground that the same requirements were mandatory requirements. It quoted the provisions of Sections 31 and Section 39 to invalidate this ground for review. The Board also found that the Applicant had not provided tax compliance certificates contrary to the requirements under the T.D. It stated that a mandatory requirement contained in the T.D cannot be waived and held that the Applicant had been properly disqualified at the Preliminary Evaluation stage for not complying with the mandatory requirements of the T.D.

¹⁴ Mwangemi General Contractors vs. Mokowe Secondary (2010) PPARB 28; Avery (East Africa) Ltd vs. Kenya Power and Lighting Company Ltd (2008) PPARB 14.

¹⁵ Arpland Architects vs. Ministry of Housing (2010) PPARB 4.

Held

The Board thus dismissed the Request for Review filed by the Applicant. It thus discharged the order of stay issued and held that the P.E was at liberty to proceed with the procurement process.

18. Transend Media Group Ltd (Applicant) vs. Kenya Airports Authority (P.E) **Decision No 20 of 2014**

Summary

An Appeal against the decision of the P.E in the Tender for provision of advertising agency and public relations services.

Practice Areas

- **Filing out of time:** Whether the Applicant had filed its Request for Review outside the seven day appeal window.

Preliminary Issues

- i. The P.E raised a P.O stating that the Applicant's Request for Review had been filed out of time.
-This objection succeeded. The Board held that the Applicant had indeed filed its RFR outside the seven day appeal window.

Held

The Board allowed the preliminary objection raised by the P.E and struck out the Applicant's RFR with no order as to costs. It held that the P.E was at liberty to proceed with the procurement process.

19. Team Engineering Spa (Applicant) vs. Kenya Railways Corporation (P.E) **Decision No 21 of 2014**

Summary

An appeal against the decision of the P.E in the Tender for the provision of consultancy services for design, review and construction supervision for the construction of a Standard Gauge Railway from Mombasa to Nairobi, Kenya and procurement and installation of facilities, locomotive and rolling stock.

Practice Areas

- **Filing out of time:** Whether the Applicant had filed its Request for Review outside the appeal window.
- **Contract signing vis a-vis the jurisdiction of the Board:** Whether the contract entered into between the S.B and the P.E ousted the jurisdiction of the Board.

Issues

Preliminary Issues

The Board quoted precedent in holding that the issue of jurisdiction is a threshold issue that ought to be determined first as soon as it arises.¹⁶

- i. An objection raised by the P.E that the Applicant had failed to file its Request for Review within the statutorily permitted seven days.
-This objection succeeded. The Board found that the determination of this issue revolved around the notification of award. It held that the email communication sent to the Applicant was valid and thus dismissed any claims that the Applicant had not been notified of the outcome of the Tender. In quoting the provisions of Section 83 (G) of The Kenya Information and Communication Act Cap 411 as read together with Section 83 (K) the Board held that the law permits service of any matter that is in writing to be rendered or made through an electronic form and that such communication shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic message. It moreover relied on precedent to state that communication of a written document via email is recognized as an acceptable mode of service in a procurement process.¹⁷ It thus computed the time from the date of the email notification and found that the Applicant had filed it RFR out of time contrary to Regulation 73.
- ii. The P.E also raised an objection stating that the jurisdiction of the Board had been ousted by the provisions of Section 93 (2) (c) as a contract had already been signed between the P.E and the S.B.
-This objection succeeded. The Board firstly investigated whether the letter of notification had been done in compliance with Section 68 (2) of the Act. In having already noting the date when the notification of award had been made, the Board computed the time and held that the contract signed had been done legally. On the issue raised by the Applicant urging the Board to declare the contract illegal it observed that it had previously ignored contracts which contravene the provisions of Section 68. In relying on precedent,¹⁸ it held that the Board cannot inquire into the issue of whether the contract was void or a nullity seeing as it had already declared that the contract had been executed in accordance with Section 68 and also no specific prayer set out by the Applicant had prayed that the Board declare the contract null and void.

¹⁶Peris Pesi Tobiko vs. The Independent Electoral and Boundary Commission (IEBC) and Anor (2013) Nairobi Civil Appeal No. 154

¹⁷ Hetero Chain Management Consortium vs. the Ministry of Public Health and Sanitation (2009) PPARB 24.

¹⁸ Kobil Petroleum Limited vs. Kenya Ports Authority (2008) PPARB 18.

Held

As a result, the Board ordered that the RFR be struck out, the order of stay issued be discharged and the P.E be at liberty to proceed with the procurement process and that each party bear its own costs.

20. China Petroleum Engineering and Construction Corp. (Applicant) vs. Kenya Pipeline Company (P.E) Decision No 23 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the construction, testing and commissioning of Line 1 Pipeline Replacement Project.

Practice Areas

- **Bid bond:** Whether the P.E acted in breach by failing to disqualify the S.B for failing to comply with the requirements of the T.D with regards to the submission of the bid bond.
- **Mandatory requirements:** Whether the P.E awarded the Tender to the S.B despite it failing to meet the mandatory requirements set out under the T.D.
- **Breach of Article 227 of the COK on fairness and competition:** Whether the P.E breached Article 227 of the COK.

Issues

- i. The Applicant claimed that the P.E had breached Section 82 of the Act when it failed to disqualify the S.B's bid for failing to comply with the requirements under the T.D as regards the bid bond.
-This ground failed. The Board held that the P.E had not breached the provisions of Section 2 of the Act and the T.D.
- ii. A claim by the Applicant that the P.E breached Section 82 of the Act and the provisions of the T.D by accepting the tender price of the S.B.
-This ground failed. The Board held that contrary to the averments of the Applicant, the S.B had not submitted two bid prices but only one. It thus quoted precedent in stating that Section 66 of the Act was not applicable to RFPs and the procedure for evaluation and award in the RFPs is governed by the provisions of Sections 76 to 87. The Board further held that under the provisions of Section 82 (5) of the Act, a tender ought to be awarded to the tenderer who had scored the highest combined technical and financial score.¹⁹ It thus found that the Applicant was not the bidder with the highest technical and financial score.

¹⁹ Landor Associates vs. Kenya Power and Lighting Company Limited (2009) PPARB 42.

- iii. The Applicant claimed that the P.E breached the provisions of Section 82 of the Act and the T.D in awarding the Tender to the S.B which did not provide a sub-contract agreement with a local company.
-This ground failed. The Board held that the requirement under the T.D was only meant to bind parties which intended to sub-contract works under the Tender.
- iv. Breach of Article 227 of the COK by the P.E. The Applicant claimed that the P.E had acted in breach by failing to act in a fair, equitable and transparent manner and to ensure that the procurement process was competitive and cost effective.
-This ground failed. The Board held that it had already found in the preceding part of the decision that it had not breached any provisions of the Act or Regulations or the criteria under the T.D. It therefore stated that there can't be a breach of the provisions of Article 227 in the absence of proof of any of the particulars of the alleged breach of the provisions of the Act, Regulations and or the criteria under the T.D. It finally relied on precedent to state that allegations of breach of the Constitution need to be sufficiently substantiated and that it is not enough for a party to just plead the same.²⁰

Held

The Board held that the Application be dismissed, the stay orders be discharged and the P.E be at liberty to proceed with the procurement process. No orders were made as to costs.

Notes

The Board clarified the difference between bid security bond and a performance bond. It stated as follows;

"A bid bond is meant to ensure that a tenderer meets its obligation up to the point of ensuring that the S.B executes the contract after which he must provide a performance security for the contract once it is signed. The bid bond thus becomes obsolete and serves further no purpose once a contract is signed and a performance security is provided."

21. China Wu Yi Co. Ltd (Applicant) vs. Kenya Pipeline Co. (P.E)

Decision No 24 of 2014

Summary

Appeal against the decision of the P.E in the Tender for construction, testing and commissioning of Line 1 pipeline replacement project.

Practice Areas

- **Statements:** Whether the RFR as filed by the Applicant contravened the provisions of Regulations 73 by not accompanying the same with statements.

²⁰ Rich Productions Limited vs. Kenya Pipeline Company Limited (2014) Nai HC Constitutional Petition 173 paragraph 67

- **Competence of the documents filed:** Whether the documents as filed by the Applicant in support of its application were competent.
- **Corruption and collusion:** Whether the Applicant had failed to substantiate the allegations of corruption and collusion against the P.E.
- **Evaluation criteria:** Whether the P.E failed to disqualify the S.B despite failing to meet a requirement under the T.D.

Issues

- i. An objection raised by the P.E that the RFR as lodged by the Applicant was in contravention of Regulation 73 (2) (b) as it was not accompanied by statements.
-This ground succeeded. The Board in quoting precedent held that the provisions of Regulation 73 (2) (b) were couched in mandatory terms.²¹ It also quoted a previous case to aver that the burden of proof in relation to proving the allegations made by him/her or it in an application filed before the Board lies with the Applicant.²² The Board also perused the Applicant's documents and found that the same had been signed by its advocate. It held that it is trite law that an advocate cannot deposed to or purport to support or give evidence in support or in opposition to contested issues. An advocate cannot in the same breath descend into the arena of a dispute as an advocate merely represents and presents his client's case and cannot take over the case. It therefore held that the Applicant's RFR had been filed in contravention of Regulation 73 (2) (b).
- ii. The P.E and the S.B alleged that the documents attached to the RFR filed by the Applicant are not properly before the Board.
-This ground succeeded. The Board as already established, held that the documents were not properly before it as the same had been signed by the Applicant's Advocate. The Board also found that the Applicant had in its possession confidential documents. It quoted the provisions of Section 44 requiring a P.E not to disclose any confidential information save for the specific items of disclosure set out in Section 44 (2).
- iii. Breach of Regulation 82 (2) of the Regulations by the P.E. The Applicant claimed that the S.B had not proven to have performed a similar project in the last 5 years as required under the T.D.
-This ground failed. The Board held that having held that the Applicant's RFR and its documents were improperly before the Board, the Applicant had not proven any infringement of the provisions of Regulation 82 (2). It further held that the Applicant had not proven the allegation that the S.B did not have necessary experience to perform a similar project.
- iv. Whether the allegations of corruption and collusion and any other like practices was a matter properly before the Board and if so whether the allegations were proven.

²¹ Voith Hydro GMBH & Company vs. Kenya Limited Generating Company Limited (2009) PPARB 55; Krannes G.M.B.H (Germany) vs. Kenya Airports Authority (2013) PPARB 33.

²² Man Diesel SE vs. Kenya Electricity Generating Company Limited (2009) PPARB 45.

-The Board held that the Applicant had not pleaded nor placed any evidence of corruption, collusion and or any like practice before the Board and further that this allegation was unsupported and lacks basis.

v. Who should bear the costs for the RFR?

-The Board held that this case was one of sour grapes. The Applicant's case was entirely unsupported by evidence and it had relied on documents which appear to be in contravention of Section 44, 45, and 31 of the Act. It also imputed criminal conduct on the part of the S.B which had been unsubstantiated, and seeing as the costs follow the event the Board held that the Applicant be condemned to pay costs.

Obiter dictum

The Board observed that some of the RFRs filed by tenderers and particularly the unsuccessful tenderers are based on very flimsy allegations which are without any proper basis and are filed for the sole purposes of slowing down the procurement process in Kenya.

Held

The Board dismissed the Applicant's RFR and ordered that the P.E be at liberty to proceed with the procurement process. It further ordered that the Applicant bear the costs for the application.

22. Suzan General Trading Ltd (Applicant) vs. Kenya Airports Authority (P.E) **Decision No 25 of 2014**

Summary

Appeal against the decision of the P.E in the Tender for the development and management of an International Brand Fast Food Outlet at Jomo Kenyatta International Airport (JKIA), Nairobi.

Practice Areas

- **Res judicata:** Whether the RFR as filed by the Applicant was barred by the doctrine of res judicata.
- **Disclosure of information:** Whether the P.E declined to disclose information on the re-evaluation of the tenders.
- **Supplementary grounds for Review:** Whether the Applicant could be allowed to file supplementary grounds for review.
- **Compliance with orders of the Board:** Whether the P.E had complied with the orders of the Board.
- **Evaluation criteria:** Whether the P.E had acted in breach in applying an evaluation criteria contrary to Section 66 (2) of the Act.

Issues

Preliminary Issues

- i. Objections raised that the issues raised by the Applicant were *res judicata*.
-This issue failed. The Board relied on precedent to highlight on the principle of *res judicata*.²³ The Board held that the tender is the same, the Applicant and the parties to the Tender are the same, the documents being relied upon are the same and the award of the Tender is the same. The Board however was of the view that the issues before it in this review concern the implementation of the orders of the Board as determined in Review No. 16 of 2014 and the compliance of the P.E with the orders delivered therein. It therefore found that the principle of *Res judicata* as an estoppel cannot apply in the current Application before it.
- ii. The second preliminary issue is the request by the Applicant to issue ex parte orders directing the P.E to disclose some additional information to it relating to the evaluation criteria applied to the Tender. This request was brought under Section 44 (3) as read together with Section 45 (2) (e) of the Act.
-This issue failed. The Board Noted that under the Act, once a RFR had been filed, the same operated as a stay against anything the P.E is supposed to do. It also noted that the P.E was under the obligation to supply the Board with further details or information after the Board has already requested for the same. However, the Board took into account the strict timelines given to it to come up with a decision. It stated that if ex parte orders were to be issued, it would end up delaying the process and strict timelines would thus not be met. It could thus not issue the ex parte orders sought.
- iii. The third preliminary issue was on the filing of supplementary grounds of review by the Applicant.
-This issue failed. The Board held that the same could not be filed as the request was contrary to Regulation 73 as amended by Regulation 20 (a) of Legal Notice 106 of 2013 having been introduced after 13 days of the filing of the RFR.

Substantive Issues

- i. The Applicant claimed that the P.E had failed to comply with the orders of the Board as directed in the Review Case No. 16 of 2014 contrary to Section 100 of the Act.
-This ground failed. The Board held that it was satisfied that its direction to re-evaluate and award the Tender within 7 days was complied with fully.
- ii. The Applicant also claimed that the re-evaluation of the Tender was not done in compliance with the provisions of Section 66 (2) of the Act.
-This ground also failed. The Board held that the P.E had complied with the orders of the Board and the provisions of Section 66 of the Act at the technical evaluation stage. On the financial evaluation, the Board noted some anomalies but however noted that the same,

²³ Lotta vs. Tanaki [2003] 2 EA 556

when taken into account still did not place the Applicant as the highest evaluated bidder when the technical and financial scores were combined.

Held

Taking into account the foregoing the RFR failed and was thereby dismissed. The Board ordered that the procurement process may proceed to its logical conclusion.

23. Civicon Kenya Ltd (Applicant) vs. Kenya Pipeline Company (P.E)

Decision No 26 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the construction of additional white-oils storage tanks and accessories at Pump Station 10 (Nairobi Terminal).

Practice Areas

- **Filing out of time:** Whether the Applicant had filed its RFR outside the seven day appeal window.
- **Evaluation Criteria:** Whether the P.E wrongly disqualified the Applicant's bid as being non responsive in reliance to an evaluation criteria that was not contained in the T.D.
- **Unpleaded issues:** Whether the Board can give an order or grant a prayer which was not pleaded by the Applicant in its RFR.
- **Costs:** Which party was to be awarded costs?

Issues

Preliminary Issues

- i. An objection raised by the P.E that the RFR as filed by the Applicant had been filed out of time.
-This ground failed. The Board held that the Applicant was not served with the notification that its bid was unsuccessful promptly and thus the RFR was filed within time.

Substantive Issues

- i. A claim by the Applicant that the P.E had breached the provisions of Section 66 (2) and (3) of the Act and Regulation 47 and 49 (1) and (2) of the Regulations and the provisions of the T.D in disqualifying the Applicant's bid as being non-responsive.
-This ground failed. The Board held that the P.E had carried out the evaluation of the tenders relying on criteria found in the T.D
- ii. Whether the Board can base its decision on an unpleaded issues or a prayer not sought before it.

-The Board quoted three precedents to affirm that a party to any proceedings of a judicial or quasi-judicial nature is bound by its case as pleaded and cannot go outside its pleadings.²⁴ It then dismissed the prayers of the Applicant for orders which it had not pleaded in its RFR.

iii. Who shall bear costs?

-The Board held that the Applicant had been partly successful and thus each party bore its own costs.

Held

The Applicant's RFR was dismissed and the P.E ordered to proceed with the procurement process. Each party to bear its own costs.

24. Urssa Construcciones Metallicas (Applicant) vs. Kenya National Highway Authority (P.E)

Decision No 27 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the design and construction project for Permanent Prefabricated Modular Steel Truss or similar bridges to be installed along the Loruk-Barpelo (B4) and Homa Bay -Mbita (C19) Roads.

Practice Areas

- **Contract signing vis a vis the jurisdiction of the Board:** Whether the entering into a contract between the P.E and the S.B ousted the jurisdiction of the Board.

Issues

Preliminary Issue

- i. The Board considered the arguments of the parties that there existed a contract between the S.B and the P.E thus in congruence with Section 93 of the Act, the RFR could not be determined by the Board as the same lacked jurisdiction.
-This issue succeeded. The Board held that the contract entered into between the S.B and the P.E was done so validly and thus it lacked jurisdiction to entertain the RFR as per the provisions of Section 93 of the Act.

²⁴ Nzoia Sugar Company Limited vs. Capital Insurance (2009) Nairobi Court of Appeal Civil Appeal No. 86; The Independent Electoral and Boundaries Commission and Another vs. Stephen Mutinda Mule and 3 others; Libyan Arab Uganda Bank for Foreign Trade and Development & Anor vs. Adam Vassiliadis (1986) UG CA 6 where the Ugandan Court of Appeal (the judgment of Odoki JA) cited with approval the dictum of Lord Denning in Jones vs. National Coal Board (1957) 2 QB 55

Held

The Board thus went ahead to state that it would not proceed and determine the issues raised by the Applicant in its grounds of the RFR as filed. Subsequently the RFR was struck out. No orders were made as to costs.

25. One Way Cleaning Services Ltd (Applicant) vs. Kenya Airports Authority (P.E)

Decision No 28 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the provision of Cleaning Services at Jomo Kenyatta International Airport, Terminal Four.

Practice Areas

- **Evaluation criteria:** Whether the P.E had acted in breach in introducing a new criteria in evaluating and awarding the tender.
- **Award of the tender:** Whether the award of the Tender by the P.E contravened the provisions of the Act and Article 227 of the COK with regards to promotion of competition and fairness.
- **Notification of award:** Whether the P.E acted in breach in failing to notify the Applicant simultaneously with the S.B of the outcome of the Tender.

Issues

- i. Breach of Section 66 (2) of the Act and the ITT and special conditions of contract contained in the T.D. The Applicant claimed that the P.E in the manner in which it awarded the tender and that the same amounted to the introduction of a new criteria in the evaluation process. The Applicant further stated that the P.E failed to use the procedures and criteria set out in the T.D contrary to the provisions of Section 66 (2) of the Act.
-This ground succeeded. The Board held that the Tender was evaluated using the criteria set out in the T.D and that specified in the addendum issued to the bidders by the P.E as per the provisions of Section 53 of the Act. It however held that the said addendum was in fact a clarification to the questions asked by the bidders. Overall although the Board was persuaded that the P.E evaluated the Tender using the criteria provided in the T.D in compliance with Section 66, the P.E went against its own T.D and especially in the general conditions of contract in awarding the tender for two lots to one bidder even if that bidder had scored the highest combined score. It held that the same clause could not be wished away and thus found that this ground had merit.
- ii. Breach of Section 2 of the Act and Article 227 of the COK by the P.E. The Applicant stated that it had met the mandatory and technical requirements for the Tender and was entitled to be awarded one of the lots since it finished second in both lots and that failure to do so

was prejudicial and unfair since it submitted a competitive bid that was beneficial to the P.E and had met all the requirements of the T.D.

-This ground succeeded. The Board held that the decision of the P.E to award the Tender for both lots to one tenderer irrespective of the clear provisions of the T.D was not in adherence to the ideals of public procurement as found in Section 2 of the Act and Article 227 of the COK 2010.

- iii. Breach of Section 67 (2) of the Act. The Applicant claimed that the P.E had acted illegally and ultra vires the above mentioned provisions in failing to notify the Applicant of the outcome of the tendering process simultaneously and in the manner required by law.

-This ground failed. The Board held that the main purpose of notification was to give an opportunity to a party whose bid was found to be unsuccessful an opportunity to be heard and challenge the procurement process and the outcome of that process. In this instant, the Board held that the Applicant was able to file its RFR in time and found that the Applicant had not suffered any prejudice arising from the failure to notify it at the same time with the S.B.

Held

The board held that the decision of the P.E to award the tender for both lots to one bidder was annulled and ordered that the P.E award the tender for one lot to the S.B and the other to the Applicant. The Board further ordered that the P.E negotiate separate contracts for the two lots with the S.B and the Applicant. No orders were made as to costs.

26. Matrix Vision Systems Ltd (Applicant) vs. Kenya Electricity Generating Company Ltd (P.E)

Decision No 29 of 2014

Summary

Appeal against the decision of the P.E in the RFP for supply, installation and commissioning of Access Control System at Gitaru & Kamburu Power Stations.

Practice Areas

- **Filing out of time:** Whether the RFR filed by the Applicant had been done outside the appeal window.
- **Tender validity period:** Whether the P.E had evaluated the Tenders within the tender validity period.

Issues

Preliminary Issues

- i. The P.E and the S.B stated that the Board lacked the jurisdiction to entertain the RFR as the same had been filed outside the appeal window.

-The P.E in arguing its preliminary objection stated that upon seeking legal advice, it discovered that the Tender had been evaluated outside the validity period and in disregard of the legal provisions. It thus urged the Board to allow the RFR and order for a re-tender process.

Held

The RFR was allowed. The Board directed that the P.E re-advertise the Tender and ensure that the Tender is kept within the same parameters for the youth, persons with disability and women groups and thereafter evaluate the same and award within the timelines set out in the Act and Regulations. No orders were made as to costs.

Notes

The P.E and the S.B, in relying on precedent stated that the appeal window began running one day from the date of dispatch of the notification letter.²⁵

27. UAP Insurance Co. Ltd (Applicant) vs. EPZ Authority (P.E)

Decision No 30 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the provision of staff medical insurance cover.

Practice Areas

- **Filing out of time:** Whether the RFR as filed by the Applicant was filed out of time.
- **Jurisdiction of the Board:** Whether the Board has jurisdiction to entertain issues on the decision of the P.E to terminate the Tender.
- **Termination of tenders:** Whether the P.E acted in breach in deciding to terminate the tender after awarding it to the Applicant.

Issues

Preliminary Issues

- i. An objection raised by the P.E that the RFR had been filed out of time pursuant to the provisions of Regulation 73 (2) (c) and thus the Board lacked jurisdiction to entertain the RFR.
-This objection failed. The Board in deciding on this had to consider two letters, one notifying the Applicant that its Tender had been successful and another informing it of the decision of the P.E to terminate the Tender. The Board held that an Applicant could not challenge a decision of the P.E to award the Tender to it as the same would be frivolous

²⁵ Ongata Works Ltd vs. Kenyatta University (2008) PPARB 42; Otieno Odongo & Partners vs. Northern Water Services Board (2008) PPARB 13

and a mockery of the Board and the process. It then held that the Applicant was challenging the termination of the Tender and in that vein held that the RFR had been so filed within the appeal window.

- ii. The P.E further raised an objection on whether the Board has jurisdiction to enquire into the question of termination once had the P.E had decided to exercise such right under the provisions of Section 36 of the Act

-This objection failed. The Board in quoting and analyzing a landmark case on the same issue,²⁶ held that it had jurisdiction to entertain the question of a P.E's decision to terminate a Tender.

Substantive Issues

- i. The Applicant claimed that the termination of the Tender by the P.E had not been done in compliance to the Act. It claimed that the P.E had erred in terminating the Tender despite an award already having been made. It also faulted the P.E for non-compliance with the procedures set out in Section 36 for the termination of tenders.

-The Board in dealing with the question of the instance when a P.E may terminate a Tender, referred to Section 36 (1) of the Act. The same clearly set out that the same could be terminated at any point before the signing of a contract. The P.E had therefore not erred in the time in which it terminated the Tender. The Board however noted that the power of termination of Tenders given to the P.E under Section 36 is not absolute and should be exercised in strict compliance with the letter and the spirit of the law. The Board thus went on to quote previous decisions whereby it ruled on the issue of termination of tenders on failing to comply with the procedures under Section 36.²⁷

Held

The Board declared the decision of the P.E to terminate the Tender as null and void. The P.E was thus directed to complete the procurement process within seven days and furnish proof of compliance with the orders to the Board. No orders were made as to costs.

²⁶ Selex Sistemi Intergrati vs. The Public Procurement Administrative Review Board and the Kenya Civil Aviation Authority (2007) Nai HCC 1260

²⁷ Tudor Services Ltd vs. National Oil Corporation (2009) PPARB 21; Horse bridge Network Systems (EA) Ltd vs. Bank of Kenya Limited (2012) PPARB 65; Muema Associates vs. Turkana County Council (2008) PPARB 35

**28. China Wu Yi Co. Ltd (Applicant) vs. Kenya Pipeline Company Limited
(P.E)**

Decision No 24 of 2014

Summary

Application seeking to have the decision given by the Board on the 33rd October, 2014 in which it dismissed the 2nd Interested Party's Applicant's bill of costs for want of prosecution set aside.

Practice Areas

- **Mandate of the Board:** Whether the Board has the mandate to hear an application for the amendment of an Applicant's application for taxation of its bill of costs.

Issues

- i. The Applicant requested the Board to set aside its decision to dismiss its previous Application for taxation of its bill of costs for want of prosecution.
-This Application succeeded. The Board conceded to the submissions of the Respondent that its mandate was limited by the provisions of Section 100 of the Act. It however stated that there were instances when the Board has been called upon to exercise its inherent power as a quasi-judicial body during the hearing of a matter ending before it. It listed the same instances as being whether or not to grant an application for adjournment, whether or not to allow the filling of additional documents before or in the course of hearing an RFR and whether or not to grant an application for amendment among other instances. It quoted precedent to further state that while there was no express provision allowing it to grant an application for amendment under the provisions of the Act and Regulations, it could nonetheless invoke the provisions of Section 98 to grant an application for amendment of an RFR.²⁸

Held

The Board thus set aside its decision to dismiss the Applicant's party and party bill of costs for want of prosecution. It thus reinstated its bill of costs. No orders were made as to costs.

²⁸ Premier Medical Corporation Limited vs. the Procurement and Supply Chain Management Consortium (2010) PPARB 10

**29. Kleen Homes Security Services Ltd (Applicant) vs. Masinde Muliro
University of Science & Technology (P.E)**
Decision No. 30 of 2014

Summary

Appeal against the decision of the P.E in the Tender for the provision of Security Services.

Practice Areas

- **Filing out of time:** Whether the RFR as filed by the Applicant had been filed out of time.

Issues

Preliminary Issues

- i. A Preliminary Objection raised by the P.E on the grounds that the RFR filed by the Applicant was filed out of time contrary to the provisions of Regulation 73 (2) (c) (ii).
-This objection succeeded. The Board held that the RFR had been filed out of time. In relying on precedent, the Board held that the issue of jurisdiction is not a mere procedural technicality and thus it could not entertain any proceedings if it had no jurisdiction.²⁹ It thus held as illustrated in its previous decision,³⁰ that once a case is filed outside the seven day appeal window, it is incompetent.

Held

Accordingly the P.O was allowed and the RFR as filed by the Applicant was struck out with no orders as to costs. The P.E was thus at liberty to proceed with the procurement process.

30. Nairobi Enterprise Ltd (Applicant) vs. Kenyatta National Hospital (P.E)
Decision No. 32 of 2014

Summary

Appeal against the decision of the P.E in the Tender for supply and delivery of pharmaceuticals.

Practice Areas

- **Withdrawal of RFR:** Whether the Applicant's decision to withdraw the RFR was done in the proper legal manner and whether the notice of withdrawal had been signed by a person with authority.

²⁹ Samuel Kamau Macharia & Anor vs. Kenya Commercial Bank Ltd & 2 others (2011) Supreme Court Application 2.

³⁰ Delloite & Touche vs. The Salaries and Remuneration Commission (2014) PPARB 17.

Issues

- i. The Applicant filed a notice to withdraw the RFR. The Board thus sought to confirm whether the counsel for the Applicant had authority to withdraw the RFR.
-The Board noted that under Section 94 of the Act, the filing of an RFR operates as stay to the procurement process. Further it noted that under Regulation 3 a party may withdraw its RFR at any time before the hearing. It however noted that a party may not use the provisions of Regulation 83 to abuse the legal process by halting a procurement process without any intention to pursue the matter to its logical conclusion. The Board further found that though the right to withdraw an RFR exists, it must satisfy itself that the party seeking to withdraw or prosecute the RFR is the person who filed it or has authority to do so. The Applicant had not met this satisfaction. The Board noted that the Applicant's RFR was only meant to buy time, but seeing as there was no authority in place to proceed with the same, it had no other option but to dismiss the same.

Held

The RFR as filed by the Applicant was dismissed for want of prosecution. The P.E was thus ordered to proceed with the procurement process. It further ordered that the Applicant pay the P.E costs in this matter to the tune of Kshs. 150,000 and supply the Board with such evidence within 7 days of this decision.

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