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1. Dome Consultants Ltd (Applicant) Vs. Elgeyo Marakwet County Assembly (P.E)

Decision No 1 of 2015

Summary

Appeal against a decision of the P.E in proposal for the provision of Human Resource Consultancy Services for the County Assembly of Elgeyo Marakwet.

Practice Areas

- **Termination of Tenders:** Whether holding onto the Applicant's bid documents by the P.E after termination of the Tender amounts to breach – What are the correct procedures for terminating a Tender as stipulated under the Act.
- **Sole Tenderer:** Whether the P.E can terminate a Tender for the reason that the Applicant was the only candidate to submit the Tender.

Issues

- i. Breach of Section 81 and 82 of the PPAD Act 2005. The Applicant averred that the P.E had acted in breach of the aforementioned provisions by failing to return their bid documents unopened once the Tender had been terminated.
--This ground succeeded. The Board found that the P.E had indeed failed to revert back to the Applicant their unopened Technical Proposal. The Board cited the provisions of Section 36 on the correct procedure for the termination of Tenders. The Board also, in citing some of its previous decisions regarding the same issue, pointed out that the failure to follow the correct procedure in termination of Tenders was enough ground for the Board to rule in the Applicant's favor.¹

Obiter Dictum

The Board on the issue of the sole tenderer stated that the P.E should evaluate the bids as per the Tender Documents and not in comparison with other bids. Therefore, the case of a sole tenderer should not cripple the procurement process.

Held

The Board made orders to the effect that;

1. The Request for Review as filed by the Applicant be allowed;
2. The P.E evaluate the Applicant's bid as per the Tender Document and extend the Tender Validity;

¹ Tricon Works Kenya Limited vs. Kenya Forestry Research Institute (2013) PPARB 51; Tudor Services Limited vs. National Oil Corporation (2009) PPARB 21; Horsebridge Network Systems (EA) Limited vs. Central Bank of Kenya (2012) PPARB 65; Muema Associates vs. Turkana County Council (2008) PPARB 35.

3. The P.E be ordered to cancel the second tender for the provision of the same services; and
4. No orders as to costs.

2. Victoria Cleaning Services (Applicant) Vs. Kenya Medical Training College- Meru (P.E) Decision No 2 of 2015

Summary

Appeal against the decision of the P.E in the Tender for the provision of cleaning services.

Practice Areas

- **Application for leave to adjourn proceedings:** Whether the Board can grant such prayers whereas the statutory time bar on the determination and dispense of the case is slowly running out.
- **Jurisdiction of the Board:** Whether the jurisdiction of the Board can be ousted following the already signed contract between the P.E and the Successful Bidder.
- **Appeal Window:** Whether the Applicant filed their Request for Review outside the statutorily permitted 7 days.
- **Evaluation Criteria:** Whether the Evaluation procedure as relied upon by the P.E was congruent to the one as specified in Section 66 of the Act.
- **Termination of Tenders:** Whether the P.E could terminate a Tender then go on to re-tender for the same services without following the procedures laid out in the Act – Whether this amounted to a breach by the P.E.

Issues

Preliminary Objections

- i. A request by the P.E supported by the Interested Party for leave to adjourn proceedings to allow for filing.
-The Board dismissed this request taking into account the time required under regulations to hear and decide cases being 30 days. In this case, only one week was left thus the same could not be allowed.
- ii. An objection raised by the P.E that the Board was not seized of jurisdiction to hear the matter seeing as the Applicant had filed the Request for Review outside the 7-day appeal window set out in Regulation 73. Moreover, the P.E claimed that a contract had already been entered into between themselves and the Successful Bidder ousting the Board's jurisdiction.
-This objection failed. The Board found that the Applicant had filed its Application in time. On the issue of the contract the Board cited Section 68 which required for the contract between the P.E and the Successful bidder to be entered into at any period after 14 days

from the notification of award. The contract between the P.E and the S.B was not entered into after the lapse of 14 days as required. Therefore, the contract was illegal and the signing of which could not possibly oust the jurisdiction of the Board. Moreover, the P.E had not filed the P.O within the time allowed for in Regulation 77 being 5 days from the date of notification. The case was then heard on merits.

Substantive Issues.

- i. Breach of Section 36 by the P.E in failing to follow the correct procedure as set out therein, for the termination of Tenders.
-This ground succeeded. The Board held that the P.E in failing to give notice, failing to provide reasons for termination within 14 days of request and not issuing a subsequent report to the PPOA acted in breach of the Act.
- ii. Breach of Section 66 in failing to follow the prescribed criteria for arriving at the Lowest Evaluated Bidder and subsequent award of the Tender by the P.E.
-This ground succeeded. The Board found that the Applicant's bid indeed was the lowest. The P.E had also disqualified the Applicant with reasons that their bid price had been amended with white out instead of crossing out with a pen as had been prescribed in the Tender Documents. This, the Board held to be discriminative as their quoted price could still be made out the white out notwithstanding and if not then the Act allowed for clarifications to be made by the P.E.

Held

The Board in considering the above held that the award of Tender was null and void and went forward to substitute the award with the decision that the Tender be awarded to the Applicant.

Notes

In this case the Board held the time to start running from the date as affixed on the notification letter.

I found it interesting that the Board chose to consider that the first tender was still alive considering that the P.E had not followed the provisions as per Section 36 in terminating the Tender and thus the second tender was null and void.

I also found it interesting that the Board may directly award Tenders to the Applicant by substituting the award with the decision of the Board.

3. Geomaps Africa Limited (Applicant) Vs. National Land Commission (P.E) Decision No 3 of 2015.

Summary

Appeal against decision of the P.E in the Tender for the provision and commissioning of NLC Integrated Systems ERP, CRM and NLIMS.

Practice Areas

- **Appeal Window:** Whether the Applicant's application was filed out of time –Whether in the case of email notification, time starts running on sending of the Email by the P.E or on opening and reading of the email by the aggrieved candidate.
- **Jurisdiction of the Board:** Whether the jurisdiction of the Board can be ousted on the claim that the P.E and the S.B have already entered into a contract.

Issues

Preliminary Issues

- i. The P.E and the First Interested Party raised an objection claiming that the request for Review had been filed out of time.
-This objection succeeded. The Board had to determine the question of whether time which a party's offices had been closed during the Christmas and New Year period was also considered in the computation of time. The Applicant had claimed that they were closed during the period and thus an email though sent by the P.E containing the letter of notification was sent earlier, it was seen on a later date by the Applicant and consequently the Application had not been filed out of time.
On this the Board found that the P.E could only go as far as to send the email but not to ascertain whether or when the Applicant had opened it. Moreover, email communication can be accessed from home one does not need to go to the office to receive the communication and consequently react to it.
- ii. That the Board did not have jurisdiction to entertain the Request for Review seeing as a contract had already been entered into between the P.E and the S.B
-This objection succeeded. The Board in considering the provisions of Section 68 as read together with Section 93 and after ascertaining that the contract was entered into after the lapse of 14 days, concluded that it had no jurisdiction to entertain the Application.

Obiter Dictum

The Board recognized that email communication was a form of written communication permitted under procurement law. The P.E however only has the duty to communicate the emails and cannot affect whether or not the Applicant or any other candidates opened and read the Emails.

Held

In light of the foregoing the Board found that it was not seized of jurisdiction to entertain the matter and thus made orders that the Request for Review be struck out and the P.E be at liberty to continue with the Procurement process.

Notes

On the issue of the email notification the Board was clearly of the position that time starts running from the day after the email is sent.

To clarify when dispatch and receipt is undertaken to have occurred, it cited the provisions of the Kenya Information and Communications Act Chapter 411 Section (2) (3) (c) (i):

Unless otherwise agreed between the originator and the addressee:

- i. The dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.*
- ii. If the addressee has a designated computer resource for the receipt of an electronic record, receipt occurs when the electronic record enters the designated computer resource.*

The Board gave justification for Email as a form of notification basing its premise on the provisions of Section 83 (G) as read together with 83 (K) of the same Act whereby the law permits service of any matter that is in writing to be made through electronic form and that such communication shall not be denied legality, enforceability or validity solely on the ground that it is in the form of an electronic message.

It also stated the case of Hetero Chain Management Consortium vs. Ministry of Public Health and Sanitation (PPARB No 24 of 2009) where it stated that Communication of a written document via email is recognized as an acceptable mode of service in a Procurement process.

4. Pestlab Cleaning Services (Applicant) vs. University of Eldoret (P.E)

Decision No 5 of 2015

Summary

Appeal against decision of the P.E in the Tender for the provision of Sanitary Bins and Collection Services.

Practice Areas

- **Bid Bond:** Whether the S.B had failed to provide a bid Bond as required under the T.D – Whether Tenders reserved for the youth, women and peoples with disability require the provision of Tender Security
- **Lowest Evaluated Bidder:** Whether the S.B was in fact the lowest evaluated bidder.

Issues

- i. The Applicant averred that the S.B had not provided a bid bond as under the Tender Documents.
-This ground failed. The Board ascertained that the S.B had actually provided Bid Bond as required. On further inquiry from the parties the Board found that the Tender had been reserved for youth, women and peoples with disability. Regulation 21 (1) of the 2011 Regulations as amended in 2014 prohibits P.Es from requesting the above category of persons from submitting Tender Security.
- ii. Breach of Section 66 (4) of the Act by failing to award the Tender to the lowest evaluated bidder.
-This ground failed. The Board found that the S.B was in fact the lowest evaluated bidder.

Held

The Request for Review was dismissed and the P.E allowed to continue with the Procurement process.

5. Polucon Services (K) Limited (Applicant) vs. Kenya Bureau of Standards (P.E) **Decision No 6 of 2015**

Summary

Appeal against the decision of the P.E in the Tender for the provision of Pre-Export for Verification of Conformity (PVoC).

Practice Areas

- **Filing out of Time:** Whether the Request for Review was filed out of time – On whom does the burden of proof lie when proving the notification of award or failure thereof.
- **Public Interest:** Whether the Board can decide a case basing its decision on Public Interest issues involve with the Tender.
- **Contract:** Whether the Board’s jurisdiction may be ousted where contracts have been entered into even if not for the item which the Applicant had tendered for

Issues

Preliminary Objections

- i. The P.E and the First Interested Party objected that the Request for Review had been filed out of the statutorily allowed time-frame hence the Board did not have jurisdiction to hear the matter on its merits.

A second limb to this objection was that contracts already existed between the P.E and Successful Bidders therefore ousting the jurisdiction of the Board.

-This limb of the objection failed. Here the Board had to decide on which of the parties was tasked with providing evidence for the notification of award or failure thereof by the P.E. In deciding that the onus lay with the party that made the allegation, the Board went on to give the Applicant the benefit of the doubt seeing as the P.E could not show proof that they had notified the Applicants at the alleged time.

- The Second limb also failed. The Board found that the contracts entered into were for different regions and not the ones which the Applicant had tendered for. The provisions of Section 93 were therefore not applicable.

- ii. An objection by the Applicant that the Procurement process had been carried out in a manner unbecoming and not as envisioned under Article 227 of the Constitution or Section 2 of the PPAD Act.

-This objection succeeded. The Board in examining the Evaluation Report noted that the Applicant had been discriminated against at numerous points of the Evaluation process. Marks had been denied and documents ignored. These same anomalies were felt by the Second Interested Party who was disqualified for failure to provide a tax compliance certificate for the Region tendered even though UAE is a tax free country thus none was needed. This disqualification done despite complaints on their part to the P.E

Held

Despite the clear discrepancies in the Evaluation carried out by the P.E the Board noted the public interest issues that emerge from this Tender and that the contracts already signed were in operation, the Board hesitated to annul the Tender. However, the following orders were arrived at in consideration of this;

- i. That the decision disqualifying the Applicant at the Preliminary stage and the Technical Evaluation stage be set aside.
- ii. The P.E be ordered to carry out a fresh evaluation of the Applicant's bid in line with the Board's findings
- iii. That said re-evaluation shall be done within 30 days and the same shall not affect the contracts already entered into with the other Successful Bidders who it was ordered should continue with their works as procured.

6. Smart International Limited (Applicant) Vs. Kenya Airports Authority (P.E)

Decision No 7 of 2015

Summary

Appeal against a decision of the P.E in the Tender for the supply, delivery and implementation of Biometric Technology Based Medical Claims Management System for KAA.

Practice Areas

- **Audited Accounts:** Whether the P.E can admit audited accounts of another company transacting as the aggrieved bidder.
- **Technical Evaluation:** Whether the P.E allowed the Successful Bidder's bid to proceed to financial evaluation despite not attaining the pass mark set in the Tender Documents.

Issues

- i. Breach of Sections 2, 64 and 66 of the PPAD Act 2005 regarding compliance and technical evaluation of the Tenders, brought forth in two limbs. The first limb; the Applicant claimed that the P.E admitted the Audited Accounts of the S.B despite them submitting accounts for another company transacting as the S.B.
-This ground succeeded. The Board in interpreting Section 16 of the Companies Act and drawing reference to authorities on the matter held that the S.B and the other company were two separate and independent entities. Therefore, the Applicant should have annexed their own audited accounts and not those of the other company.
The second limb of this ground was allegations by the Applicant that the P.E allowed the S.B to proceed to the financial evaluation whereas they had not attained the pass mark.
-This limb also succeeded. The Board found that the Successful Bidder's bid had indeed been allowed to proceed to financial evaluation despite not attaining the pass mark stipulated in the Tender Documents.
- ii. Breach of Section 83 of the Act by the P.E in failing to promptly notify the Applicant that its bid had been unsuccessful.
-This ground failed. The Board held that the Applicant had not suffered any prejudice as it was still able to file its Request for Review on time.

Held

The Board gave orders that the award to the S.B be annulled and ordered the P.E to re-tender within 14 days. The parties were ordered to bear their own costs

7. AON Insurance Brokers (Applicant) Vs. Teachers' Service Commission (P.E)

Decision No 8 of 2015

Summary

Appeal against the decision of the P.E in the Tender for the provision of Medical Healthcare Cover and Group Life Insurance (including last expense) Cover for all teachers employed by TSC and their dependants.

Practice Areas

- **Termination of tender:** Whether the P.E can terminate the Tender after award and subsequent entry into a contract with the S.B.
- **Tender Evaluation:** Whether the P.E is at liberty to include to the Tender Evaluation Committee other parties not constituent of the same.

Issues

- i. Breach of Section 36 of the PPAD Act 2005. The Applicant claimed that the P.E in terminating the Tender acted in breach of the above provision of the law.
-This ground succeeded. The Board in interpreting the aforementioned section confirmed that the P.E acted ultra vires to the powers conferred to it by the provisions of Section 36. This is by terminating the Tender after award and confirmation of award has already taken place.
- ii. Allegation by the Applicant to the effect that the P.E allowed for the participation of 'strangers' in the procurement process.
-This ground also succeeded. The Board in referring to the provisions of Section 26 of the Act determined that the P.E had the mandate to appoint procurement units to make decisions on its behalf. Such include the Tender Evaluation Committee and the Tender Negotiation Committee. The P.E cannot however, once the appointment of said officials has been made, allow for 'strangers' to the procurement process to influence any decisions made with regard to the Tender. The P.E therefore acted in breach by allowing commissioners of the TSC -who were not appointed to any procurement units as provided for in Section 26- to sanction the termination of the Tender.

Obiter Dicta

The Board noted some irregularities in the conduct of the P.E during the procurement process. First the P.E in terminating the Tender did not act diligently as the Act in Section 84 clearly provides for the enjoinder of the second highest evaluated tenderer upon any disagreement between the S.B and the P.E leading to the failure to enter into a contract.

The Board also clarified the issue of its jurisdiction being striped by the contents of Section 36 as raised by the P.E. It relied on the case of Selex Sistemi vs. PPARB where the High Court held that the aforementioned provisions do not oust the jurisdiction of the Board and that the Board has mandate to review any decision made by the P.E with regard to the termination of Tenders.

Lastly, the Board brought into focus the allegation by the P.E that it was a constitutionally established body and thus independent to the mandate of the Board. In clarifying this, the Board respectfully pointed out that even though the P.E is a constitutionally established body it is not precluded from adhering to the provisions of the PPAD Act 2005.

Held

The upshot of the above, the Board held that the termination of the Tender was void ab initio and ordered for the entry into contract between the S.B and the P.E within 14 days of the decision.

8. Medipharm East Africa LTD (Applicant) Vs. National Council for Persons With Disabilities (P.E)

Decision No 9 of 2015

Summary

Appeal against the decision of the P.E in the Tender for the supply of Therapeutic Sun Screen Lotions with Sun Protection Factor SPF 50+ for children and SPF 50+ for adults for persons with Albinism

Practice Areas

- **Tender Requirements:** Whether the P.E erred in failing to clearly provide in the Tender Documents which requirements were mandatory and which were not; Whether the P.E erred in failing to distinguish between the requirement of the Preliminary Evaluation stage and those in the Technical Evaluation stage.
- **Technical Evaluation:** Whether the failure to provide bank statements and audited accounts by the Applicant contrary to the Tender Document amounted to disqualification by the P.E.
- **Failure to provide summary of evaluation:** Whether the P.E acted in breach in failing to provide the Applicant with the summary of the evaluation as requested.

Issues

- i. Breach of Section 66 (2) (3) (b) of the Act. The Applicant claimed that the P.E had acted in breach by importing the requirements of the Preliminary Evaluation stage into the Technical Evaluation stage. The Applicant also averred that the P.E in disqualifying its bid due to failure to provide audited accounts and bank statements had acted in breach of the Act.
-This ground succeeded. The Board in examining the Tender Document found it to be vague and not capable of sustaining a suitable evaluation of the parties. In reliance to a previous decision by itself the Board went on to justify the allegations made in this ground.² The Board also noted that the provision of the bank statements and audited accounts was provided for in the Tender Document however in view of the highlighted vagueness of the said document, this was not enough to disqualify this ground.
- ii. A claim by the Applicant that the P.E acted in breach by failing to provide the Applicant with a summary of the evaluation as requested.

² Midroc Water Drilling Company vs. National Water Conversation & Pipeline Corporation (2008) PPARB 36

-This ground succeeded. The Board in assessing the time between the filing of the Request for Review and the letter requesting for the summary, came to the finding that this time was too short therefore the P.E could be justified as to having been busy preparing for the Application. The P.E however acted in breach of Section 44 (1) and 45 (3) in providing confidential information such as the complete evaluation report and the minutes of the Tender Evaluation Committee.

Obiter Dicta

The Board noted irregularities in the manner in which the P.E carried out the tender evaluation. These are;

1. Failure to provide an objective evaluation criterion;
2. Award of the Tender to two bidders contrary to Section 66 (4) of the Act; and
3. Submission of confidential information in response to the Request for Review.

All the above finding by the Board were used to influence the decision.

Held

Seeing as the Tender Document was sufficiently flawed the Board ordered for a complete overhaul of the same, annulment of the award to the two winning bidders and the subsequent re-tendering on the new revised Tender Document to be completed within 45 days.

9. Scope Design Systems (Applicant) Vs. Ministry of Industrialization (P.E) and Industrial and Commercial Development Corporation (P.E) (Second Respondent)

Decision No 11 of 2015

Summary

Appeal against the decision of the P.E in the Tender for the proposal for the provision of consultancy services for the proposed small and medium enterprise (SME) parks at Eldoret, Juja and Taveta in Uasin Gishu, Kiambu and Taita Taveta Counties.

Practice Areas

- **Parties to a Review:** Whether the Second Respondent was rightfully enjoined in the Request for Review.
- **Prayers as sought:** Whether the Board may grant relief on prayers not specifically set out in the body of the Request for Review.

Issues

Preliminary Objections raised by the Second Respondent

- i. Breach of Sections 26 and 96 of the Act by the Applicant in enjoining the Second Respondent in the Request for Review.
-This ground succeeded. The Board in evaluating the said provisions and looking at the letter of award concluded that the entire tender process was carried out by the First Respondent.
- ii. Claim by the Second Respondent that the prayers as sought by the Applicant could not be granted by the Board.
-This ground also succeeded. The Board noted that the Applicant had prayed for the awarding of the Tender to itself in spite of the award having been made to itself. The only issue faced by the Applicant was having the relevant party to the Tender process sign the contract. There was therefore no legal basis for the Board to grant the reliefs set out in the prayers.

Held

The Request for Review was dismissed with no orders as to costs.

10. Salgaa Butchery Golicha Gange Omar (Applicant) Vs. Ministry of State of Defense (P.E) **Decision No 15 of 2015**

Summary

Appeal against the decision of the P.E in the Tender for the supply of fresh meet (beef) on bone to Eldoret based units.

Practice Areas

- **Signing of the Request for Review:** Whether failure by the Applicant to sign the Request for Review is enough to disqualify the Applicant from the Review proceedings.
- **Inappropriate influence, Collision and Undue influence**
- **Lowest Evaluated Tenderer:** Whether the Applicant was the lowest evaluated tenderer and thus ought to be awarded the Tender over the S.B.

Issues

- i. The Board brought to the attention and consequently the issue taken up by counsel for the Interested Party and the P.E, the issue that the Applicant had not signed the Request for Review.
-This ground failed. The Board in considering the competence of the Request for Review as served to the parties and not signed by the Applicant, also took into account the fact that the Applicant was not represented. It also considered the principle of justice being

dispensed without undue regard to technicalities. It was thus held that the Request for Review be heard on its merits.

- ii. Breach of Section 38, 42 and 43 of the Act by the P.E relating to inappropriate influence, collusion and conflict of interest.
-This ground failed. This due to the failure of the Applicant to provide sufficient evidence to prove the same in pursuance of the position held by the Board that any allegations claimed by the Applicant need to be strictly proved on a balance of probabilities.
- iii. Breach of Section 66 (4) of the Act in failing to award the Tender to the Applicant despite being the lowest tenderer and contrary to the recommendation of the Tender Evaluation Committee. The Applicant also claimed that the P.E procured for the meat at non applicable prices.
-This ground failed. The Board in examining the minutes of the Tender Evaluation Committee stated that nowhere was the Applicant referred for award of the Tender. On the issue of market prices, the Board found that the P.E had conducted market survey considerably and that the award was thus justified by the provisions of Section 30 (3).

Held

The Request for Review was dismissed and no orders made as to costs.

11. Sicpa Security Solutions SA (Applicant) Vs. Kenya Bureau of Standards (P.E)

Decision No 17 of 2015

Summary

Appeal against the decision of the P.E in the Tender for the supply of KEBS Quality Marks complete with traceability systems.

Practice Areas

- **Filing a Request for Review accompanied by statements:** Whether the Applicant's failure to accompany the Request for Review with a statement ousts the jurisdiction of the Board.
- **Mandatory Requirement:** Whether the Applicant met the requirement of an ISO Certificate b submitting a NASPO Certificate.
- **Technical Evaluation:** Whether a requirement for inspection of the Applicant's premises by the P.E was to be met at contract implementation stage or during the technical evaluation.

Issues

Preliminary Issues

- i. The P.E raised a preliminary objection claiming that the Applicant gone against the provisions of Regulations 73 by failing to accompany the Request for Review with statements.

-This ground failed. The Board held that this requirement of Regulations 73 only posed a mandatory requirement for accompaniment with a statement where the issues under contest are issues of fact.

Substantive Issues

- i. The Applicant claimed that the P.E wrongfully disqualified it on grounds of failing to provide an ISO Certificate despite it providing a NASPO Certificate.
-This ground succeeded. The Board here had to decide on whether an ISO Certificate is equivalent to a NASPO Certificate. It held that the two were equivalent thus holding that the Applicant's bid was responsive.
- ii. An averment by the Applicant that the P.E erred in precluding the Applicant from the financial evaluation due to failure to meet a requirement that was to be met at contract implementation stage and not technical evaluation stage.
-This ground succeeded. The Board in looking at the requirement as in the T.D held that the requirement of providing an encoding facility at KEBS premises was to be met at the contract implementation stage. The P.E therefore erred in precluding the Applicant from the financial evaluation stage on this ground.

Held

The Board held that the Applicant be readmitted into the Tender process. The P.E was also ordered to carry out an independent evaluation of whether the ISO Certificate is equivalent to the NASPO Certification. Upon such verification, the P.E was ordered to re-evaluate the Applicant's tender alongside that of the S.B and make an award within fifteen days.

12. Civicon Limited (Applicant) vs. Kenya Pipeline Company (P.E) **Decision NO 18 of 2015**

Summary

Appeal against a decision of the P.E in the Tender for the construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport, Nairobi (Greenfield).

Practice Areas

- **Filing out of time:** Whether the Applicant's Request for Review had been filed out of time.
- **Award criteria:** Whether the P.E erred in applying the award criteria for requests for proposals in an open tender.
- **Lowest evaluated tenderer:** Whether the P.E acted in breach by failing to award the Tender to the Applicant despite it being the lowest evaluated tenderer.

Issues

Preliminary Issue

- P.O raised by the P.E claiming that the Applicant had failed to file the Request for Review within the appeal window allowed for by Regulation 73. The P.E claimed that the Applicant had failed to file its Request for Review within seven days of knowing that it had been deemed unsuccessful at the technical evaluation stage.
-This ground failed. The Board in perusing through the documents filed by the parties found that the Applicant had received a letter from the P.E informing it that its bid had been successful at the technical evaluation stage and had been inviting it to attend the opening of the financial proposals. The P.E could not allude time to start running from this letter as it does not prejudice the Applicant in any way.³

Substantive Issues

- Alleged breach of Sections 2, 34, 52, 53, 62, 63, 66, 67, 82 and 98 of the PPAD Act by the P.E in failing to award the Tender to the Applicant. The Applicant claimed that the P.E had failed to award it the Tender despite it being the lowest evaluated tenderer. It also averred that the P.E adopted an award criteria applied for request for proposals whereas the Tender in question was an open tender.
-This ground succeeded. The Board held that the P.E had acted in breach of section 66 (4) in awarding the Tender. It held that the P.E awarded the Tender based on the combined aggregate score which was an award criterion for requests for proposals. This despite the Tender being advertised as an open tender. In relying on precedent,⁴ the Board held that where a P.E advertised the Tender as an open tender it could not purport to adopt an award criteria for another tendering process such as request for proposals.

³ HYoung Consortium vs. Kenya Pipeline Company Ltd (2014) PPARB 33

⁴ Landor Associates vs. Kenya Power and Lighting Company Ltd (2000) PPARB 42; Horsebridge Network Systems vs. Central Bank of Kenya (2012) PPARB 65

Held

The Board in relying on precedent,⁵ substituted the decision of the P.E with its own decision to award the Tender to the Applicant. The P.E was thus ordered to issue a letter of award to the Applicant within 15 days.

13. Civicon Limited (Applicant) vs. Kenya Pipeline Company (P.E) **Decision NO 18 of 2015**

Summary

The Request for Review was first filed by the Applicant on 24th March 2015 and was heard to conclusion with the Board nullifying the award of the Tender to the S.B. The Board substituted the decision of the P.E with its own awarding the Tender to the Applicant- Civicon Limited on the grounds that the Applicant had been the lowest evaluated bidder.

The dissatisfied S.B lodged a JR Application,⁶ which was heard on merits and remitted back to the board for re-consideration in the light of findings made by the Court.

Practice Areas

- **Candidature:** Whether the Applicant was a candidate to the Tender under the provisions of Sections 3 and 93 of the PPAD Act 2005.
- **Joint venture tendering:** Whether the Applicant could have had the locus to bring the suit on its own despite tendering as a joint venture.

Issues

Preliminary Issue

- i. P.O raised by the S.B claiming that the Applicant was not a candidate to the Tender. The S.B claimed that the Applicant had failed to enjoin its partner in a joint venture thus stripping the Board of its jurisdiction.
-This ground failed. The Board noted that the issue of jurisdiction had not been remitted to it by the High Court. On objections regarding the Applicant not including its partner in its joint venture despite tendering as one, the Board held that the Applicant had been the lead bidder as could be seen from the tendering process. Moreover, the Board held that in light of Section 93 and Regulation 73, the partner had not been served with a notification letter and seeing as notification is the onset of the bid process, the partner could not be expected to attend to the proceedings. Finally, on the issue, the Board asserted its position that any member of a joint venture and who had participated in the tender process as a member of a joint venture could challenge the outcome of the process

⁵ Com Twenty One Ltd vs. The Comptroller of State House (2014) PPARB 45

⁶ JGH Western Marine Services CNPC Northeast Refining & Chemical Engineering Co. Ltd Pride Enterprises Vs. The PPARB and 2 others (2015) Nai HC JR App 137

and could not be precluded just because the partner had not been joined into the proceedings

Substantive Issues

- i. The High Court averred that the Board failed to take into account the provisions of Section 66 (2) of the PPAD Act 2005 and the award criteria set out in the T.D. The learned judge further held that if the Board had faulted the criteria set out in the T.D then the proper remedy would have been for the Board to order for a re-tender.
- ii. The second finding of the High Court was that the nature of the Tender necessitated it to be finalized without further delay and that re-tendering may take time and will end up delaying the project which was important to the economy of the country.

Held

The Board in using precedent,⁷ demonstrated the strictness of the principle of stare decisis in averring that it did not have any option but to comply with the orders of the High Court.

To this effect the Board considered the provisions of the T.D on the award criteria and the provisions of Section 66 (2) of the Act, the Board held that an order of re-tendering was not the appropriate remedy in the circumstances of the review. It held that the party which was qualified for the award of the Tender as per the T.D was the bidder who had attained the highest weighted score for both technical and financial evaluation as per the T.D.

The Board thus awarded the Tender to the S.B and held that the Request for Review had failed. No orders were made as to costs.

14. Disney Insurance Brokers Limited (Applicant) vs. County Government of Nyandarua (P.E) **Decision No 19 of 2015**

Summary

Appeal against the decision of the P.E in the Tender for the provision of insurance services.

Practice Areas

- **Technical Evaluation:** Whether the T.D lacked the procedures and criteria to be used to evaluate and compare the Tenders.
- **Notification of award:** Whether the notification letter was signed by the duly assigned person

⁷ Mwai Kibaki vs. Daniell Torotich Arap Moi & 2 Others (1999) Civil Appeal 172; Beth Wanjiru Mulinge vs. James Mutonga Mulinge (2000) HCC 542;

- **Evaluation criteria:** Whether the evaluation criteria employed by the P.E was not congruent to that in the T.D

Issues

- i. A claim by the Applicant that the T.D lacked the procedures and criteria to evaluate the tenders contrary to the provisions of Section 52.
-This ground failed. The Board noted that the Applicant had participated in the Tender without objection and only expressed its reservations once it had lost the bid. The Board also found that the T.D was clear and had used the standard tender document issued to it by PPOA for insurance services tenders.
- ii. The Applicant claimed that the P.E had breached the provisions of Section 27. It claimed that the notification letters sent out were not signed by a duly authorized official of the P.E.
-This ground failed. The Board held that the provisions of Section 27 only require the accounting officer to ensure the provisions of the Act are complied with. Further Regulation 7 only places a responsibility on the same official to sign procurement contracts. Therefore, there was no evidence of a breach of the Act which the P.E was liable for.
- iii. An averment by the Applicant that the P.E acted in breach of Section 66 of the Act in failing to apply the evaluation criteria set out in the T.D.
-This ground also failed. The Board held that the P.E had carried out its evaluation according to the T.D.

Held

The Board dismissed the Request for Review. It made orders that the P.E was at liberty to proceed with the procurement process up to its logical conclusion. It made no orders as to costs.

15. Viable Deco Solutions Ltd (Applicants) vs. Kenya Ports Authority (P.E) **Decision No 20 of 2015**

Summary

Appeal against the decision of the P.E in the Tender for the supply and installation of office furniture.

Practice Areas

- **Evaluation criteria:** Whether the evaluation criteria applied by the P.E was similar to the one set out in the T.D.
- **Award criteria:** Whether the P.E erred in failing to award the Tender to the Applicant- Whether the P.E erred in awarding the Tender to numerous tenderers.

- **Filing of Request for Review:** whether the Applicant was estopped from filing a request for review since it had already received a letter of award from the P.E.

Issues

Preliminary Issue

- i. The P.E claimed that the Applicant was estopped from lodging the Request for Review since it had already received a letter of award from the P.E.
-This objection failed. The Board held that the Applicant was not estopped seeing as it had based its Request for Review on items which it had not been awarded.

Substantive issues

- i. The Applicant claimed that the P.E acted in breach of Regulation 64 and 49 by relying on an evaluation criterion that was not provided for in the T.D.
-This ground failed. The Board held that the P.E had complied with the evaluation criteria set out in the T.D in evaluating the Tender. Moreover, the Applicant had not contested the evaluation of the items which it had been awarded but only the ones which it had not despite the same evaluation criteria being applied across the board.
- ii. An allegation by the Applicant that the award criteria used by the P.E amounted to favoritism and that the P.E erred in awarding the contract to numerous tenderers. The Applicant claimed that the P.E should have awarded it the full tender.
-This ground failed. The Board held that the P.E had not acted in breach in disqualifying the Applicant's bid for the contested items. It further held that the T.D provided that the Tender may be awarded to numerous tenderers or one tenderer as a full tender. Therefore, the P.E in opting for the former did not act in breach.

Held

The Board dismissed the Request for Review. It further held that the Applicant to pay the P.E kshs. 100,000 seeing as it had failed on all of its grounds. This payment was to be made within fifteen days of the decision and before the entering into a contract between the P.E and themselves for the other items which it was successful.

**16. Thwama Building Services Ltd (Applicant) vs. Tharaka Nithi County
Government (P.E)**
Decision No 21 of 2015

Summary

An Appeal against the decision of the P.E in the Tender for Tharaka Nithi County Headquarters at Kathwana

Practice Areas

- **Lowest Evaluated Tenderer:** Whether the P.E had acted in breach by failing to award the Tender to the Applicant despite it being the lowest evaluated tenderer.
- **Summary of the Evaluation Report:** Whether the P.E had acted in breach by failing to supply the Applicant with a summary of the evaluation report despite its requests for the same.
- **Confidentiality:** Whether a party can base its request for review on confidential information which it not ought to have acquired.
- **Notification of award:** Whether the P.E had failed to notify the Applicant of the outcome of the Tender

Issues

- i. A claim by the Applicant that it had not received any notification from the P.E with regard to the outcome of the Tender.
-This ground failed. The Board held that despite the admission by the P.E that it had not notified the Applicant of the outcome of the Tender, the Applicant had not been prejudiced by such failure to notify.
- ii. An averment by the Applicant that the P.E had failed to supply it with a summary of the evaluation report despite its requests for the same.
-This ground failed. The Board held that the P.E had not acted in breach as the first instance it received a request for the summary of the reports was before the award had been made and the second instance was after the Request for Review had been filed after which the summary was filed with the Board. The Board moreover found that the Applicant by its own admission, already had the summary of the evaluation reports.
- iii. The Applicant further claimed that the P.E had acted in breach by failing to award the Tender to it despite being the lowest evaluated tenderer.
-This ground failed. The Board held that the Applicant had not provided any evidence to show that it had been the lowest evaluated tenderer. The Board noted that the Applicant only relied on the prices called out during the tender opening contrary to Section 66 (4) and even if this was to be considered, the Applicant had quoted the fourth lowest price.
- iv. The Applicant claimed that it had information showing that the P.E had awarded the Tender to the S.B despite the S.B failing to meet some mandatory requirements. The

Applicant evidenced a copy of the Tender Evaluation Committee Report proving these averments.

-This ground failed. The Board held that the Applicant had breached the provisions of Section 44 by acquiring confidential information regarding the tendering process. In relying on precedent the Board held that basing a decision on an illegality would be going against public policy.⁸

Held

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

17. Wanjohi Mutonyi Consult Limited (Applicant) vs. Kirinyaga County Government (P.E)

Decision No 23 of 2015

Summary

An Appeal against the decision of the P.E in the Tender for the provision of consultancy services for carrying out survey works, detailed designs, preparation of Tender Documents and operations and maintenance manuals for storm water drainage, road improvement and security lighting in Kerugoya, Kutus and Wang'uru Townships.

Practice Areas

- **Evaluation Criteria:** Whether the P.E had applied an evaluation criterion that was not set out in the T.D on account of the format for submission of tenders.

Issues

- i. Breach of Section 66 (2) of the Act by the P.E in applying an evaluation criterion that was not set out in the T.D on account of the format for submission of tenders.
-This ground succeeded. The Board noted that the specified format of submission in the advertisement differed from that in the T.D. On this difference, the Board held that where such occurs, the provisions of the T.D prevail over those in the advertisement. The Board looked at the provisions of Regulation 47 (1) (a) which specify that the format for the submission of tenders is looked into by the P.E at the preliminary evaluation stage. It then held that the P.E therefore acted in breach of Section 66 (2) by opting to disqualify the Applicant at the financial evaluation stage on grounds of it indicating its name and address on the envelope contrary to the advertisement. This criterion was not in the T.D.

⁸ Kenya Airways Limited vs. Satwart Singh Flora (2005) Nai CA 54.

Obiter Dictum

The Board noted the Applicant's averment that if the Tender was not awarded to it, it would suffer loss. On this the Board held that the tendering process is a risk and everyone entering into it expects to either win or lose.

Held

The Board allowed the Request for Review and annulled the decision of the P.E to award the Tender to the S.B. It further made orders that the P.E admit the Applicant's bid into the financial evaluation stage and evaluate it against the other qualified bidders. Said evaluation was to be done and complete within seven days from the passing of the decision.

18. Scipa Securities Solutions SA (Applicant) vs. Kenya Bureau of Standards (P.E)

Decision No 24 of 2015

Summary

An appeal against the decision of the P.E in the Tender for the supply and delivery of KEBS Quality Marks complete with Traceability System. This matter was remitted back to the Board after the Board ordered for re-tendering in decision NO 17 of 2015.

Practice Areas

- **Compliance with the orders of the Board:** Whether the P.E had complied with the orders of the Board.
- **Evaluation criteria:** Whether the evaluation criteria used by the P.E was the one specified in the T.D and in compliance with the orders of the Board.

Issues

- i. The Applicant claimed that the P.E had disobeyed the orders of the Board by failing to confirm whether the NASPO Certification is equivalent to the ISO Certification.
-This ground failed. The Board found that the P.E had indeed taken steps to confirm the equivalence of the two certifications. After various correspondences attempting to confirm this, the P.E found that NASPO certifications is different from the ISO Certification.
- ii. A claim by the Applicant that the P.E had failed to comply with the orders of the Board while carrying out the re-evaluation using online ordering system.
-This ground failed. The Board in looking at the re-evaluation criteria, held that the P.E had complied with its orders for re-evaluation using the online ordering system.

Held

The Board dismissed the Request for Review and ordered that the P.E and the S.B enter into a procurement contract. Both parties to bear its own costs.

19. Mbarak Pit Contractors (Applicants) vs. Kenya Ports Authority (P.E) **Decision No 25 of 2015**

Summary

An Appeal against the decision of the P.E in the Tender for the provision of public outdoor toilet cleaning services.

Practice Areas

- **Appeal window:** Whether the Applicant filed the Request for Review outside the seven-day appeal window despite the T.D providing for a fourteen-day appeal window.
- **Filing of a preliminary objection:** Whether the P.E filed its preliminary objection outside the five-day period provided for in statute.
- **Evaluation criteria:** Whether the P.E acted in breach by failing to employ the evaluation criteria set out in the T.D.

Issues

Preliminary objection

- i. An objection raised by the P.E claiming that the Applicant breached Regulation 73 by failing to file its Request for Review within the fourteen-day appeal window
-This ground failed. The Applicant raised an objection that the P.E had also breached Regulation 77 by failing to file its preliminary objection within five days. The Board I computing the days from when the P.E was informed of the filing of the Request for Review, found that the P.E had indeed breached the Regulations 77 (1). It thus held that the Preliminary Objection was incompetent and went ahead to disallow it.

Substantive Issues

- i. The Applicant claimed that the P.E breached Section 64 of the Act by failing to adhere to the criteria in the T.D and thereby declaring the Applicant's bid unresponsive at the preliminary evaluation stage.
-This ground failed. The Board held that the P.E had conformed to the criteria set out in the T.D in carrying out its preliminary evaluation. The P.E therefore had not breached the provisions of Section 64 as claimed by the Applicant.
- ii. The Applicant claimed a breach of Sections 31(1) 31(4) 2(b) (c) (d) (e) 39(1) (b) and 59(3) by the P.E.
-This ground failed. The Board found that the Applicant had failed to provide proof for the alleged breaches but had only merely stated them.

Held

The Board dismissed the Request for Review and ordered that the P.E is at liberty to proceed with the procurement process. The parties were ordered to meet their own costs.

20. Kenya Shield Security (Applicant) vs. Kenya Pipeline (P.E)

Decision No 26 of 2015

Summary

An Appeal against the decision of the P.E in the Tender for the provision of security services. This Appeal was made before the awarding of the Tender.

Practice Areas

- **Filing out of time:** Whether the Request for Review had been filed out of time.
- **Tender Requirements:** Whether the requirements as set out by the P.E in the T.D were unfair and hindered competition among the bidders.

Issues

Preliminary Issues

- i. An objection raised by the P.E averring that the Applicant had breached the provisions of Regulations 73 by failing to file its Request for Review within seven days of the date of occurrence of the breach.
-This ground failed. The Board held that the time from when the computation is deemed to commence is from when the Applicant purchased the T.D. This is contrary to the P.E's contention that the time begun running from the date of the advertisement. The Board held that the time could not be adduced to have started running from then as the grounds of review as stated by the Applicant are not contained in the advertisement but in the T.D. In computation of the window, the Board found that the Request for Review had been filed within the appeal window.

Substantive issues

- i. The Applicant claimed that the P.E had breached the provisions of Sections 2, 31, 34 and 52 of the Act together with Article 227.
-This ground succeeded. The Board in review of the T.D held that some of the requirements stated therein were unfair and did not promote competition among the

bidder. The Board referred to two previous cases⁹ whereby it had held that the requirements in the T.D were outright unfair, unreasonable and inhibit competition.

Held

The Board annulled the Tender and made orders that the P.E to issue a new T.D to be approved by the Director General of the PPOA before the Tender is re-advertised.

21. Tropical Technology Limited (Applicant) vs. Ministry of Interior & Coordination of National Government (P.E)

Decision No 28 of 2015

Summary

An Appeal against the decision of the P.E in the Tender for the supply and delivery of motorized vehicle number plate hot stamping foil.

Practice Areas

- **Technical Evaluation:** Whether the P.E carried out the technical evaluation using the evaluation criteria set out in the T.D.
- **Notification of award:** Whether the P.E had failed to notify the Applicant that its bid had been unsuccessful -Whether the P.E notified the Applicant of the result of the technical evaluation.
- **Post award evaluation:** Whether the P.E had carried out a due diligence test after the award of the Tender to the S.B.

Issues

- i. An allegation by the Applicant that the P.E had acted in breach of Sections 2, 53, 66 and 82 of the Act and Regulations 47, 49, 50, 51 by evaluating the tenders using an evaluation criterion not set out in the T.D.
-This ground succeeded. The Board found that the P.E had failed to take into account several items on the bidders' responsiveness. Moreover, the P.E had breached the provisions of Regulation 16 by failing to provide the individual score sheets for each tenderer. It relied on two previous cases in finding that the P.E had acted in breach of Section 66 (2).¹⁰

⁹ Unifree Duty Free & Others vs. Kenya Airports Authority (2013) PPARB 50; Transcend Media Group vs. Kenya Airports Authority (2014) PPARB 6.

¹⁰ Richardson Company Limited vs. Registrar of the High Court of Kenya (2008-2010) PPARB pg 232; Midroc Water Drilling Co.Ltd vs. National Water Conservation Pipeline Corporation (2008-2011) PPRB pg 162

- ii. The Applicant claimed that the P.E had acted in breach by failing to notify it of the outcome of the technical evaluation.
-This ground succeeded. The Board held that Section 37 of the Act required that all forms of communication between the P.E and the bidders be done in writing. Therefore, the P.E in its own admission acted in breach by purporting to notify the Applicant by oral notification and failing to do so in writing. The Board quoted a previous decision where it had held that the P.E has an obligation to notify the bidders of the results of the technical evaluation before proceeding to the financial evaluation.¹¹
- iii. A claim by the Applicant that the P.E had acted in breach by carrying out a due diligence test on the lowest evaluated tenderers after the award of the Tender had already been made to the S.B.
-This ground succeeded. The Board held that an evaluation cannot be made after the Tender had already been awarded.
- iv. The Applicant claimed that the P.E acted in breach of Section 39 (7) as read together with Section 2 (1) of the Act. It averred that the P.E had failed to consider and grant it preference in evaluating its Tender despite it being a local company.
-This ground succeeded. The Board found that the T.D provided for preference and therefore the Applicant acted in breach by not considering the same as was seen in the evaluation report.
- v. The Applicant claimed that the P.E had failed to notify the Applicant that its bid had been unsuccessful.
-This ground failed. The Board held that the Applicant had managed to file it Request for Review on time and thus had not suffered any prejudice.

Held

The Board annulled the award of the Tender to the S.B. It also ordered that the P.E carry out a re-evaluation within thirty days of the decision and ensures that it adheres to all the recommendations made by the Board with regard to adherence to the award criteria, evaluation criteria and others pointed out by the Board.

¹¹ Imprimirie National vs. Ministry of State for Immigration and Registration of Persons (2015) PPARB 25

22. Damak Enterprises (Applicant) vs. Kenyatta University (P.E)

Decision No 29 of 2015

Summary

An Appeal against the decision of the P.E in the Tender for the supply of beef, mutton, chicken and eggs.

Practice Areas

- **Evaluation Criteria:** Whether the P.E acted in breach by disqualifying the Applicant on the grounds of failure to provide a price schedule – Whether the Applicant failed to complete filling in the Confidential Business Questionnaire.
- **Notification of bidders:** Whether the P.E acted in breach by issuing two notices to the Applicant that its bid had been unsuccessful.
- **Preference and Reservations:** Whether the P.E acted in breach by failing to take into account the preference and reservations owed to the Applicant

Issues

- i. A claim by the Applicant that the P.E acted in breach by declaring its bid unsuccessful on the ground of failing to provide a Price Schedule and providing an incomplete Confidential Business Questionnaire.
-This ground succeeded. The Board held that the provisions of Section 60 clearly define the process to be employed by the P.E during the tender opening. This provision states that the members of the Tender Opening Committee ought to append their signatures on the price schedule, which was the case judging from the Tender Opening minutes. On the issue of the Confidential Business Questionnaire, the Board held that the P.E had erred in disqualifying the Applicant's bid as it found that the Applicant had indeed filled in the Confidential Business Questionnaire save for the segments which did not apply to it. The Board also found that the P.E had issued two notifications to the Applicant contrary to the provisions of Section 167 of the Act. The Board was of the view that this provision only required for one notification to be issued and the P.E therefore went to great lengths to disqualify the Applicant from the Tender. The Board finally held that the P.E had also acted in breach of Regulations 21 and 19 of Legal Notice 114 by failing to take into account the preference owed to the Applicant in evaluating the Tenders.

Held

The Board held that the Request for Review was allowed. It made further orders to annul the award made to the S.B. It held that the P.E was to retender for the services taking into account the observations made by the Board with regard to preference and reservations and also conform to the PPAD Act 2005. No orders were made as to costs.

**23. Noble Gases International Limited (Applicant) vs. Kenyatta National
Hospital (P.E)
Decision No 30 of 2015**

Summary

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

Practice Areas

- **Minor Deviations:** Whether the P.E acted in breach by failing to treat the grounds upon which it disqualified the Applicant's bid to be a minor deviation.
- **Notification of Award:** Whether the P.E acted in breach by failing to notify the S.B and the Applicant simultaneously.

Issues

- i. A claim by the Applicant that the P.E breached the provisions of Section 64 (2) of the Act by failing to treat the failure to treat the grounds upon which its bid was disqualified as minor deviations
-This ground failed. The Board held that the issue of the Applicant issuing a bid bond in a different name was not a minor deviation as in Section 64 (2). It however noted that the notification letter issued to the Applicant contained only one ground for disqualification despite it being disqualified on two grounds.
- ii. The Applicant claimed that the P.E acted in breach of Section 67 of the Act by failing to issue the notice of regret made to it simultaneously with the notification of award made to the S.B
-This ground failed. The Board held that the Applicant had not suffered any prejudice as it was able to file its Request for Review on time.

Obiter Dictum

The Board made two observations;

- i. Firstly, that the P.E had breached the provisions of Section 44 and 45 of the Act by disclosing to the Applicant the evaluation report and other confidential documents.
- ii. Secondly that the P.E had breached the provisions of Section 94 and Regulation 74 (2). The Board stated that as per the aforementioned provisions, the filing of a request for review at the Board operates as stay and therefore the P.E in purporting order for the supply of gases pending the determination of the matter, acted in breach.

Held

The Board dismissed the Request for Review and ordered that the P.E be at liberty to proceed with the procurement process. Both parties were ordered to bear their own costs.

24. Pelican Insurance Brokers (K) Ltd (Applicant) vs. Kenya Ferry Services (P.E)

Decision No 31 of 2015

Summary

Appeal against the decision of the P.E in the Tender for the provision of marine hull and machinery protection and indemnity insurance cover for MV Kwale and Likoni Ferries.

Practice Areas

- **Mandatory Requirements:** Whether the P.E acted in breach by declaring the Applicant's bid unresponsive for failure to provide two authorization letters from underwriters.
- **Evaluation and Award of Tender:** Whether the P.E acted in breach by failing to evaluate the Tender within fifteen days and make an award within thirty days.

Issues

- i. The Applicant claimed that the P.E had acted in breach by declaring its bid unresponsive for failure to provide two authorization letters from underwriters as required under the T.D.
-This ground succeeded. The Board held that the same had been provided by the Applicant but had gone missing. Moreover, the P.E had failed to adduce evidence to disapprove the assertions made by the Applicant vide a sworn affidavit by a member of the Tender Evaluation Committee.
- ii. A claim by the Applicant that the P.E acted in breach of Section 66 (6) as read together with Regulation 46 (1) and 16 (4) (b) in failing to evaluate the Tender within fifteen days. The Applicant further claimed that the P.E breached Regulation 65 (2) by failing to award the Tender within a period of thirty days.
-This ground succeeded. The Board held that there was indeed inordinate delay by the P.E in awarding the Tender contrary to the provisions of Regulation 65 (2). The Board in further looking at the evaluation of tenders held that the requirements of the T.D did not promote the principles of effectiveness and competition. This was because most of the bidders were disqualified at the preliminary stage of the Tender for failing to show experience of more than five years. In relying on precedent,¹² it averred that on previous occasions it had ruled to the effect that the T.D provided for by the P.E was discriminative

¹² Kenya Shield Security Limited vs. Kenya Pipeline Company (2015) PPARB 26; Unifree Duty Free & Others vs. Kenya Airports Authority (2013) PPARB 50; Transcend Media Group vs. Kenya Airports Authority (2014) PPARB 6;

and went against the principle of competition. It averred that once proven that the T.D had the aforementioned irregularities, then the Board gives orders of re-tendering.¹³

Held

The Board allowed the Request for Review and annulled the award of the Tender to the S.B. It further ordered the P.E to re-tender within fifteen days and to issue fresh tender documents which promote the principle of competition and non-discrimination. All parties to bear their own costs.

25. Frontier Engineering Company Limited (Applicant) vs. Marsabit County Government (P.E)

Decision No 33 of 2015

Summary

Appeal against the decision of the P.E in the Tender for the construction of Sasala water pan at Forolle.

Practice Areas

- **Filing out of time:** Whether the Request for review was filed out of the fourteen-day appeal window- Whether the P.E notified the Applicant that its bid had been unsuccessful.
- **Contract between the P.E and S.B:** Whether the contract entered into between the P.E and the S.B was done lawfully and whether the Board has jurisdiction to hear the matter.
- **Evaluation criteria:** Whether the T.D provided by the P.E contained an evaluation criterion for the evaluation of tenders- Whether the tender evaluation committee adopted the evaluation criteria contained in the T.D
- **Lowest evaluated tenderer:** Whether the P.E acted in breach by failing to award the Tender to the Applicant despite it being the lowest evaluated bidder.

Issues

Preliminary Issue

- i. The P.E claimed that the Applicant had filed the Request for Review out of time.
-This ground failed. The Applicant claimed that the P.E had failed to notify it that its bid had been unsuccessful. The Board held that since the P.E had failed to provide proof of service it had not notified the Applicant contrary to Section 67 of the Act.
- ii. Whether the contract entered into between the P.E and the S.B was done lawfully thus ousting the jurisdiction of the Board.

¹³ JGH Marine A/S Western Marine Services Ltd CNPC North East Refining and Chemical Engineering Co.Ltd/ Pride Enterprises vs. Public Procurement Administrative Review Board & 2 Others (Nai HC JR Misc Application No. 137 of 2015)

-This ground failed. The Board in noting the failure of notification, quoted the provisions of Section 67 (1) and 67 (2) on notification of award and stated that where a contract has not been entered into in compliance with the said provisions, then the contract cannot be adjudged to be in compliance with Section 68 of the Act.¹⁴ The Board further held that the filing of a request for review at the Board operates as a stay of the procurement process. Hence the P.E and the S.B by entering into a contract could not oust the jurisdiction of the Board.

Substantive Issues

- i. A claim by the Applicant that the T.D did not contain an evaluation criteria and that the bidders were not treated fairly and competitively.
-This ground succeeded. The Board found that the P.E had indeed failed to provide for an evaluation criterion for the evaluation of tenders but instead employed its own tender evaluation criteria contrary to the provisions of Section 66.
- ii. The Applicant claimed that the P.E had failed to award the Tender to it despite being the lowest evaluated tender contrary to the provisions of Section 66 (4).
-This ground succeeded. The Board found that the P.E had awarded the Tender to the highest evaluated tenderer instead of the Applicant.

Held

The Board allowed the Request for Review and annulled the award made to the S.B. It further made orders that the P.E re-tender within thirty days issuing fresh tender documents which had well set out evaluation criteria. Lastly it ordered that the P.E submit a report to it thirty days thereafter proving compliance with the orders. All parties ordered to meet their own costs.

26. Microhouse Technologies Limited (Applicant) vs. National Industrial Training Institute (P.E) **Decision No 36 of 2015**

Summary

¹⁴ Betech Contractors vs. The Tender Committee of Mogotio District (2010) PPARB 42

Appeal against the decision of the P.E in the Tender for the supply, installation, implementation, testing, training and commissioning of an Enterprise Resource Planning (ERP) System.

Practice Areas

- **Notification of award:** Whether the P.E acted in breach by failing to notify the Applicant of the outcome of the Tender.
- **Evaluation criteria:** Whether the P.E evaluated the tenders using an evaluation criterion that was not contained in the T.D.
- **Conflict of interest:** Whether the P.E acted in conflict of interest in the evaluation of the tenders
- **Tender evaluation:** Whether the members of the tender evaluation committee of the P.E were competent.
- **Termination of Tenders and Re-tendering:** Whether the P.E had followed the due process set out in the Act in terminating the tenders.
- **Confidential information:** Whether the P.E had disclosed confidential information contrary to the Act.

Issues

- i. Alleged breach of Section 67(2) and or 83(2) by the P.E in failing to notify the Applicant of the outcome of the Tender.
-At the onset of the determination of this ground, the Board was faced with the confusion of whether the Tender in question was an open tender or a request for proposal. The advertisement stated that the Tender was an open tender whereas the Tender was evaluated as a request for proposals. These two methods, the Board held, were governed by two different provisions with regard to notification –Section 67 and 83- in that order. The Board was however of the view that despite this confusion both provisions provide that all bidders must be simultaneously notified of the outcome of the tender. It thus found that the P.E had failed to prove notification of award to the Applicant. Moreover, in looking at the notification annexed by the P.E, the Board held that merely stating that the Applicant’s bid had been unsuccessful at technical stage did not amount to giving reasons.
- ii. The Applicant claimed that the P.E breached the provisions of Section 66 (4) and or 882 of the Act by failing to evaluate the Tender according to the evaluation criteria set out in the T.D.
-This ground succeeded. The Board held that the P.E had acted in breach of the aforementioned provisions by not carrying out evaluation according to the criteria set forth in the T.D.¹⁵ It further held that the P.E had breached Regulation 16 by failing to compile an evaluation report.

¹⁵ Societe Generale De Surveillance S.A (SGS) vs. The Kenya Bureau of Standards (200-2010) PPARB report pg. 176

- iii. The Applicant claimed that the P.E acted in breach of Section 39 (1) of the Act and or acted in conflict of interest during the evaluation of the tenders. It also averred that the Tender Processing committee of the P.E was not competent to carry out the evaluation of tenders. -This ground succeeded. The Board found that the P.E had cancelled and re-tendered the Tender five times prior to the advertisement of the Tender in issue. The Board also found that said termination of tenders was done contrary to the process stipulated under Section 36 of the Act. On the issue of bias, as claimed by the Applicant that one of the procurement officials of the P.E had specifically tailored the T.D to favor one bidder, the Board applied a test previously employed in a landmark case.¹⁶ The result was that there was a high probability of bias on the part of the P.E. On the issue of competence, the Board held that the P.E could have easily proven that the members of the Tender Evaluation Committee were competent. It held that it was not enough for the P.E to claim that it is within its mandate to determine who evaluates the tenders. Lastly, the Board found that the P.E had breached Section 44 (1) by disclosing the evaluation criteria instead of a summary of the same. This amounted to disclosure of confidential information.

Held

The Request for Review was allowed on the following terms;

- i. The award of Tender made to the S.B is annulled.
- ii. The P.E to re-evaluate the tenders as submitted from the technical evaluation stage and complete said evaluation in fifteen days.
- iii. The P.E to reconstitute the tender evaluation committee and carryout evaluation based on the criteria set forth in the T.D and without bias. Moreover, no member of the previous tender evaluation committee shall constitute the new committee.
- iv. The P.E to extend the tender validity period and the bid bonds of the bidders.

The Board further made orders that the Director General of PPOA to carry out an investigation on the prolonged nature of the procurement by the P.E and the conflict of interest. On costs, the Board ordered that the P.E pay a sum of Kshs.150, 000 which was the cost of the suit to the Applicant. The P.E was to issue the Board with evidence of compliance with the orders through its secretary within fifteen days therefrom.

¹⁶ Republic vs. Bow street Metropolitan Stipendiary Magistrate & Others Ex Parte Pinochet Ugarte (1999) All ER [The Pinochet Case]

27. Three Star Contractors Ltd (Applicant) vs. Judiciary of Kenya (P.E)

Decision No 37 of 2015

Summary

An appeal against the decision of the P.E in the Tender for the proposed rehabilitation of Vihiga Law Courts.

Practice Areas

- **Filing out of time:** Whether the Applicant had filed the Request for Review outside the seven-day appeal window.
- **Contract:** Whether the contract entered into between the S.B and the P.E ousted the jurisdiction of the Board.
- **Termination of award of contract:** Whether the P.E violated the provisions of the T.D and law in terminating the Tender.

Issues

Preliminary Issue

- i. A preliminary objection raised by the P.E claiming that the Applicant had breached Regulation 73 by filing its request for review outside the seven-day appeal window.
-This ground failed. The Board held that since the P.E had failed to prove that it had notified the Applicant of its decision to terminate the Tender, the notification had not been made and hence the Request for Review had been filed on time.
- ii. The P.E averred that the seeing as an award had been made and the same accepted by the Applicant that the jurisdiction of the Board had been ousted as the tender had moved from the evaluation stage to the contractual stage.
-This ground failed. The Board held that its jurisdiction according to the Act is ousted by the entering into a written contract. Moreover, the T.D stated that the contract between the S.B and the P.E was to be entered into after the lapse of twenty-eight days which had not been the case.

Substantive Issues

- i. An averment by the Applicant that the termination of the award of contract by the P.E was unlawful.
-This ground succeeded. The Board found that the P.E had terminated the award of contract despite the Applicant meeting all the pre contract conditions contrary to the T.D and the procurement laws.

Held

The Request for review was allowed and the P.E ordered to issue a formal contract to the Applicant and ensure the same is executed within fifteen days. No orders were made as to costs.

**28. OJSC Power Machines Limited, Trans century Limited and Civicon
Limited (Applicants) vs. Kenya Electricity Generating Company Limited
[KENGEN] (P.E)
Decision No 39 of 2015**

Summary

Appeal against the decision of the P.E in the Tender for the Request for Proposals for the leasing of 50 MW Wellheads geothermal power generation units at Olkaria geothermal fields on build, lease, operate and maintain basis.

Practice Areas

- **Mandate of the Board:** Whether the Board can admit additional grounds not contained in the Request for Review; Whether the Board can entertain and grant relief on grounds raised by the second interested party, grounds which are not contained in the Request for Review.
- **Lowest Evaluated Tenderer:** Whether the Applicant was the lowest evaluated tenderer and ought to have been awarded the Tender.
- **Evaluation criteria:** Whether the P.E carried out evaluation of the proposals according to the criteria set out in the RFP.

Issues

- i. An objection raised by the P.E that the Applicant had tried to add two grounds for review which were not contained in the Request for Review. The Board was also faced with a decision of whether the second interested party which had not filed a Request for Review could pray for relief of annulment of the T.D and re-tendering on grounds of errors on the T.D whereas it had not filed a request for review.
-The Board held on the matter of the ground raise by the interested party that the Board cannot entertain such prayer and grant orders sought in the absence of an independent request for review. On the issue of the additional grounds raised by the Applicant which were; absence of scores for the technical and financial proposals and adoption of evaluation criteria not contained in the RFP, the Board held that the former was not contained in the original Request for Review while adopting the latter to be determined as the second ground holding that it was contained in the general grounds as pleaded by the Request for Review.¹⁷

¹⁷ **Auto Terminal Japan Limited vs. Kenya Bureau of Standards (2014) PPARB 59-** The Board held that it could only entertain and grant relief to a party based on the grounds set out in the Request for Review; **Republic vs. PPARB & Another Ex Parte Gibb Africa Limited & Another (2012) Eklr-** The HC held that a party which had submitted its bid in a procurement process based on a flawed T.D could not upon failing to attain the minimum technical marks raise the issue of such irregularities at the end of the process.

- ii. Breach of the provisions of Sections 64, 66 (2), (4) and 82 (1) and (2). The Applicant claimed that the P.E had acted in breach by failing to evaluate its Tender in accordance to the criteria set out in the RFP.
-This ground failed. The Board in looking into the RFP and the evaluation reports by the Tender Evaluation Committee, held that the Committee had employed an evaluation criterion that as contained in the RFP contrary to the allegations by the Applicant. In relying on precedent,¹⁸ the Board held that it rarely interferes with the evaluation as done by the tender evaluation committees save for when the evaluation is carried out using a criteria not contained in the T.D.
- iii. A breach of Article 227 of the COK 2010, Sections 2 and 27 of the Act by the P.E in failing to promote the values of competition, fairness and transparency by failing to award the Tender to the Applicant despite it being the lowest evaluated tenderer.
-This ground failed. In relying on precedent,¹⁹ the Board held that the Applicant had based the above ground on breach of section 66 of the Act whereas the Tender was a RFP and not an open tender under which the above mentioned provision relates.

Obiter Dictum

The Board in looking at the case in question stated that Applicants to a request for review had to ensure that they had a *prima facie* case before filing the same before the Board.

Held

The Board dismissed the Request for Review and ordered that the P.E be at liberty to proceed with the procurement process. It further made orders that the Applicant pay costs to the P.E and the 1st Interested Party.

29. Protecht Limited (Applicant) vs. National Construction Authority (P.E) **Decision No 40 of 2015**

Summary

An Appeal against the decision of the P.E in the Tender for the provision of consultancy services for the construction of an automated institutional risk management ad policy framework.

¹⁸ **Auto Terminal Japan Limited vs. Kenya Bureau of Standards (2014) PPARB 59**

¹⁹ **Landor Associated vs. Kenya Power and Lighting Company Limited (2008-2010) pg. 481**

Practice Areas

- **Evaluation criteria:** Whether the P.E acted in breach by adopting an evaluation criterion that was not contained in the RFP.
- **Mandatory requirements:** Whether the P.E acted in breach by failing to award the Tender to the Applicant despite them meeting all the requirements.

Issues

- i. A claim by the Applicant that the P.E breached the provisions of Section 82 of the Act in failing to carry out the evaluation of tenders according to the criteria set out in the RFP.
-This ground succeeded. The Board in quoting precedent,²⁰ held that the PE had indeed failed to follow the evaluation criteria set out in the RFP.
- ii. The Applicant further claimed that the P.E had acted in breach by disqualifying its bid despite them meeting all the requirements under the RFP. The P.E went on to terminate the Tender on grounds that none of the bidders had been responsive.
-This ground succeeded. The Board held that the Applicant had complied with all the requirements under the RFP by assessing the evaluation report of the Tender Evaluation Committee. The Board on the claim by the P.E that it had the right to terminate the Tender at any point quoted a previous case to the effect that procuring entities have a duty, once having commenced the procurement process, to see it to its natural end.²¹

Held

The Board allowed the Request for Review and annulled the decision of the P.E to terminate the Tender. In exercise of its powers, it substituted the decision of the P.E with its own of awarding the Tender to the Applicant and ordered the P.E to issue a letter of award to the Applicant within seven days. It further ordered that the P.E send a letter to prove compliance with said orders to the Board within seven days therefrom.

30. J. Knieriem JV (Applicant) vs. National Transport and Safety Authority (P.E)

Decision No 41 of 2015

Summary

An Appeal against the decision of the P.E in the Tender for printing, supply and delivery of third license plate stickers

²⁰ Societe Generale De Surveillance S.A (SGS) vs. The Kenya Bureau of Standards (2008-2010) PPARB report pg. 176

²¹ Micro house Technologies vs. The National Industrial Training (2015) PPARB 36.

Practice Areas

- **Filing of the Request for Review:** Whether the Request for Review as filed by the Applicant had been signed by a person duly authorized to do so – Whether the Applicant acted in breach by failing to accompany the Request for Review with a statement.
- **Filing out of time:** Whether the Request for Review had been filed out of time.

Issues

Preliminary Issues

- i. An objection raised by the P.E that the Request for Review had been lodged and signed by a person who had not been duly authorized by the Applicant to do so. The P.E further claimed that the Applicant had failed to adhere to the provisions of Regulation 73(2) by failing to accompany its Request for Review with a statement.
-This ground succeeded. The Board held that the person who had signed the Request for Review was neither a director of the company nor an assignee to a power of attorney mandating him to lodge the Review on behalf of the Applicant. The Board quoted previous cases whereby it had ruled on the same issue.²² On the issue of failure to accompany the Request for Review with a statement, the Board held that the same is only mandatory where the contested issues are issues of fact for example fraud.²³
- ii. An objection by the P.E that the Applicant breached the provisions of Regulation 73 as amended by Regulation 20 of the PPAD Act and L.N 106 by filing its Request for Review outside the Appeal window.
-This ground succeeded. The Board in reading and interpreting the provisions of Regulation 3 of the Kenya Information and Communication (Postal and courier services) Regulations 2010, the time starts running from when the letter of notification was delivered to an employee or an agent of the postal service operator of the Applicant. In computing the time, the Board therefore held that the Request for Review had been filed out of time. Upon relying on precedent,²⁴ the Board held that the filing of a Request for Review out of time ousted the jurisdiction of the Board.

Held

²² East Africa Automobile Co Ltd vs. Kenya Bureau of Standards (2014) PPARB 55; China Wu YI Co. Ltd vs. Kenya Pipeline Company Ltd & 3 others (2014) PPARB 24 – The Board quoted this case to show the dangers involved with this issue of a person other than the Director filing a RFR. In this case the Applicant, after having its Request for Review dismissed, turned around and disowned the person who had filed the RFR.

²³ China Wu YI Co. Ltd vs. Kenya Pipeline Company Ltd & 3 others (2014) PPARB 24

²⁴ Transcend Media Group vs. Kenya Airports Authority (2014) PPARB 20; Republic vs. PPARB & 2 Others (2015) JR 21.

The Board struck out the Request for Review as filed by the Applicant. It further ordered that the P.E was at liberty to proceed with the procurement process to its logical conclusion. No orders were made as to costs.

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