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1. MS Super Tag General Contractors Ltd (Applicant) Vs. Parliamentary Service Commission (P.E)

Decision No 3 of 2016

Summary

Appeal against a decision of the P.E in Tender for the provision of Consultancy Services for conducting a security survey, design, documentation and supervision of installation of an Integrated Security Management System at the Parliamentary Buildings.

Practice Areas

- **Filing out of time:** Whether the Request for Review had been filed out of time.
- **Notification of award:** Whether the P.E had acted in breach by failing to notify the Applicant that its bid had been unsuccessful.
- **Tender Validity:** Whether the Tender Document provided for Tender Validity- Whether the award of the Tender was made during the Tender Validity period- Whether a provision for the validity period of the Tender Security in the T.D amounted to Tender Validity Period.
- **Evaluation Period:** Whether the Tender had been evaluated and awarded within the 30-day statutory period.

Issues

Preliminary Objection

- i. Preliminary objection raised by the P.E claiming that the Applicant had filed the Request for Review outside the seven-day appeal window. The P.E averred that the Applicant had become aware of the alleged preferential treatment offered to the Successful Bidder by the P.E on a date from which computation of the window would exceed the seven-day time limit.

-This ground failed. The Board held that the Applicant had also moved the Board on other grounds to which the Applicant had become aware of at a later date. Hence the Request for Review had been filed on time. The Board also noted, upon raising of the issue by the Applicant, that the P.E had failed to provide proof of notification. The preliminary objection was thus dismissed.

Substantive Review

- i. A claim by the Applicant that the P.E had acted in breach by failing to provide for Tender Validity period in the T.D. The Applicant further claimed if indeed there had been a Tender Validity period, the award made to the S.B had been done outside the Tender Validity Period.

-This ground succeeded. The Board found that the T.D only provided for a Bid Bond of 150 days. It went ahead aver that the Bid Bond period cannot be substituted for the Tender

Validity period. In assumption that the foregoing is true, the Board computed the date from the date of closing/opening of the Tender to the date of award and found that it was outside the 150 days Tender Security period. The Board in quoting precedent¹ stated that an award cannot be made outside the tender validity period.

- ii. A claim by the Applicant that the P.E had acted in breach of Regulation 63 as amended by Legal notice 106 Regulation 18 by conducting the evaluation of the Tender beyond the statutory period of 30 days.
-This ground succeeded. The Board found that the P.E had conducted the Tender Evaluation in a period of 120 days.
- iii. An allegation by the Applicant that the P.E had offered preferential treatment to the S.B in performing a site visit which was not provided for in the T.D.
-This ground failed. The Board held that the Applicant had failed to provide enough evidence to prove its assertions.

Obiter Dictum

The Board noted the following flaws in the tendering process:

- i. That the Tender was conducted through RFP method and was not an open Tender under the Act.
- ii. The method of technical evaluation was not as stipulated in the T.D. In quoting precedent² the Board asserted that a Tender conducted under RFP method should be governed under the provisions of Sections 76-87 and that as in Section 82(5) the award is made to the bidder who scored the highest aggregate combined technical and financial score. The P.E could therefore not claim to have not carried out financial evaluation since the S.B was the sole tenderer to qualify to the financial evaluation stage.
- iii. The P.E had significantly modified the standard Tender Document issued by the Authority not to resemble an RFP.
- iv. On raising of altercations on the powers of the Board to visit issues alien to the documents filed by the parties, the Board stated that its comments had been restricted to the documents as filed. It quoted a case to the effect that the Board could not ignore filed documents as this would be going against the rules of natural justice.³

Held

The Board held that the procurement process and the award to the S.B was null and void. It then ordered that re-tendering be done within 30 days of its decision.

¹ Lantech Africa Limited vs. Ministry of Finance (2007) PPARB 2

² Runji & Partners Consulting Engineers Ltd vs. Kenya Rural Roads Authority (2010) PPARB 35

³ R vs. PPARB & 2 others Ex- Parte Suzan General Trading (2014) HC JR 289; see also Kenya Pipeline Company Limited vs. Hyosung Ebara Company Ltd & 2 Others (2012) eKLR on powers of the Board.

Notes

The Board differentiated the difference between tender validity period and tender security as thus;

A tender validity period prescribes the period when a procurement process must begin and come to an end while a tender security serves the purpose of ensuring that a bidder meets its obligations from the date of submitting a bid to the date of award.

2. Spic and Span Cleaning Services (Applicant) vs. Geothermal Generating Company (P.E) **Decision No 4 of 2016**

Practice Areas

- **Evaluation criteria:** Whether the P.E had acted in breach in failing to award the Tender to the Applicant despite it having the highest technical score and quoting the lowest price

Summary

Appeal against the decision of the P.E in the Tender for the provision of cleaning, sanitation, waste collection, transportation and disposal services.

Issues

- i. Breach of Section 66 (2) and (4) of the Act and Regulation 50 by the P.E. The Applicant claimed that the P.E had failed to award it the Tender despite having the highest technical score and quoting the lowest price.
-This ground succeeded. The Board found that the Applicant had been disqualified for not quoting for provision of sanitary bins, items which according to normal trade practice, is private property of the bidders. The Board also faulted the P.E in failing to seek clarifications from the Applicants. In quoting a previous case⁴ the Board averred to the effect that the provisions of Regulation 50 place a mandatory requirement upon the P.E to carry out a financial evaluation of all bidders who qualified from the technical evaluation stage. Finally, in assessing the award criteria, despite not carrying out a financial evaluation of the Applicant's bid, the P.E also erred in failing to award the Tender based on the combined aggregate of the technical and financial scores.

⁴ Auto Express Ltd vs. Kenya Ports Authority (2006) PPARB 61

Held

The Request for Review succeeded. The Board ordered that the P.E carry out a technical and financial re-evaluation of the bidders and come up with an award based on the combined technical and financial scores within 14 days of the decision. It also ordered that the P.E extend the tender validity and bid bond periods accordingly.

3. Machiri Limited (Applicant) vs. Coast Water Services Board (P.E) Decision No 5 of 2016

Summary

An appeal against the decision of the P.E in the Tender for the supply and construction of Kakuyuni to Gongoni and Kakuyuni to Kilifi pipeline works Baricho immediate works - lot 3.

Practice Areas

- **Locus standi:** Whether the Applicant in tendering as a joint venture had the *locus standi* to institute proceedings with the exclusion of its partner.

Issues

Preliminary Issue

- i. A preliminary objection raised by the P.E claiming that the Applicant did not *have locus standi* to institute the Request for Review. The P.E also claimed that the Applicant had through a power of attorney specified who was to institute any legal proceedings arising from the tender and that that individual was not party to the proceedings before the Board.
-This ground succeeded. The Board found that indeed the Applicant had indeed tendered as a joint venture. It relied on a case whereby the High Court had given the test for an aggrieved party.⁵ In applying this test the Board held that the Applicant was not properly before the Board stating that joint tenderers were jointed at the hip and that so to speak must act jointly.

Held

The Board upheld the Preliminary Objection and held that the Applicant lacked *locus standi* to institute the Request for Review.

⁵ Lithotech Exports PYT Limited vs. Electoral Commission of Kenya (2009) HC JR Misc. 999

4. Sameer Africa Limited (Applicant) vs. Ministry of Defense (P.E)

Decision No 8 of 2016

Summary

Appeal against the decision of the P.E in the Tender for the provision of tires and tubes of different sizes through restricted tendering

Practice Areas

- **Notification:** Whether the P.E had failed to notify the Applicant that its bid had been unsuccessful contrary to section 67 of the Act
- **Mandatory requirements:** Whether the Applicant's bid was responsive in terms of the mandatory requirements of provision of current tax compliance and CR 12 documents as contained in the T.D.
- **Evaluation and award criteria:** Whether P.E conducted the Tender according to the evaluation criteria and award criteria contained in the T.D.

Issues

- i. The Applicant claimed breach of Section 67 of the Act by the P.E in failing to notify it that its bid had been unsuccessful.
-This ground succeeded. The P.E failed to provide enough evidence to prove service to the Applicant.
- ii. The Applicant submitted that the P.E had acted in breach by declaring its bid unresponsive. The Applicant claimed that failure to submit a current tax compliance certificate and the Company's CR 12 amounted to minor deviations as provided for in Section 64 (2) of the Act.
-This ground failed. The Board in reading T.D held that these documents amounted to a mandatory requirement.
- iii. The Applicant claimed that the P.E had acted in breach of Section 66 (2) of the Act and the award criteria specified in the T.D by purporting to award the Tender to more than one bidder.
-This ground succeeded. The Board held that the award criteria employed by the P.E did not conform to the provisions of the T.D and Section 66 (2) of the Act.⁶

Held

The Board annulled the award made to the S.B. It further made orders for the P.E to make amendments to the T.D and once the amendments have been made to re-advertise the Tender afresh.

⁶ Auto Express vs. Kenya Ports Authority (2015) PPARB 61

5. Bedrock Holdings Limited (Applicant) vs. Kenya Pipeline Company (P.E)
Decision No 9 of 2016

Summary

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

Practice Areas

- **Mandatory requirement:** Whether the P.E had acted in breach by disqualifying the Applicant for failing to provide a license which was allegedly impossible to acquire.
- **Compliance with orders of the Board:** Whether the P.E had failed to comply with orders of the Board directing it to complete the re-evaluation of the Tender within thirty days from the passing of its decision.

Issues

- i. The Applicant claimed that the P.E had acted in breach by disqualifying the Applicant for failure to provide a valid frequency license from the Communications Authority of Kenya (CAK) for VHF and HF frequencies. The Applicant claimed that the said license was impossible to acquire for security firms as had been held in Application No. 61 of 2015.⁷
-This ground failed. The Board held that it had already decided the matter in the previous case and the provisions of Section 175 (1) of the Act together with the principle of res judicata precluded the Board from dealing with the matter again⁸ seeing as it had already held the requirement as being a mandatory requirement to the Tender. Moreover, the Board held that in perusing bids from the other tenderers the said license had already been provided by them stating that its acquisition was not impossible as averred by the Applicant.
- ii. The Applicant averred that the P.E had acted in breach by failing to adhere by the orders of the Board in its decision passed in Application No. 61 of 2015 requiring the P.E to complete the re-evaluation within thirty days.
-This ground failed. The Board held that this ground had been mentioned by the Applicant in passing and the P.E had not been accorded ample opportunity to respond to the said allegations. Moreover, the Applicant had not been prejudiced by the failure of the P.E to complete the process within thirty days.

Held

The Request for Review was dismissed and the P.E placed at liberty to proceed with the procurement process.

⁷ Witerose Radio Alarms (K) Limited vs. Kenya Pipeline Company Limited (2015) PPARB 61

⁸ Lotta vs. Tanaki (2003) 2 EA 556

**6. JK Construction Limited & Mount Kenya Limited (Applicants) vs. Kiirua
Technical Training Institute (P.E)
Decision No 10 of 2016**

Summary

Appeal against a decision of the P.E in the Tender for the proposed erection and completion of twin workshop, classroom and office block at Laikipia West Training Institute.

The Tender was advertised, opened/closed, evaluated and awarded. Upon challenging of the decision of the P.E in Request for Review NO. 54 of 2015, the Board ordered for retendering within 15 days. This Request for Review is a result of the re-tendering process.

Practice Areas

- **Lowest evaluated bidder:** Whether the Applicant was the lowest evaluated bidder and whether the P.E erred in not awarding it the Tender.
- **Award criteria:** Whether the P.E acted in breach of the Act, Tender evaluation criteria and the T.D in awarding the Tender to the bidder with the highest scores.

Issues

- i. Alleged breach of Section 66 (2) of the Act and the provisions of the Tender Document by the P.E. The Applicant claimed that the evaluation criteria as applied by the P.E was contrary to the T.D and the Act.
-This ground succeeded. The Board in looking at the evaluation formula as set out in the T.D, held that the P.E had applied not applied the formula set out. This contrary to Section 66 (2) of the Act.
- ii. A claim by the Applicant that the P.E acted in breach of the Act, the tender evaluation criteria and the T.D by failing to award the Tender to the lowest evaluated tenderer. This is in breach of Section 66 (4) of the Act
-This ground succeeded. The Board found that the S.B was indeed not the lowest evaluated bidder based on its findings in the first ground.

Held

In applying the powers enshrined upon it by Section 173 of the Act (2015), the Board annulled the award. The Board further stated that seeing as this was the second time this Tender had come up for review, it went ahead to substitute its decision for that of the P.E by awarding the Tender to the lowest evaluated bidder. The Board also ordered for the procurement process to be completed in 15 days.

**7. Amiro Insurance Brokers (Applicant) vs. Kenya Wildlife Services (P.E)
Decision No 11 of 2016**

Summary

Appeal against the decision of the P.E in the Tender for the provision of Aviation Insurance Brokerage Services.

Practice Areas

- **Mandatory requirements:** Whether the Applicant had complied with the mandatory requirement of provision of bank guarantee of three million to be deposited with the Insurance Regulatory Authority

Issues

- i. Allegation by the Applicant that the P.E acted in breach by declaring its bid unresponsive. The Applicant claimed that it had been declared unresponsive for failing to provide a bank guarantee of 3 million deposited with the IRA despite it meeting this requirement.
-This ground failed. The Board held that the Applicant had indeed provided a guarantee but the same was not valid, and had been provided for from two banks one of which did not have a date on the face of it. It averred that in a Tender of this magnitude the P.E could not rely on such guarantee and that the Applicant had failed to comply with the T.D.
- ii. Whether the Applicant had relied on confidential information in the Request for Review contrary to Section 44 and 45 of the Act. The Applicant had annexed the original tender evaluation committee's technical and financial evaluation reports in its Request for Review. It also had in its possession the minutes of the original tender evaluation committee and the supplementary evaluation report.⁹
-This ground succeeded. The Board in relying on precedent,¹⁰ held that the Applicant was in breach of the Act and Article 227 of the COK in relying on confidential information. It further stated that evidence act and common law interpretations in favor of the Applicant's position that the evidence was admissible could not be applied in matters procurement. Further to this it quoted the provisions of Regulation 86 which provides that the Board shall not be bound to observe the rules of evidence.

⁹ The Applicant relied on two cases to back its position that the court has to rely on evidence no matter how it was acquired. These are; Kuruma son of Kaniu vs. Reginam (1955) (1) All E.R 236; Nicholas Randa Owano Ombija vs. The Judges and Magistrates Vetting Board (2015) Civil Appeal 218. The Board held that it could not be bound by these cases as they were decided in application of the Evidence Act and Common Law.

¹⁰ Thwama Building Services vs. Tharaka Nithi County Government (2015) PPARB 21; Kenya Airways Limited vs. Satwart Singh Flora (2005) Nai CA 54; China Overseas Engineering Group Company Limited vs. Kenya Rural Roads Authority (2016) PPARB 7- where the Board made orders for the Director General of the PPRA to investigate cases of confidential information.

Held

The Board dismissed the Request for Review. It further went ahead to recommend that the EAC investigate how the Applicant came to acquire the confidential information. It ordered that the Applicant pay Kshs. 300,000 the P.E and the S.B.

8. Rentco East Africa Limited/ Lantech Africa Limited, Toshiba Corporation Consortium (Applicant) vs. Kenya Electricity Generating Company (P.E)

Decision No 14 of 2016

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 field on build, lease, operate and maintain basis.

Practice Areas

- **Mandate of the Board:** Whether the Board has powers to look into the decision by the P.E to terminate the Tender.
- **Filing out of time:** Whether the Request for Review was filed outside the appeal window.

Issues

Preliminary Objections

- i. A P.O raised by the P.E claiming that the Board did not have jurisdiction to hear matters regarding the decision of the P.E to terminate the Tender
-This ground failed. The Board in noted that the Tender had been terminated under Section 2 of the Act and Article 227 of the COK. It averred that tenders can only be terminated under Section 36 of the 2005 Act and Section 63 of the 2015 Act. The Board in reliance on previously decided cases,¹¹ further affirmed that it had jurisdiction to entertain appeals on any decision of procuring entities including the termination of tenders.
- ii. A claim by the P.E that the Request for Review as filed by the P.E was done outside the fourteen-day appeal window in breach of Regulation 73 and Section 167 of the Act 2015.
-This ground also failed. The Board held that the letter of notification of the termination of the Tender to the Applicant was unlawful. This is due to the existence of a JR at the High Court regarding the subject tender. The Board was also of the position that Section 100 of the Act clearly stipulates that the decision of the board is final and binding. Therefore the P.E in purporting to terminate the Tender despite orders of the Board in favor of the Applicant rendered the letter of termination of the Tender as unlawful.¹²

¹¹ Selex Sistemi Intergretti vs. The PPARB and the Kenya Civil Aviation Authority (2007) Nai HC Misc App 1260; Horse Bridge Network Systems (EA) ltd vs. Central Bank of Kenya ltd (2012) PPARB 65; AON Kenya Insurance Brokers Limited vs. Teachers Service Commission (2015) PPARB 8.

¹² Sheribiz Supplies Limited vs. Kenya Airports Authority (2014) PPARB 8 -In this case the Board held that the P.E could not purport to terminate the Tender.

The Board also dismissed the claim of the P.E that the appeal window was seven days instead of fourteen days in reliance to precedent.¹³

Substantive Issues

- i. An assertion by the Applicant that the termination of the Tender by the P.E was unlawful. -This ground succeeded. The Board held that the P.E was precluded by the provisions of Section 100 from terminating the Tender. Moreover, in reviewing the circumstances of termination, the Board in relying on precedent,¹⁴ held that the law does not permit persons who are not part of the Tender Committee or the Tender Evaluation Committee to participate in the Tender. Therefore, seeing as the P.E had involved persons who were strangers to the evaluation process to participate in the termination of the Tender, the termination was not lawful. Lastly in holding the said termination as being unlawful, the Board noted the averments by the P.E that its termination of the Tender was not based on any provisions of the PPAD Act.

Held

The Request for Review was allowed. The Board also held that the decision of the P.E to terminate the Tender was null and void. It further ordered that the P.E proceed with the procurement process and issue a report to the Board as evidence of compliance with this order. The Applicant was awarded costs.

9. Palona Enterprises & General Supplies Limited (Applicant) vs. University of Eldoret (P.E)

Decision No. 15 of 2016

Summary

Appeal against a decision of the P.E in the Prequalification for the provision of printing services.

Practice Areas

- **Notification of Award:** Whether the P.E failed to notify the Applicant that its bid had been unsuccessful.
- **Evaluation criteria:** Whether the P.E had acted in breach by failing to award the Tender to the Applicant despite it quoting the lowest price in the Request for Quotations- Whether the P.E employed an evaluation criterion which was not provided for in the T.D

¹³ Toddy Civil Engineering Company Limited vs. Coast Water Services Board (2016) 6- In this case the Board held that by virtue of Section 8 of the third schedule to the 2015 Act (Transitional clauses) parts III and XV of the new Act have come into force emphasizing the applicability of the 14-day period as per section 167.

¹⁴ AON Kenya insurance Brokers Limited vs. The Teachers Service Commission (2015) PPARB 8.

Issues

- i. Breach of Section 67 of the Act as read together with Regulation 66 of the Regulations by the P.E in failing to notify the Applicant that its bid had been unsuccessful.
-This ground succeeded. The Board relying on the admission by the P.E that it had supplied neither the successful nor the unsuccessful bidders of the outcome of the Tender, held that the P.E had indeed acted in breach of the aforementioned provisions.
- ii. The Applicant averred that the P.E acted in breach by failing to award the Tender to it despite being the lowest evaluated tenderer.
-This ground succeeded. The Board looked at the minutes for the Tender Evaluation Committee and held that the P.E had disqualified the Applicant's bid using a criterion that was not provided for in the T.D (it carried out due diligence). This in violation of Section 66 (2). In therefore analyzing the prices quoted by the bidders it held that the P.E had also violated Section 89 (4) by not awarding the Tender to the bidder with the lowest price in the Request for quotations.

Held

The Board quashed the decision of the P.E to award the Tender to the S.B. It went ahead to replace this decision with its own decision of awarding the Tender to the Applicant. The costs of the application were to be met by the P.E.

10. Technology Benchmark Limited (Applicant) vs. County Government of Makueni (P.E)

Decision No 20 of 2016

Summary

Appeal against the decision of the P.E in the Tender for

Practice Areas

- **Sole bidder:** Whether the P.E acted in breach by terminating the Tender on grounds that only one bidder responded to the Tender.
- **Filing out of time:** Whether the Applicant had filed its request for review on time taking into account the date when it became aware of the decision of the P.E to declare the Applicant's bid unresponsive -Whether the P.E notified the Applicant of the decision to terminate the Tender and re-advertise.
- **Termination of Tender:** Whether the termination of the Tender by the P.E was done lawfully

Issues

Preliminary Objection

- i. The P.E raised a P.O claiming that the Applicant's Request for Review had been filed outside the fourteen-day appeal window.
-This ground failed. The Board held that the P.E had by its own admission failed to notify the Applicant of its decision to declare its bid unresponsive.

Substantive Issues

- i. Breach of Section 36 of the Act by the P.E in failing to follow the necessary steps in terminating the Tender.
-This ground succeeded. The Board in relying on precedent¹⁵ held that the P.E had failed to follow the steps stipulated in the aforementioned provision.
- ii. The Applicant claimed that the P.E had acted in breach by declaring its bid unresponsive despite them meeting all the requirements under the T.D. The Applicant further averred that the P.E had only dismissed its bid as it had been the only tenderer. --This ground succeeded. The Board held that the bid was not dismissed for being unresponsive. The Board further held that the decision to terminate the Tender due to only one bid submitted is not provided for under law as one of the grounds for termination of tenders.

Held

The Request for Review succeeded. The Board annulled the decision of the P.E to terminate the Tender and subsequent re-tendering. It ordered for the P.E to carry out re-evaluation and award the Tender to the Applicant after fourteen days.

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¹⁵ Dome Consultants Limited vs. Elgeyo Marakwet County Assembly (2015) PPARB 1; Tricon Works Kenya Limited vs. Kenya Forestry Research Institute (2013) PPARB 51- In this case the Board held that the powers conferred upon the P.E by Section 36 were not absolute.