



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 160 OF 2014**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSALS ACT, 2005**

**AND**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSALS REGULATIONS, 2006**

**AND**

**IN THE MATTER OF: REQUEST FOR PROPOSALS NO. NCC/ICT/RFP/113-2013-2014**

**FOR SUPPLY, INSTALLATION, CONFIGURATION, AND IMPLEMENTATION OF**

**DATA CENTRE AND STRUCTURED CABLING INFRASTRUCTURE**

**AND**

**IN THE MATTER OF: A DECISION BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**

**BOARD IN APPLICATION NO.7/2014 OF 24<sup>TH</sup> MARCH 2014**

**AND**

**IN THE MATTER OF: AN APPLICATION BY SEVEN SEAS TECHNOLOGIES**

**LIMITED FOR ORDERS OF CERTIORARI**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**PUBLIC PROCUREMENT**

ADMINISTRATIVE REVIEW BOARD.....1<sup>ST</sup> RESPONDENT

NAIROBI CITY COUNTY.....2<sup>ND</sup> RESPONDENT

BCX KENYA LIMITED.....INTERESTED PARTY

EX-PARTE.....SEVEN SEAS TECHNOLOGIES LIMITED

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 13<sup>th</sup> May, 2014, the *ex parte* applicant herein, **Seven Seas Technologies Limited**, seeks the following orders:

1. **THAT** an Order of **Certiorari** do issue removing to the High Court and quashing the decision of the Public Procurement Administrative Review Board made on 11<sup>th</sup> April 2014, purportedly refusing to endorse the withdrawal of the Request for Review that had been filed by BCX Kenya Limited, the Interested Party herein.

2. **THAT** and order of **Certiorari** do issue removing to the High Court and quashing the **entire** decision of the Public Procurement Administrative Review Board made on 22<sup>nd</sup> April 2014, which decision purported to, *inter alia*, declare the Interested Party herein, BCX Kenya Limited, to have submitted the successful proposal, and further, to annul the award to tender made by the procuring entity to Seven Seas Technologies Limited.

3. **THAT** an Order of **Certiorari** do issue removing to the High Court and quashing the **entire** decision of the Public Procurement Administrative Review Board made on 22<sup>nd</sup> April 2014, which decision purported to, *inter alia*, direct the procuring entity to complete the procurement and render an award as respect the tender within fifteen (15) days

4. **THAT** an Order of **Certiorari** do issue removing to the High Court and quashing the **entire** decision of the Public Procurement Administrative Review Board made on 22<sup>nd</sup> April 2014, which decision purported to, *inter alia*, direct the procuring entity to compete the procurement and render an award as respects the tender within fifteen (15) days from the date of the decision.

5. **THAT** an Order of **Certiorari** do issue removing to the High Court and quashing the **entire** decision of the Public Procurement Administrative Review Board made on 22<sup>nd</sup> April 2014, which decision purported to, *inter alia*, direct the procuring entity to extend the tender validity period and the bid bonds for such period of time as shall be required to complete the remaining stages of the procurement.

6. **THAT** the costs of this Application be provided for.

### Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by **Njeri Wachira**, the Head of Legal and Corporate Affairs of the applicant on 28<sup>th</sup> April, 2014.

3. According to the deponent, on or about 3<sup>rd</sup> December 2013, the Applicant submitted its proposal in

regards to the 2<sup>nd</sup> Respondent's Request for Proposals No. NCC/ICT/RFP/113-2013-2014 for Supply, Installation, configuration, and Implementation of Data Centre and Structured Cabling Infrastructure. After evaluation by the 2<sup>nd</sup> Respondent, the *ex parte* Applicant was awarded the tender by the 2<sup>nd</sup> Respondent.

4. However, **BCX Kenya Limited**, the interested party herein filed a request for Review of the tender with the 1<sup>st</sup> Respondent on 24<sup>th</sup> March 2014 after which both the applicant and the 2<sup>nd</sup> interested party, the Procuring Entity, filed their respective responses to the Request for Review filed by the interested party. However, before the substantive Request for Review could be heard by the Board, the interested party filed a Notice of Withdrawal on 9<sup>th</sup> April 2014. Despite that when parties appeared before the 1<sup>st</sup> Respondent on 11<sup>th</sup> April 2014, the 1<sup>st</sup> Respondent refused to endorse the withdrawal and essentially compelled the Interested Party to prosecute its Request for Review when it was no longer interested in the same.

5. It was deposed that at page 4 of the decision delivered by the 1<sup>st</sup> Respondent on 22<sup>nd</sup> April 2014, the 1<sup>st</sup> Respondent made reference to their earlier decision delivered on 11<sup>th</sup> April 2014 in the following terms: "The Board noted that the decision and the order for directions **was contained in a separate decision given on 11<sup>th</sup> April 2014...**"

6. According to the applicant, once a Notice of Withdrawal is filed, the Request for Review is deemed to have been withdrawn as per the provisions of Regulation 83 of the **Public Procurement and Disposal Regulations, 2006** (hereinafter referred to as "the Regulations"). It was therefore averred that once the Notice of Withdrawal was filed, the 1<sup>st</sup> Respondent did not have any jurisdiction to hear and/or make any determination arising out of Application No.7/2014 of 24<sup>th</sup> March 2014 hence it is within the powers of this Court to quash the decisions of the 1<sup>st</sup> Respondent delivered on 11<sup>th</sup> April 2014, which decision was *ultra vires*.

7. In the deponent's view, if the tender which had been initially awarded to the applicant is awarded to another entity, the Applicant will suffer great financial loss occasioned by the Board delivering a decision and nullifying the tender award in favour of the Applicant when he Board had no jurisdiction for doing so.

8. To the applicant, it is within the powers of this Court to quash the entire decision of the 1<sup>st</sup> Respondent delivered on 22<sup>nd</sup> April 2014, which decision was delivered when the Board had no jurisdiction hence it is in the interests of justice that the orders sought in this application be granted.

9. Vide a further affidavit sworn on 28<sup>th</sup> April, 2014, the same deponent exhibited a copy of the decision made on 11<sup>th</sup> April, 2014.

### **Respondent's Case**

10. In opposition to the application the Respondent filed a replying affidavit sworn by **Pauline O. Opiyo**, the Respondent's Secretary on 13<sup>th</sup> May, 2014.

11. According to her, the interested party filed a Notice of Withdrawal of Request for Review against the 2<sup>nd</sup> Respondent dated 4<sup>th</sup> April, 2014 and was received by the 1<sup>st</sup> Respondent on 9<sup>th</sup> April, 2014. However, on 9<sup>th</sup> April, 2014 the *ex parte* applicant filed a Notice of Preliminary Objection dated the same day based *inter alia* on the late filing of the Request for Review. After hearing the parties present on 11<sup>th</sup> April, 2014, the 1<sup>st</sup> Respondent delivered its ruling on 11<sup>th</sup> April, 2014 declining to make an order for withdrawal of the said Request on the ground that there was no evidence of service on all the parties to the tender.

12. It was deposed that the said decision was made within the 1<sup>st</sup> Respondent's mandate and proceeded to hear and determine the Request which it determined based only on the provisions of the relevant law.

13. It was deposed that the ruling delivered by the Board on 22<sup>nd</sup> April, 2014 involved two requests for review, No 7 of 2014 and No.10 of 2014 which were consolidated for the purposes of hearing hence the applicant is seeking to quash two decisions of the Board nullifying the subject tender. It was however the deponent's view that the applicant cannot seek to have the Court quash the entire ruling dated 22<sup>nd</sup> April, 2014 as there is a separate application and decision based on separate rounds.

### **Determinations**

14. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

15. The issue before me in the instant application in my view is a simple one: whether the 1<sup>st</sup> Respondent Board had the jurisdiction to proceed with the Request for Review made by the interested party after the said party had filed a Notice of Withdrawal of the same Notice.

16. Regulation 83 of the Regulations provides as follows:

***83. (1) A request for review may be withdrawn at any time before or during the hearing by notice in writing to the Secretary signed by the applicant and upon such notice being received the request for review shall be deemed to have been withdrawn.***

***(2) When a request for review is withdrawn, the Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal.***

17. As is clearly apparent from the foregoing provision, once a Notice of Withdrawal is received by the 1<sup>st</sup> Respondent's Secretary, the request is deemed to have been withdrawn. Therefore the law itself provides for the consequences of receipt of a notice of withdrawal. The word "deem" has been interpreted by the Court in **Gatete and Another vs. Kyobe SCCA No. 7 of 2005 [2008] 2 EA 135** where it was held by the Supreme Court of Uganda that:

**"The word "deemed" is commonly used in legislation to create legal or statutory fiction. It is used for the purpose of assuming the existence of a fact that in reality does not exist. The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to place beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."**

18. This position was appreciated in **Prof. Peter Anyan'g Nyong'o and 10 Others vs. Attorney General of Kenya & Others EACJ Reference No. 1 of 2006 [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397** where the East African Court of Justice, citing **St. Aubyn (LM) vs. AG [1951] 2 All ER 473 at 498** expressed itself as follows:

**"The word "deemed" is commonly used both in principal and subsidiary legislation to create what is referred to as *legal or statutory fiction* and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist..."**

19. In Regulation 83 the law used the word “deemed” in order to create the fiction that upon the Notice of Withdrawal being received, the proceedings before the 1<sup>st</sup> Respondent would in law be withdrawn although in reality no order to that effect is made.

20. In my view, it does not matter whether the notice was given by the interested party and not the applicant. The 1<sup>st</sup> Respondent’s jurisdiction is derived from the existence of a valid request for review. It cannot for example take upon itself to a review a decision of a Procuring Entity unless its jurisdiction is properly invoked. Similarly where a request has been withdrawn it cannot purport to continue to hear the request.

21. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others and based on **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327**, the courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

22. Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**.

23. Whereas the powers of the 1<sup>st</sup> Respondent in exercising its powers of review are wide, the same can only be exercised within the framework of an existing request for review. Any attempt to exercise powers outside that ambit would in my view amount to assuming jurisdiction which it does not possess.

24. It is therefore my view that the 1<sup>st</sup> Respondent’s jurisdiction ceased on receipt of the Notice of Withdrawal by its secretary and any proceedings undertaken subsequent to the same by the 1<sup>st</sup> Respondent apart from notification of the parties under Regulation 83(2) were not only unprocedural but also without legal basis. As was held by **Nyamu, J** (as he then was) in **Republic vs. Kajjado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another Nairobi HCMA. No. 689 Of 2001 [2006] 1 EA 318**, if an award is made without jurisdiction, it is a nullity and anything out of a nullity is a nullity due to the maxim *ex nihilo nihil fit* – out of nothing comes nothing hence despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role as it has powers to strike out nullities. Where a decision is a nullity, it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there, as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169**.

25. Regulation 83 does not as it was contended by the Respondent require that the effectiveness of the

notice is only after other parties are served.

26. It was however contended by the Respondent that since there were two reviews which were consolidated, to grant the orders sought would have the effect of nullifying the two reviews. With due respect this submission is not borne out by the record. In the ruling dated 11<sup>th</sup> April, 2014 which is the basis for the submission that the request for review no. 7 of 2014 was consolidated with request no. 10 of 2014, it was decided *inter alia* that the said requests were consolidated only for the purposes of hearing but that upon hearing thereof the Board would deliver separate decisions. In fact separate decisions were delivered.

27. It is therefore my view that the quashing of one decision does not necessarily quash the other decision.

28. It follows that the Notice of Motion dated 13<sup>th</sup> May, 2014 succeeds to the extent that the Respondent's decision made on 22<sup>nd</sup> April 2014, in the request for review No. 7 of 2014 between **BCX Kenya Limited vs. Nairobi City County and Seven Seas Technologies Limited** is hereby quashed.

29. The Applicant is awarded the costs of these proceedings to be borne by the 1<sup>st</sup> Respondent.

30. It is so ordered.

**Dated at Nairobi this 16<sup>th</sup> March, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr. Mwihuri for the Applicant**

**Cc Richard**



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