REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. E005 OF 2022

REPUBLIC.....APPLICANT

-VERSUS-

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

VICE CHANCELLOR, KENYATTA UNIVERSITY.....1ST INTERESTED PARTY

AAR INSURANCE COMPANY LIMITED.....2ND INTERESTED PARTY

EX PARTE: MADISON GENERAL INSURANCE KENYA LIMITED

JUDGMENT

The motion before court is dated 24 January 2022 and is filed under Article 47 of the Constitution of Kenya, 2010, Section 3, 4, 7, 9, 10 and 11 of the Fair Administrative Actions Act, 2015. The applicant has also invoked Section 175(1) of the Public Procurement and Asset Disposal Act, 2015(hereinafter also referred to as 'the Act') and Order 53 Rule 1 & 2 of the Civil Procedure Rules. The prayers in the motion have been framed as follows:

"a) An order of certiorari to bring into the High Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board in Review Application No. 155/2021 in regard to TENDER NO. KU/TNDR/S/015/PM/C/2021-2022 FOR PROVISION OF MEDICAL INSURANCE COVER SERVICES. INPATIENT AND OUTPATIENT COVER. RE-ADVERTISED.

b) An order of prohibition restraining the 1st Interested Party from entering into any other contract other than the contract dated 11th December 2021 and executed between the 1st Interested Party and the ex-parte Applicant.

c) An order of mandamus to compel the 1st Interested Party to fully perform the contract dated 11th December 2021 and

executed between the 1st Interested Party and the ex-parte Applicant.

d) Such further and other reliefs as this Honourable Court may deem just and expedient to grant.

e) That the costs of this Application be provided for."

The motion based on a statement of facts dated 19 January 2022 verified by an affidavit sworn on even date by Hazron Gitonga Wambugu, the applicant's managing director and a further verifying affidavit sworn by one Bernard Otieno Onyango.

The genesis of the applicant's application is a procurement process according to which Kenyatta University, which I will henceforth refer to as 'the procuring entity' had tendered for provision for an in-patient and out-patient medical cover more particularly described as "Tender No. KU/TNDR/S/015/PMIC/2021-2022". The tender document exhibited to the applicant's verifying affidavit shows that the closing date, which ordinarily would be the date by which the bidders ought to have submitted their bids was 20 September 2021.

At the end of the procurement process, the tender was awarded to the applicant. Subsequently, and more particularly on 11 December 2021, the procuring entity and the applicant executed a procurement contract for the goods and services that the procuring entity had procured for.

The 2nd interested party was not satisfied with the procurement process and the award of the tender and therefore, by an application dated 13 December 2021, filed before the 1st respondent on 17 December 2021, it requested for review of the award. In requesting for review, the applicant apparently invoked section 167 (1) of the Public Procurement and Asset Disposal Act, 2015 which states as follows:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

In a decision dated 7 January 2022, the respondent allowed the 2nd respondent's application and made the following orders:

1. The contract dated 11th December 2021 with respect to Tender Number: KU/TNDR/S/015/PMIC/2021-2022 for provision of medical insurance cover services-inpatient and outpatient-cover-Re-Advertised between the procuring entity and the interested party be and is hereby cancelled and set aside.

2. The procuring entity's letter of award in Tender Number: KU/TNDR/S/015/PMIC/2021-2022 for provision of medical insurance cover services-inpatient and outpatient-cover-Re-Advertised dated 23rd November 2021 addressed to the interested party be and is hereby cancelled and set side.

3. The letters of notification in Tender Number: KU/TNDR/S/015/PMIC/2021-2022 for provision of medical insurance cover services-inpatient and outpatient-cover-Re-Advertised dated 23rd November 2021 addressed to the applicant and all other unsuccessful tenderers be and are hereby cancelled and set aside.

4. The Accounting officer of the procuring entity is hereby ordered to direct the evaluation committee to reinstate the applicant's financial evaluation stage and conduct a re-evaluation of the applicant's tender at the financial evaluation stage together with all other tenders that made it at the financial evaluation stage.

5. Further to order 4 above, the accounting officer is hereby directed to proceed with the procurement process of Tender Number: KU/TNDR/S/015/PMIC/2021-2022 for provision of medical insurance cover services-inpatient and outpatient-cover-Re-Advertised to its logical conclusion including the making of an award to the lowest evaluated tenderer taking into

consideration our findings in this request for review within 14 days from the date hereof.

6. Given the procurement process is not complete, each party shall bear its own costs in the request for review.

7. Given the procurement process is not complete, each party shall bear its own costs in the request for review."

The applicant was aggrieved by this decision and it is for this reason that the present suit has been instituted for the orders whose prayers have been reproduced at the beginning of this judgment.

It is the applicant's case that the decision is tainted with illegality for, among other reasons, the reason that since the 1st interested party issued the notification of award to the applicant and letters of regret to the other bidders on 24th November, 2021 and 26th November, 2021 respectively through a registered post, the request for review on any issue arising from the tender process ought to have been lodged with the Respondent within 14 days from 26th November, 2021 in accordance with the mandatory provisions of Section 167(1) of the Act.

The applicant also urges that the respondent had no jurisdiction to entertain a request for review after the procurement contract had been signed and to this end the applicant has cited section 167 (4) of the Act which bars the respondent from interrogating procurement proceedings after a procurement contract has been signed.

In so doing, it has been urged, the respondent acted *ultra vires* the Act.

The applicant has also urged that the respondent failed to consider relevant matters in so far as it ignored the fact that once the procurement contract was signed, the applicant secured insurance policies for the procuring entity's staff and issued them with medical cards to access medical services from the service providers. Since the insurance policy became effective from the date of the contract, the applicant has been receiving claims from the service providers for the services rendered.

Professor Paul Okemo, swore a replying affidavit on behalf of the 1st interested party basically confirming that indeed the applicant has engaged third parties as a result of the procurement contract and if the respondent's decision was to be allowed to stand the vested rights of those parties would be compromised and this would not serve the greater public interest.

The 2nd interested party opposed the motion and filed a replying affidavit to that end; it was sworn by Wilfred Mutuku on 27 January 2022. Mutuku deposed that no evidence was tabled before the respondent to the effect that the 2nd interested party was notified of the outcome of the procurement process on 26 November 2021. It is only on 8 December 2021 that the 2nd interested party was made aware of the award of the tender and that is the date the clock on limitation period for filing of the request for review started ticking. It was therefore contended that the request for review lodged before the respondent was filed within time.

As far as the signing of the contract is concerned, the 2nd interested party submitted that it could only have been signed after fourteen days from the date the notification was sent to the 2nd interested party which was 8 December, 2021 and in this regard the 2nd interested party invoked Section 135(3) of the Act which is to the effect that a written contract can only be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification; in any event, it has to be signed within the tender validity period.

While citing the decision in **African Merchant Assurance Co. Ltd (AMACO) v Public Procurement Administrative Review Board; Madison General Insurance Kenya Ltd & 2 others (Interested Parties) [2020] eKLR,** the 2nd interested party urged that according to section 135 of the Act, time starts to run from the time of sending of the notification, and not the receipt of a notification. Even then, the 2nd interested party urged that since it received the notification on 8 December, 2021 and, going by the provisions of Section 167(1) of the Act as read with Section 57(1) of the Interpretation and General Provisions Act, cap. 2, any aggrieved party had up to 22 December, 2021 to file a request for review.

For purposes of entering into contract under Section 135 of the Act, considering the 1st interested party sent the notification to the 2nd interested party on 8 December, 2021, the applicant and the 1st interested party could only enter into a contract after 21 December, 2021. It was urged that, in these circumstances, the 1st interested party prematurely entered into the procurement contract since it was executed before the lapse of fourteen days from the date the notification was sent to the 2nd interested party.

The question whether the respondent had jurisdiction to determine the request for review by the 2nd interested party is as relevant to the determination of the present suit as it was in the determination of the application before the respondent whose decision, as noted, is now the subject matter before this honourable court. This question arose, and is still pursued in the present proceedings, because the request for review was filed after the procurement contract had been signed. The fact of signing the procurement contract before the application before the respondent was filed is not in dispute and as the orders given by the respondent in its decision would show, the respondent was alive to this fact. For the avoidance of doubt, the pertinent order in respect of this particular contract read as follows:

"The contract dated 11th December 2021 with respect to Tender Number: KU/TNDR/S/015/PMIC/2021-2022 for provision of medical insurance cover services-inpatient and outpatient-cover-Re-Advertised between the procuring entity and the interested party be and is hereby cancelled and set aside."

Earlier in its decision, the respondent acknowledged that the 2nd interested party's request for review was dated 13 December 2021 and that it was filed before it on 17 December 2021, almost six days after the material event. It is thus apparent that the respondent was aware that, as far as the signing of the procurement contract was concerned, the request for review was filed later in time.

The question as to when a procurement contract is executed does matter and it is material because it is a question that goes to the jurisdiction of the respondent to determine the application or the request for review of a procurement process. The law on this question is section 167(4) of the Act which states as follows:

167. (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act. (Emphasis added).

Section 167 (4) (c) is more or less self-explanatory and for our purposes it is fairly clear that the respondent is deprived of jurisdiction to determine a request for review if a procurement contract has been signed in accordance with section 135 of the Act. Section 135 to which reference has been made states as follows:

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

(a) Contract Agreement Form;

(b) Tender Form;

(c) price schedule or bills of quantities submitted by the tenderer;

(d) Schedule of Requirements;

(e) Technical Specifications;

(f) General Conditions of Contract;

(g) Special Conditions of Contract;

(h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.

Section 135 (1) is more or less an embodiment of the general principle of contract that a contract is formed the moment the offer is accepted and signing of a contract document is, no doubt, one of the means of expressing such acceptance. As far as the procurement process is concerned, the signing of the contract document would signfy the end of the procurement process.

It goes without saying that once a contract is made, parties are bound by its terms and failure by any of the parties to discharge its obligations under the contract will certainly expose such a party to the risk of payment of damages or other liabilities prescribed under the law or the contract itself.

It is also worth noting that the terms of the contract, among other things, not only regulate the manner the parties to the contract relate with each other but are also meant to ensure performance of the contract. Flowing from these terms will be obligations whose discharge may very well involve commitments to other third parties who may not necessarily be privy to the procurement contract but whose services are necessary for the performance of the contract. In the process, new obligations and rights are respectively assumed and vested. The discharge of the obligations and enforcement of the vested rights will have very little to do, if at all, with the procurement process and, for this very reason, will be outside the jurisdiction of the Public Procurement Review Board.

The point is this: fundamental questions beyond the procurement process will arise once a procurement contract is signed; while reference may be made to the Public Procurement and Asset Disposal Act in determination of such questions, more often than not, the court will look beyond the Public Procurement and Asset Act for the appropriate answers. This is an exercise that the Public Procurement Review Board will be ill-equipped to undertake. Of the many reasons that Parliament may have thought it fit to remove from the purview of the Public Procurement Review Board disputes arising after the procurement contract has been signed, it is my humble view that the inability of the Board to determine such questions is one of those reasons.

And speaking of questions, one need not look any further than the reason or reasons given by the respondent why it purportedly nullified the procurement contract. At page 28 of its decision, the respondent acknowledged that indeed a procurement contract between the procuring entity and the applicant had been signed but went further to question its validity; the question was framed as follows:

“Whether the contract with respect to the subject tender was signed in accordance with section 135 of the Act to divest the Board of its jurisdiction by dint of section 167 (4) (c) of the Act.”

In considering this question the respondent captured the parties’ submissions on this point as follows:

"The procuring entity simply objected to the jurisdiction of this Board to hear and determine the request for review on grounds that a contract between the procuring entity and the interested party had been signed in accordance with section 135 of the Act. On the other hand, the applicant opposed the objection to the jurisdiction of this Board by stating that the contract signed between the procuring entity and the interested party was invalid by virtue of section 87(3), 135 (3) and 176(1)(k) of the Act."

The respondent found for the applicant; it proceeded to entertain the dispute, and as its orders would show, it ultimately nullified the contract.

It could be that indeed the contract was invalid but, in my humble view, considering the provisions of section 167 (4) (c), once a contract has been signed, the appropriate forum before which the question of validity of a signed contract can be determined is this Honourable Court.

It does not necessarily follow that an aggrieved party is left without a remedy merely because a contract is signed. Grievances arising out of a signed contract will certainly be addressed but not before the Public Procurement Administrative Review Board. They will be addressed before the court which only has the jurisdiction to determine such disputes related to the alleged grievances.

I venture that such disputes may be lodged in this honourable court on all or any of the grounds of judicial review. Assuming, for instance, that the contract is signed before the elapse of the statutory period of fourteen days as it was alleged in the instant case, that contract may be quashed on the ground of illegality, for breach of section 135 (3) of the Public Procurement Act which prescribes the period in which a procurement contract must be signed or for procedural impropriety for ignoring the procedures which the procuring entity is enjoined to abide by before the contract is signed.

In these circumstances, the argument that the dispute ought to have been lodged before the Public Procurement Review Board will be rebuffed by section 167 (4) (c) which, as noted, bars the board from entertaining requests for review after a procurement contract has been signed.

The dispute may also be open as a commercial dispute as between the parties privy to the procurement contract. But whether a party aggrieved by the contract but to which it is not privy may sue to question the validity of the contract as a commercial dispute, is a question whose answer I cannot speculate; all I can say is that it is a question that the court before which it is presented for determination may find legitimate, calling for the court's attention.

I am persuaded that the respondent's decision is tainted at least on two grounds of judicial review; illegality and procedural impropriety. These grounds, together with the ground of irrationality were explained by Lord Diplock in the case of **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410.** The learned judge explained these grounds as follows:

"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so

outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

My assessment of the respondent's decision, is that the respondent misapprehended the import of section 167 (4) of the Act which deprived it of jurisdiction to determine a request for review that was filed after a procurement contract was signed. The respondent failed to give effect to this provision of the law.

The ground of procedural impropriety is viable because the applicant ought not to have been subjected to the proceedings before the respondent in the first place. Section 167 (4) does not contemplate any proceedings before the respondent after a procurement contract has been signed.

I am satisfied, for reasons I have given, the respondent did not have jurisdiction to dispose of the request for review. In the absence of the requisite jurisdiction, the proceedings in application No. 155 of 2021 were not more than a nullity. In the circumstances, I allow the applicant's application dated 22 January 2022 to the extent of prayer (a) only; for the avoidance of doubt, an order of certiorari is hereby issued quashing the decision of the Public Procurement Administrative Review Board in Review Application No. 155/2021 in regard to TENDER NO. KU/TNDR/S/015/PM/C/2021-2022 for provision of medical insurance cover services inpatient and outpatient cover.

With the quashing of the impugned decision, the *status quo ante* prevails and therefore I see no reason for granting the rest of the prayers. There shall be no order as to costs. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 8TH MARCH, 2022

NGAAH JAIRUS

JUDGE