REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 24 OF 2014

BETWEEN

CHINA WU YI CO. LTD .....APPLICANT

AND

THE KENYA PIPELINE
COMPANY LIMITED ..... PROCURING ENTITY

AND

ZAKHEM INTERNATIONAL
CONSTRUCTION LIMITED.....1ST INTERESTED PARTY

KALPATARU POWER
TRANSMISSION LIMITED .....2ND INTERESTED PARTY

CHINA PETROLEUM ENGINEERING
& CONSTRUCTIONCORPORATION.....3RD INTERESTED PARTY

BOARD MEMBERS PRESENT

Mr. Paul Gicheru	-	Chairman
Mrs. Rosemary Gituma	-	Member
Mr. Nelson Orgut	-	Member
Mr. Peter B. Ondieki, MBS	-	Member
Mrs. Gilda Odera	-	Member

IN ATTENDANCE

Mr. Philip Okumu- Secretariat

Ms. Shelmith Miano- Secretariat

PRESENT BY INVITATION

Applicant/Respondent ..... China Wu Yi Co. Ltd

Olive Rotich - Advocate

Interested Parties

1. Charles Kanjama - Advocate, Kalpataru Power/Applicant
2. Gathoni Kimani - Lawyer, Kalpataru Power/Applicant

This decision relates to an application dated 6th November, 2014 filed by the firm of M/s Muma Kanjama Advocates on 20th November, 2014 seeking to have the decision given by this Board on 3rd October, 2014 in which it dismissed the 2nd Interested Party's/the Applicant's bill of costs for want of prosecution set aside. The 2nd Interested party seeks by the same application that it's Party and Party bill of costs be reinstated for hearing. The application was supported by an affidavit sworn by Mr. Charles Kanjama advocate on 6th November, 2014.

The Applicant in the main Request for Review which was the Respondent in the application now before the Board did not file a Replying Affidavit and or grounds of opposition in opposition to the 2nd Interested Party's application but relied on the oral submissions made by it's advocate before

the Board when the application dated 6th November, 2014 came up for hearing.

In his arguments in support of the application, Mr. Kanjama while relying on his Supporting Affidavit submitted that the 2nd Interested party requested the Board to set down it's bill of costs for taxation by a letter dated 23rd September 2014 and that upon that Request, the Board set down the taxation of it's party and party bill of costs for taxation on 3rd October, 2014 at 12.00 noon in it's Boardroom situated on the 10th Floor of the National Bank Building situated along Harambee Avenue Nairobi.

Counsel for the 2nd Interested Party however submitted that he wrote to the Board a letter dated 24th September, 2014 indicating that the date given by the Board was not convenient to him since he was scheduled to travel out of the Country and that he would be out of the Country until the evening of 3rd October, 2014 and would not therefore be able to attend before the Board for the taxation of the party and party bill of costs.

Mr. Kanjama argued that no other advocate from his firm was able to appear before the Board on the appointed date since the advocate he had instructed to attend the Board was at the time engaged in another matter which was due for hearing at the High Court under Certificate of urgency at the time the taxation was due to proceed.

Counsel for the 2nd Interested Party submitted that he however later learnt from the Board that his client's party and party bill of costs had been

dismissed for non attendance. He stated that is after he learnt of this fact that he decided to make the application for setting aside the exparte taxation and for the reinstatement of his client's party and party Bill of Costs.

M/s Olive Rotich who appeared on behalf of the Respondent opposed the 2nd Interested Party's application and as earlier indicated, relied on her oral submissions in opposition thereto.

Counsel for the Respondent's first argument was that she had read through the provisions of the Public Procurement and Disposal Act (2005) and that there was no express provision in the said Act that empowers the Board to set aside an ex-parte order dismissing a party and party bill of costs or an interlocutory application. Counsel for the Respondent further submitted that once the Board had dismissed any matter under the Act, an aggrieved Party's only recourse was to apply for judicial Review or lodge an appeal under the Provisions of Section 100 of the Act, but not to apply to have the order of dismissal set aside.

Counsel for the Respondent additionally submitted that before dismissing the 2nd Interested Party's party and party bill of costs, the Board had taken into consideration the fact that the date on which the Bill of costs was fixed for taxation was taken by consent and that the Board was therefore right in dismissing the 2nd Interested party's party and party bill of costs ex-parte since counsel for the 2nd Interested party did not send a representative to appear and apply for an adjournment on behalf his behalf.

In a brief response to the Respondent's counsel's submissions, Counsel for the 2nd Interested Party argued that just like the court, the Board had an inherent jurisdiction to entertain any interlocutory application or applications in the course of or after giving a final decision in a Request for Review. The 2nd Interested Party argued that such power extended to entertaining any application arising from the ex-parte decisions made by the Board while entertaining an interlocutory matter such as the taxation of a party and party bill of costs.

Counsel for the 2nd Interested Party also relied on the provisions of Articles 10, 47, 50(1) and 159 (2)) of the Constitution and argued that while interpreting the provisions of the Public Procurement and Disposal Act (2005) the Board was bound by the Articles of the Constitution and that it ought to give an interpretation that would uphold the rights to a fair hearing which is reserved by the Constitution.

The Board has heard and considered the submissions made by advocates for both parties on the application dated 6th November, 2014 and on the issue of jurisdiction, the Board agrees with the submissions made by Counsel for the Respondent on the limits of the Board's powers under the Provisions of Section 100 but only to the extent that where the decision made by the Board is a final decision on a substantive Request for Review under Section 98 of the Act. Such a decision is final and binding on the parties in the absence of any challenge by way of judicial Review or an appeal to the High Court under the provisions of Section 100 of the Act.

The Board however finds that several interlocutory matters do arise in the course of the hearing or after the hearing and delivery of a final decision on a Request for Review which are either expressly provided for in the rules or which though not expressly provided for, call for intervention through the exercise of the Board's power to regulate it's proceedings for the purposes of affording the parties a fair hearing.

Some of the instances when the Board has been called upon to exercise it's inherent power as a quasi judicial body during the hearing of a matter pending before it is in determining whether or not to grant an application for adjournment, whether or not to allow the filling of additional documents before or in the course of hearing a Request for Review, whether or not to grant an application for amendment among other instances. This Board held in the case of **Premier Medical Corporation Limited -vs- The Procurement and Supply Chain Management Consortioum (PPRB APPL. NO. 10 of 2010)** that while there was no express provision allowing it to grant an application for amendment under the provisions of the Act and the Regulations, the Board nonetheless could and did invoke the provisions of Section 98 of the Act to grant an application for amendment of a Request for Review.

The Board also accepts the 2nd Interested Party's submission that it is bound to take into account and uphold the values set out in the Constitution while interpreting the Provisions of the Act.

This obligation is set out in among other Articles in Articles 10 and 159 (1) of the Constitution of Kenya (2010) which provide that judicial authority is derived from the people and vests in and shall be exercised by the Courts and tribunals established by or under this Constitution.

The Law governing Public Procurement including the creation of the Board is derived from Article 227 of the Constitution of Kenya (2010)and the Board finds that it is therefore bound by the principles set out in Article 159 (2) of the Constitution.

Articles 47, 50 and 159 (2) of the Constitution preserve the right to a fair hearing, fair administrative action and an expeditious hearing without undue regard to technicalities.

Having found that the Board has jurisdiction to consider whether to set aside an exparte dismissal order, the Board wishes to observe that it is now established in law that a decision whether to set aside an exparte order is a discretionary one and should be exercised judiciously. The Board further notes that whereas Counsel for the 2nd Interested Party swore a ten (10) paragraph affidavit to explain why he did not appear before the Board on the appointed date and time, the Respondent did not file any affidavit to rebut the reasons or produce any evidence to rebutt what the 2nd Interested Party who is also an advocate of the High Court and whose client had an order of costs made in it's favour was not true. Such a scenario would be unexpected in the ordinary course of events. Such an advocate cannot deliberately absent himself from the Board and therefore stand the danger

of forfeiting an order of costs made in his client's favour or deliberately let such an order be discharged.

On the issue of the length of the delay, the Board finds that based on the correspondences placed before it, Counsel for the Applicant became aware of the dismissal of his client's bill of costs when the Board informed him of this fact.

He explained that he prepared the application for setting aside on 6th November, 2014 but could not file it with the Board since the clerk he found at the Board's offices on the 10th Floor of the National Bank Building informed him that he had to seek directions from the Board before the filling of the application and that the Board was at the time holding a retreat/seminar in Mombasa. This version of the 2nd Interested Party's evidence was not contested by the Respondent.

The Board finds that in any event, a period of one month or so between the time the Applicant through it's Counsel became aware of the exparte dismissal of it's bill of costs and the date when it filed the present application cannot be described as being so inordinate as to deprive the 2nd Interested Party the right to be heard on it's bill of costs.

The Board is finally mindful of the fact that all the circumstances giving rise to the dismissal of the 2nd Interested Party's party and party bill of costs were attributable not to the 2nd Interested Party but to it's Counsel.

The Board is therefore hesitant to punish a litigant for a mistake or perceived mistakes leading to a default attributable to it's advocate.

In the premises and in order to afford all the parties a fair opportunity to fully ventilate the issues herein on merits, the Board makes the following orders on the application dated 6th November, 2014.

a) **That the order given by the Board on 3rd October, 2014 dismissing the Applicant's party and party bill of costs for want of prosecution be and is hereby set aside.**

b) **The 2nd Interested Party's Bill of Costs be and is herby reinstated for hearing and determination on the merits on a date to be fixed by the Board's secretariat on priority basis.**

c) **That each party shall bear it's costs of the application dated 6th November, 2014.**

Dated at Nairobi this 18th December, 2014.

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CHAIRMAN

PPARB

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SECRETARY

PPARB