



Republic v Public Procurement Administrative Review Board & another; Iansoft Technologies Limited (Interested Party); Green Com Enterprise Solutions Limited (Exparte) (Application E148 of 2024) [2024] KEHC 10081 (KLR) (Civ) (13 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

APPLICATION E148 OF 2024

J NGAAH, J

AUGUST 13, 2024

BETWEEN

REPUBLIC APPLICANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST
RESPONDENT**

**ACCOUNTING OFFICER NUCLEAR POWER AND ENERGY ACTION
(NUPEA) 2ND RESPONDENT**

AND

IANSOFT TECHNOLOGIES LIMITED INTERESTED PARTY

AND

GREEN COM ENTERPRISE SOLUTIONS LIMITED EXPARTE

JUDGMENT

1. The applicant’s application is a motion dated 24 June 2024 expressed to be brought under Articles 10, 21, 22,23, 47, 48, 201 & 227 of *the Constitution*; Sections 8 (2) & (4) and 9 of the *Law Reform Act*, cap. 26; Sections 7 (1), (2) & 9(1) of the *Fair Administrative Action Act* No. 4 of 2015 and Section 175 (1) of the *Public Procurement and Asset Disposal Act*, 2015. The applicant seeks the following orders:

- “1. An Order of Certiorari removing to this Honourable Court for purposes of quashing in its entirety, the decision of the Public Procurement Administrative Review Board’s issued on 21st June 2024 in PPARB



Application Number No. 49 OF 2024 Iansoft Technologies Limited –Versus-
Accounting Officer, Nuclear Power and Energy Agency (Nupea) & Green
Com Enterprise Solutions Limited.

2. An Order of Prohibition restraining the 2nd Respondent from undertaking any further steps in the procurement process in respect of the subject tender until hearing and determination of the review herein.
 3. A declaration that the Applicant’s tender met the evaluation criterion under Clause 1 A (i) of the Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document.
 4. An Order of Mandamus compelling the 2nd Respondent to issue the Applicant with a letter of notification of intention to enter into a contract pursuant to Section 87 of the Public Procurement and Asset Disposal Act, 2015 with respect to Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System.
 5. An Order of Mandamus compelling the 2nd Respondent to enter into a procurement contract with the Applicant in terms of Section 135 of the Public Procurement and Asset Disposal Act, 2015 with respect to Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System.
 6. Any other appropriate relief which the Honourable Court deems fit and just in the circumstances.
 7. The costs of this Application be provided for.”
2. The application is based on a statutory statement dated 24 June 2024 and an affidavit sworn on even date by Mr. Mutisya Mwanthi verifying the facts relied upon. According to these documents, on 30 January 2024, Nuclear Power and Energy Agency (which I shall henceforth refer to as “the procuring entity”) floated a tender, more particularly described as “Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System”.
 3. The applicant submitted its documents bidding for the tender at a tender price of Kshs. 98,583,001.00. By a letter of Notification of Intention to Award dated 2 April 2024, the 2nd Respondent notified the applicant that it had emerged as the successful bidder in the subject tender. However, the Interested Party (which I will also hereinafter refer to simply as “Iansoft”) lodged a Request for Review before the respondent, being application no. 34 of 2024 seeking, inter alia, for nullification of the letter of award, re-evaluation of its bid document and, in the alternative, for the entire evaluation process to be terminated and started afresh.
 4. In its decision delivered on 6 May 2024, the 1st respondent allowed the request for review and ordered, inter alia, that the notification letters to both the successful and unsuccessful bidders dated 2 April 2024 be set aside and nullified and the Interested Party’s tender to be admitted for evaluation at the Technical Evaluation stage. The 1st respondent also ordered a fresh evaluation of the rest of the tenders that had progressed for evaluation at the Technical Evaluation stage. But even after the second evaluation, the



applicant still emerged as the successful tenderer and was, therefore, issued with a letter of Notification of Intention to Award dated 17 May 2024.

5. For a second time, the interested party disputed the procuring entity's decision and requested for its review in application no. 49 of 2024 before the respondent. The applicant opposed the application. However, like in its decision in application no. 34 of 2024, the 1st respondent, once again, allowed the interested party's request for review and, amongst other orders, set aside or nullified the Letter of Notification of Intention to Award the subject tender to the applicant dated 17 May 2024. In the same vein, the 1st respondent set aside letters of regret dated 17 May 2024 issued to the interested party and other unsuccessful bidders. The 1st respondent also ordered the 2nd respondent to reconvene the evaluation committee for a second time for purposes of re-evaluating all tenders that had progressed for evaluation at the Technical Evaluation stage, including the interested party's tender. The Evaluation Committee was also ordered to conduct due diligence on bidder's completion certificates submitted in response to Clause 1A of Tender Firm Capacity of Section III– Evaluation and Qualification Criteria at page 28 of the Tender Document. The applicant contends that this was not an evaluation criteria in the tender document.
6. It is the applicant's case that 1st respondent committed errors of law in finding that the applicant's contract with a company called Abted Company Limited dated 2 January 2020 and accompanying completion certificate dated 25 March 2023 for the period 2 January 2020 to 4 January 2022 failed to meet the evaluation criterion due to a discrepancy of dates between the period stipulated in the contract and the completion certificate. The discrepancy, according to the 1st respondent, was that while the contract was an annual subscription service contract for a period of three years from 2 January 2020, the completion certificate indicated the period of the contract as two years from 2 January 2020 to 4 January 2022. According to the applicant, this was not an issue raised in the Request for Review and, therefore, the applicant did not have an opportunity to respond to it. Accordingly, its right to be heard and a fair administrative action was violated.
7. A document filed on the Judicial Review Division's Case Tracking System portal by the 1st respondent, apparently in response to the applicant's application could neither be opened nor downloaded. I will therefore proceed on the assumption that the 1st respondent did not file a response to the application.
8. On its part, the interested party filed a replying affidavit and a preliminary objection. The preliminary objection is based on the grounds that this Honourable Court lacks jurisdiction to hear and determine the application and that the affidavit verifying the facts relied upon is contrary to Rule 9 of the Oaths and Statutory Declarations Rules for the reason that the exhibits annexed to the affidavit verifying the facts relied upon are not marked.
9. The replying affidavit is sworn by Mr. Geoffrey Rono who has sworn that he is a director of the interested party. The interested party admits having filed the request for review no. 49 of 2024 before the 1st respondent and has largely supported the 1st respondent's impugned decision.
10. In the written submissions filed on behalf of the applicant, it has been urged that the 1st respondent's decision is illegal because the 1st respondent is said to have usurped the mandate of the Evaluation Committee and evaluated the applicant's tender. In the process, the respondent is said to have substituted its findings with those of the Evaluation Committee.
11. It is urged that although the 1st respondent noted in its decision that the interested party had admitted that it had not submitted four completion certificates as required under Clause 1A (i) of Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document



- the respondent erred in law when it failed to declare the interested party's tender non-responsive but, instead, ordered that it be evaluated afresh at the Technical Evaluation stage.
12. The respondent is also said to have acted beyond the scope of its jurisdiction as defined by Section 46 of the *Public Procurement and Asset Disposal Act* by determining the aspect of compliance at the Technical Evaluation stage of both the applicant's and interested party's bid documents while excluding other bidders who had progressed to this stage and, further, by ordering for due diligence to be carried out to scrutinise bidder's completion certificates.
 13. The applicant relied on this Honourable Court's decision in Republic v Public Procurement Administrative Review Board & another; Managing Director, Ruiru- Juja Water and Sewerage Company Ltd & another (Exparte) (Miscellaneous Civil Application E130 of 2022) [2022] KEHC 16432 (KLR) (Judicial Review) (15 December 2022) (Judgment), for the argument that although the respondent has immense powers under section 173 of the Act, it has to give a party an opportunity to be heard on an issue that it raises suo moto and which affects that particular party.
 14. On the question whether the respondent could substitute its decision for that of the procuring entity's evaluation committee, the applicant relied on Republic v Public Procurement Administrative Review Board & 2 others Masinde Muliro University of Science and Technology (2016) eKLR, where it was held that it could not.
 15. The applicant relied on JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 Others (2015) eKLR and Anismic v Foreign Compensation Commission (1969) 2 A.C 147 for the argument that the 1st respondent could not act beyond the scope of its jurisdiction.
 16. On the ground of irrationality, it was urged that the respondent's order to the effect that all bidders who had progressed to the Technical Evaluation stage be subjected to a fresh evaluation was irrational as none of the other bidders had objected to the reasons issued for their disqualification except the interested party who had, in any event, admitted having failed to comply with the requirements for firm experience under Clause 1A (i) of Tender Firm Capacity of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document.
 17. In support of its argument, the applicant relied on Zachariah Wagunza & Another versus Office of the Registrar Academic Kenyatta University & 2 Others (2013) eKLR, where it was held that while exercising statutory powers, the decision maker must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. According to that decision, this Court would check administrative bodies against any excesses and restrain abuse of powers.
 18. As far as the ground of procedural impropriety is concerned, it was urged that the 1st respondent introduced its own case against the applicant to defeat the award made by the procuring entity. The applicant has also urged that the respondent acted contrary to the applicant's legitimate expectation that it would give effect to the principles of natural justice and the principles of public procurement as stipulated under *the Constitution* and the *Public Procurement and Asset Disposal Act*.
 19. On its part the respondent submitted that Judicial Review is more concerned with the manner in which a decision is made than with the merits of the ultimate decision and that as long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. For this argument, the respondent relied on Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalj (the full citation of the case was not given). The applicant's application is said to be an appeal and not an application for judicial review.



20. In defending the 1st respondent's decision, it was urged that the 1st respondent acted within the confines of *the Constitution*, the *Public Procurement and Asset Disposal Act* and the Regulations made thereunder, the Fair Administrative Actions Act and the rule of law in its findings in Request for Review No. 49 of 2024. The decision is said to have been reasonable, rational and lawful and within the scope of the 1st respondent's jurisdiction. The interested party urged that since the exhibits on the affidavit of Mr. Mwanthi were not sealed by a commissioner of oaths, the applicant's application is thereby defective. As earlier noted, the interested party relied on rule 9 of the Oaths and Statutory Declaration Rules for this argument.
21. In further support of interested party's argument on the incompetence of the applicant's application as a result of the defect of the verifying affidavit, the 1st interested party cited the decision in *Okello v Kairu Enterprises Limited (Environment and Land Case Civil Suit 617 of 2005)* (2023) KEELC 20225 (KLR) where an application was dismissed because the seal of the commissioner for oaths and his signature were not properly secured on the exhibits in the affidavit. On the same lines, the interested party cited the cases of Solomon Omwega Omache & another versus Zachary O Ayieko & 2 others (2016) eKLR and Abraham Mwangi vs. S. O. Omboo & Others HCCC No. 1511 of 2002.
22. According to the interested party, though the requirement of the sealing and signing of the exhibits is a procedural requirement, it cannot be dismissed as a procedural technicality and in this regard, the interested party relied on *Zaheer Jhanda & another v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR where the Supreme Court held that Article 159 (2)(d) of *the Constitution* means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice and that this article was never meant to oust the obligation of litigants to comply with procedural imperatives.
23. The rest of the interested party's submissions are in defence of the 1st respondent's decision and it has, in particular, urged that in reaching its decision, the 1st respondent considered sections 28, 80(1) and (2) of the *Public Procurement and Asset Disposal Act* together with the parties' pleadings, documents, including confidential documents submitted by the procuring entity, and both written and oral submissions by the respective parties. In summary, the 1st interested party urged that the applicant had not proved that the 1st respondent's decision is tainted by illegality, irrationality or procedural impropriety. There is also no proof that the applicant's legitimate expectations have been curtailed.
24. In determining this application, I must start, as I should, by considering the preliminary objection which, as noted, arises from failure by the applicant to have the exhibits on the affidavit verifying the facts relied upon signed and sealed. The requirement for the sealing of the exhibits is prescribed by rule 9 of the Oaths and Statutory Declarations Rules. This rule reads as follows:
9. All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.
- The rules have been made by the Chief Justice in discharge of the Chief's Justice's obligation to make such rules under section 6 of the *Oaths and Statutory Declarations Act*, cap. 15.
25. The exhibits in contention have been captured in paragraphs 11 and 13 of the affidavit of Mr. Mwanthi where he has sworn in part as follows:
11. That in response to the Request for Review Application No. 49 of 2024, the Applicant filed on 10th June 2024 Replying Affidavit in response to the Request for Review Application No. 49 of 2024 and urged the Review Board to find, inter alia, that... (Annexed hereto and



marked “GMM-01” is a copy of the Tender Document, the Interested Party’s Request for Review Application No. 49 of 2024, the 2nd Respondent’s response filed on 5th June 2024, the Applicant’s response filed on 10th June 2024 in Request for Review Application No. 49 of 2024, and the Interested Party’s Supplementary Affidavit and Written Submissions filed on 12th June 2024.)

13. That on 21st June 2024, the Review Board delivered its decision in the Request for Review Application No. 49 of 2024 with respect to Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System wherein it set aside and/or nullified the Letter of Notification of Intention to Award the subject tender to the Applicant dated 17th May 2024 while also setting aside letters of regret dated 17th May 2024 issued to the Interested Party and other unsuccessful bidders. (Annexed hereto and marked “GMM-01” is a copy of the Review Board’s Decision dated 21st June 2024).
26. The evidence which the applicant has referred to in these paragraphs are either documents or pleadings that are not in dispute and to which all the parties, including the interested party, have made reference to. As a matter of fact, the interested party is the author of some of these documents. Take, for instance, the request for review in application no. 49 of 2024, the supplementary affidavit and written submissions by the interested party are all interested party’s documents. In its affidavit, the interested party has extensively made reference to the tender document and the decision of the 1st respondent which, of course, is the subject of these proceedings.
27. In these circumstances, where the evidence complained of is not in dispute or is in possession of the complaining party, in this case, the interested party, I would be hesitant in insisting on rigid application of the rule 9 of the Oaths and Statutory Declarations Rules. In my humble view, and in the circumstances peculiar to this case, failure to seal each of the exhibits on the applicant’s affidavit is an infraction which can properly be described as a procedural technicality which does not go to the root of the applicant’s case and which, for that reason, is subject to Article 159 (2) (d) of *the Constitution* that enjoins courts to administer justice without undue regard to procedural technicalities. In holding as I do, it is not out of lack of deference to those authorities cited by the interested party where applications or suits have been dismissed or struck out for want of compliance with rule 9 of the Oaths and Statutory Declarations Rules but to emphasise the point that each case will depend on its own peculiar circumstances.
28. In the event I am wrong, the applicant’s application would still have not failed because when the interested party raised the issue of compliance with rule 9 of the Oaths and Statutory Declaration Rules, the applicant moved fast to ameliorate the damage that would have been occasioned to its application by filing a supplementary affidavit to which the exhibits in issue, sealed and signed in accordance with rule 9, were attached.
29. I would not say, as suggested by the interested party, that by filing a supplementary affidavit, the applicant sought to steal a match, so to speak, from the interested party. I would have been persuaded by the interested party’s argument if it could be demonstrated that the interested party has suffered some prejudice as a result of the applicant’s belated compliance with rule 9.
30. My point is this: depending on the circumstances peculiar to a particular case, where each or any of the exhibits on a deponent’s affidavit are not sealed and signed in accordance with rule 9 of the Oaths and Statutory Declarations Rules, the court would serve substantive justice, not by striking out the affidavit to which these annexures are purportedly exhibited but by according the deponent an opportunity to file a further or supplementary affidavit only for the purpose of complying with rule 9. Procedural



rules, as it is were, are hand maids of justice and courts must, as much as possible, avoid sacrificing justice at the altar of strict adherence to the rules. For these reasons, I do not find any substance in the interested party's preliminary objection. It is hereby overruled.

31. Turning back to the substance of the applicant's application, the facts leading to the 1st respondent's decision are not contested. It is not in dispute that the procuring entity floated a tender for an assortment of services to what has been described in the tender as "Enterprise Resource Planning System". The tender was more particularly described as "Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System."
32. From what I gather in the 1st respondent's impugned decision, fifteen tenderers submitted their bids. At the conclusion of the preliminary, mandatory evaluation stage, twelve tenders, including the interested party's tender, were disqualified. Of the three that proceeded to the technical evaluation stage, only the applicant qualified. The other two unnamed tenderers did not make it to the final financial evaluation stage.
33. The applicant, which was the only tenderer that reached the financial evaluation stage was found to have met the financial requirements and, therefore, was recommended for the award of the subject tender at the tender price of Kshs. 98,583,001/=. The interested party contested the award and filed a review application no. 34 of 2024. It prayed for, among other things:
 - "d) The Applicant's tender be re-evaluated from the Preliminary/Mandatory stage;
 - e) The Evaluation Committee be reconstituted with members that are heads of department and that have requisite technical expertise;
 - f) In the alternative to a) to d) above, the entire evaluation process be and is hereby cancelled and/ or terminated and thereafter restarted with a newly constituted Evaluation Committee."
34. The request for review was successful for, by the 1st respondent's decision dated 6 May 2024, the 1st respondent allowed the application and ordered, inter alia, that:
 - "d) The Respondent is hereby ordered to admit the Applicant's tender for evaluation at the Technical Evaluation stage and direct the Evaluation Committee to evaluate the Applicant's tender together with all other tenders that progressed for evaluation at the Technical Evaluation stage taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, *the Constitution*, the Act and Regulations 2020."
35. So, a fresh evaluation was conducted as ordered by the 1st respondent and, at the end of the evaluation exercise, the applicant still emerged the winner and recommended for the award of the tender.
36. The interested party was still not satisfied with the results and, therefore, filed a second request for review being application no. 49 of 2024, before the 1st respondent, seeking to impeach the procuring entity's decision. The 1st respondent was again satisfied that the interested party's application was



merited and, therefore, allowed it. In allowing the application the 1st respondent made the following orders:

- a) The letter of Notification of intention to Award dated 17 May 2024 issued by the Respondent to the Interested Party with respect to Tender No. NuPEA/OT/D CT/ 004/ 23-24 for Supply, Delivery, Customisation on, installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System be and is hereby nullified and set aside.
- b) The letters of Notification of intention to Award dated 17th May 2024 issued by the Respondent to the Applicant and all unsuccessful tenderers with respect to Tender No. NuPEA/OT/D CT/004/23-24 for Supply, Delivery, Customisation, installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System be and are hereby nullified and set aside.
- c) The Respondent is hereby ordered to reconvene the Evaluation Committee for purposes of re-evaluating all tenders that qualified and progressed for evaluation at the Technical Evaluation stage and to order the Evaluation Committee to conduct scrutiny on the authenticity of all the bidder's completion certificates submitted in response to Clause 1A of Tender Firm Capacity of Section I- Evaluation and Qualification Criteria at page 28 of the Tender Document taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, *the Constitution*, the Act and Regulations 2020.
- d) Further to Order c) above, the Evaluation Committee is hereby ordered to ensure that it conducts due diligence in accordance with the provisions of Section 80 as read together with section 83 of the Act.
- e) The Respondent is hereby ordered to ensure that the procurement process with respect to Tender No. NuPEA/OT/D CT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System proceeds to its lawful and logical conclusion within thirty (30) days from the date of this decision.
- f) A copy of this decision be served upon the Director General of the Public Procurement Regulatory Authority and the Respondent is hereby ordered to furnish a report on the progress of the evaluation of the subject tender upon the Office of the Director General of the Authority on compliance with the orders issued herein within twenty-one (21) days from the date of this decision.
- g) In view of the Board's findings and orders above, each party shall bear its own costs in the Request for Review.

37. This time round, rather than submit itself to a second evaluation, the applicant opted to exercise its right under section 175 (1) of the *Public Procurement and Asset Disposal Act* and challenge the respondent's decision by way of the instant application. Section 175 (1) of the Act reads as follows:

175. Right to judicial review to procurement



- (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

According to subsection (3) of Section 175, the application ought to be determined within 45 days of the date the application is made or filed and, therefore, having been filed on 5 July 2024, the 45th day by which a decision ought to have been rendered on the instant motion is 19 August 2024.

38. Looking at the applicant's statutory statement, the grounds for which judicial review reliefs are sought are irrationality, illegality and procedural impropriety. The applicant has also pleaded the ground of legitimate expectation which, as far as I understand the applicant, arises as a result of all or any of the first three traditional grounds of judicial review. This is not surprising because these grounds are not necessarily exclusive; the facts out of which the ground of irrationality, for instance, arises may also be the basis of any of the other grounds for judicial review. The impugned decision has to be weighed against these grounds.
39. Speaking of irrationality, my attention has been drawn to order (c) of the respondent's "final orders". I have reproduced all the orders as captured in the respondent's decision but for emphasis sake I, once again, quote here this particular order in view of its centrality to my judgment; it reads follows:

"c) The Respondent is hereby ordered to reconvene the Evaluation Committee for purposes of re-evaluating all tenders that qualified and progressed for evaluation at the Technical Evaluation stage and to order the Evaluation Committee to conduct scrutiny on the authenticity of all the bidder's completion certificates submitted in response to Clause 1A of Tender Firm Capacity of Sect on I- Evaluation and Qualification Criteria at page 28 of the Tender Document taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, *the Constitution*, the Act and Regulations 2020."

40. The uncontroverted evidence as captured in the respondent's decision is to the effect that, following its order made in request for review no. 34 of 2024, four tenderers met the cut to the technical evaluation stage. This is clear in paragraph 24 of the respondent's decision where the respondent noted as follows:

"24. Pursuant to the Board's orders of 6th May 2024, the Applicant's tender was admitted for evaluation at the Technical Evaluation stage together with three (3) other tenders that progressed for evaluation at the Technical Evaluation stage as evidenced by an Evaluation Report dated 14th May 2024."

41. The applicant referred to in this passage is, of course, the interested party in the instant applicant. So, the tenderers that made it to technical evaluation stage were Iansoft Technologies Limited, Greencom Enterprise Solutions Limited and two other tenders whose identity is not apparent in paragraph 24 of the respondent's decision.
42. Of the four tenders, only one tender met the test at this stage and, therefore, qualified for financial evaluation stage. The tenderer that qualified was Green Com Enterprise Solutions Limited, which is



the applicant in this application but was named as the interested party in the request for review. This evidence is captured in paragraph 27 of the respondent's decision; it reads as follows:

“27. At the end of evaluation at this stage, the three (3) tenders were determined non-responsive including the Applicant's tender while one (1) tender, being the interested Party's tender was invited for a demo presentation on 13th May 2024 and was thereafter determined to be responsive and proceeded for further evaluation at the Financial Evaluation stage.”

43. As noted, Iansoft Technologies Limited, disputed its disqualification at this stage. Part of its arguments against the disqualification, at the hearing of its request for review, are captured in the respondent's decision as follows:

“52. On the issue of evaluation of the Applicant's bid, Mr. Muge submitted that the Applicant's bid was rejected purportedly on a no/yes criteria for failing to have the requisite firm experience. Counsel requested the Board to note that the Applicant had complied with all mandatory provisions and that the subsequent rejection was based on insufficient reasons at the Technical Evaluation stage.

55. Counsel submitted that the reason for disqualification of the Applicant in the subject tender was pegged on those two completion certificates with an intention to cause the public to lose 10 Million Shillings due to an insufficient reason for disqualification. He further submitted that the Respondent's decision was contrary to the provisions of Section 79 and 80 of the Act since the Respondent refused to objectively evaluate the Applicant's bid noting that the Applicant had provided extensive proof of firm experience and that the completion certificates were just but supporting documents.”

44. In the course of submissions by Iansoft's learned counsel, the respondent sought some clarifications from him. Some of the responses from the learned counsel were as follows:

“87. When asked to expound on whether or not the Applicant was aware of what they were subjecting themselves to, counsel submitted that the Applicant was aware of the documents that they were required to provide but were not aware that the evaluation criteria was on a yes/no basis instead of scale based.

89. When asked by the Board to clarify whether the Applicant admits that there was a criteria requiring for four (4) completion certificates of projects previously handled, counsel answered in the affirmative. When asked if the Applicant actually submitted the four (4) completion certificates, counsel submitted that the Applicant only provided two (2) certificates.”

45. The respondent then made its findings on Iansoft's case. Part of the findings are captured in the respondent's decision as follows:

“123. Turning to the circumstances in the instant Request for Review, it is not in contest that the Applicant was aware of the contents and provisions of the Tender Document of the subject tender advertised on 30th January 2024 and scheduled to close on 22nd February 2024 since it chose to participate on 21st February 2024 in the tendering process. It was only after its tender



was found non responsive that it opted to challenge, inter alia, the evaluation criterion of a Yes/No basis provided under the Technical Evaluation stage of the Tender Document as being arbitrary and an unwarranted deviation from the Authority's Standard Tender Document for Procurement of Information Technology issued on 22nd April 2021 and updated on 21st April 2022 which procuring entities are obligated to use.

124. In our considered view, this objection by the Applicant ought to have been raised by virtue of Regulation 203(2)(c)(i) of Regulations 2020 since the occurrence of the alleged breach of duty by the Respondent complained of took place on 30th January 2024 when the subject tender was advertised and way before the subject tender closed on 22nd February 2024 and an award made in the subject tender. We are not convinced by the Applicant's argument that despite being aware of all the requirements stipulated in the Tender Document it was not aware that the evaluation criteria was on a Yes/No basis instead of a scale based as it was expected to take note of all the contents of the Tender Document prior to committing to participate in the subject tender.

128. However, the Applicant opted to raise the aforesaid allegations in the instant Request for Review filed on 31st May 2024 which was the 101day from the date it was assumed to have received the Tender Document at the latest. Even if the Applicant had raised these allegations in Request for Review No. 34 of 2024 filed on 15th April 2024, the same would have been the 56th day from the date it was assumed to have received the Tender Document at the latest. As such, the aforesaid allegations by the Applicant are time barred and contrary to Section 167(1) of the Act read with Regulation 203 (2)(c)(i) of regulations 2020 in so far as the Applicant became aware of the alleged breach of duty complained of with respect to the provisions of the Tender Document in the subject tender.”

46. Several conclusions pivotal to the determination whether the respondent's decision is tainted by irrationality can be made from the foregoing paragraphs. First, it is apparent Iansoft questioned the criteria for evaluation at the technical evaluation stage. This argument against the procuring entity's decision was dismissed by the respondent because it ought to have been raised in request for review no. 34 of 2024 and, in any event, it was time-barred.

47. Second, the questioning of the criteria against which the Iansoft's tender was disqualified was provoked by the very fact of disqualification. In other words, Iansoft simply did not meet the criteria and as the submissions by its learned counsel would show, it was not in dispute that Iansoft did not meet the criteria at the technical evaluation stage.

48. In paragraphs 87 and 88 of the 1st respondent's decision which I have reproduced verbatim in this judgment, Iansoft admitted that it was not aware that the evaluation criteria was on a yes/no basis. It thought it was scale based and even went further and suggested what it would have been awarded if the evaluation was on scale basis. Again, Iansoft was not only aware of the other limb of qualification which was production of completion certificate but also, it did not produce these certificates. Paragraph 89 of the 1st respondent decision explains this better and is thus worth reproducing here again:

“When asked by the Board to clarify whether the Applicant admits that there was a criteria requiring for four (4) completion certificates of projects previously handled, counsel



answered in the affirmative. When asked if the Applicant actually submitted the four (4) completion certificates, counsel submitted that the Applicant only provided two (2) certificates.”

49. Another conclusion that can be made from the forgoing paragraphs of the respondent’s decision is that the other tenderers who made it to the technical evaluation stage but were disqualified at that stage of the procurement process did not question their disqualification and, therefore, were prepared to live with the procuring entity’s decision.

50. Finally, the respondent was itself satisfied that the evaluation was satisfactory and, in any event in accordance with its orders in request for review no. 34 of 2024 and nowhere is this clearer than in paragraph 139 of its decision where it noted as follows:

“ 139. As such, the Board finds that the Procuring Entity complied with the Board’s orders issued on 6th May 2024 in Request for Review No. 34 of 2024.”

51. For the avoidance of doubt, one of orders which the respondent made in request for review no. 34 of 2024 was for the procuring entity to conduct the evaluation process in accordance with the Constitution and the Public Procurement and Asset Disposal Act; it is captured at paragraphs 22 of its decision as follows:

“ d) The Respondent is hereby ordered to admit the Applicant’s tender for evaluation at the Technical Evaluation stage and direct the Evaluation Committee to evaluate the Applicant’s tender together with all other tenders that progressed for evaluation at the Technical Evaluation stage taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, the Constitution, the Act and Regulations 2020.”

52. No doubt, this is one of the orders that the procuring entity is presumed to have complied with when the respondent found as a fact and stated so in unambiguous terms that “the procuring entity complied with the Board’s orders issued on 6th May 2024 in Request for Review No. 34 of 2024”.

53. What all these boil down to is this: first, if the respondent was satisfied with the procuring entity’s decision that Iansoft’s tender was wanting at the technical evaluation stage coupled with the fact that the rest of the tenderers who were disqualified at technical evaluation stage were satisfied with the procuring entity’s decision, it would be unreasonable to subject them to a fresh technical evaluation. If Iansoft and the two other tenderers did not meet the criteria at the technical evaluation stage, nothing will change regardless of the number of times they are subjected to same evaluation. It is even more irrational to subject the tenderers who are otherwise contended with the procuring entity’s decision disqualifying them to a fresh evaluation, more so when they have not called for it.

54. Secondly, having found that the procuring entity complied with its orders in request for review no. 34 of 2024 including, the order to undertake a fresh evaluation at the technical evaluation stage in compliance with the tender document, the Constitution, the Public Procurement and Asset Disposal Act and the regulations made thereunder, it would be unreasonable to subject the tender to a fresh evaluation.

55. In these circumstances, the respondent’s decision would fall on the ground of irrationality. This ground, amongst other grounds of judicial review, was defined in Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410 where Lord Diplock explained it as applying



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”.

56. For the reasons I have given, the respondent’s order to subject tenders that have otherwise failed the technical evaluation criteria to the same evaluation or without any complaint from the tenderers whose tenders were disqualified, fits the description of an irrational decision as defined by Lord Diplock. It is an outrageous decision. It defies logic. And no sensible person applying his mind to the question in issue would have reached the same decision. To that extent, the decision is tainted and, therefore, not tenable on the ground of unreasonableness or irrationality.

57. Turning to Order (d) of the respondent’s “final orders”, it is outrightly illegal. This order reads as follows:

“d) Further to Order c) above, the Evaluation Committee is hereby ordered to ensure that it conducts due diligence in accordance with the provisions of Section 80 as read together with section 83 of the Act.”

58. Section 83 (1) of the *Public Procurement and Asset Disposal Act* leaves it to the discretion of a procuring entity to undertake a due diligence exercise yet the tenor of the respondent’s order is that it is a mandatory step which the procuring entity overlooked. This section reads as follows:

83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act. (Emphasis added).

59. In view of such an explicit proclamation of the procuring entity’s discretion to conduct a due diligence, there is absolutely no legal basis upon which the respondent can purport to order the procuring entity to undertake this exercise unless, of course, the discretion is exercised at whim or capriciously. There is no suggestion that the procuring entity’s exercise of discretion not to conduct due diligence was tainted in this manner or at all and, therefore, to the extent that the respondent ordered it to undertake due diligence or exercise its discretion in a particular manner, the respondent’s order is not only ultra vires section 83 of the *Public Procurement and Asset Disposal Act*, but it is also beyond powers with which the respondent is clothed under section 173 of the Public Procurement and Asset Disposal Ac. This latter section reads as follows:

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;



- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- (e) order termination of the procurement process and commencement of a new procurement process.

60. No doubt, the respondent's powers under this provision of the law are wide but in exercising them and, in particular, in giving directions to the accounting officer of a procuring entity to do or not to do anything in the procuring proceedings, for instance, the respondent is enjoined to give due regard to other provisions in the Act that are consequential to or have a bearing on such directions.
61. The ground of illegality has been explained by Lord Diplock in *Council of Civil Service Unions versus Minister for the Civil Service* (supra) to mean "that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it."
62. Considering that the respondent's order to the procuring entity to conduct due diligence is contrary to the express provisions of section 83 of the *Public Procurement and Asset Disposal Act* and beyond its powers under section 173 of the Act, I am persuaded that the respondent misapprehended the law that regulates its decision-making power and did not give effect to it. Its decision would, therefore, fail on the ground of illegality.
63. Besides being tainted by the grounds of illegality and irrationality, the respondent's decision is also tinged with procedural impropriety. At paragraph 160 of its decision, the respondent found that the interested party's (the applicant in this application) bid failed to comply with Clause 1 A (i) of the tender document. Apparently, this requirement enjoined the tenderers to produce four completion certificates demonstrating that they had completed similar works as those tendered for and, therefore, they had the capacity to undertake or perform the tender. According to the respondent, only three of the interested party's certificates met the criteria. The fourth certificate which the procuring entity accepted as compliant had what the respondent described as "a notable discrepancy". Accordingly, this particular certificate should not have been accepted.
64. This is how the respondent captured this particular issue in paragraphs 160, 161 and 162 of its decision:

"160. From the analysis enumerated above, we note that despite the Interested Party's bid having been determined compliant to the requirement under Clause 1 A (i) of the Tender Firm Capacity of Section II - Evaluation and Qualification Criteria at page 28 of the Tender Document, the Interested Party submitted three (3) contracts and completion certificates which met the evaluation criterion. In our considered view, the Contract with Abted Company Limited dated 2nd January 2020 and accompanying completion certificate dated 25th March 2023 for the period 2/01/2020 to 4/01/2022 failed to meet the aforementioned evaluation criterion in that there is a notable discrepancy between the period stipulated in the contract and the completion certificate since the contract was to be an annual subscription service contract period of three (3) years from 2nd January 2020 whereas the completion certificate indicated the period of the contract as two years from 2/01/2020 to 4/01/2022.



161. In view of the foregoing, we find that the provisions of Clause 1A (i) of the Tender Firm Capacity of Section III- Evaluation and Qualification Criteria at page 28 of the Tender Document were not fairly or equally applied by the Evaluation Committee when evaluating the Applicants and Interested Party's tenders since it is the duty of the Evaluation Committee to verify all the information submitted by bidders so as to ascertain that they have satisfied the stipulated requirements in the Tender Document.
162. In the circumstances we find that the Procuring Entity's Evaluation Committee evaluated and compared tenders in the subject tender with respect to Clause 1A of Tender Firm Capacity of Section III - Evaluation and Qualification Criteria at page 28 of the Tender Document in an unfair manner contrary to the provisions of Section 80(2) of the Act read with Article 227(1) of the Constitution.”
65. In the request for review before the respondent, the question of whether there was any discrepancy between the period stipulated in the contract and the interested party's completion certificate, or any discrepancy in the interested party's documents for that matter, was neither a ground upon which the request for review was made nor an issue upon which applicant was invited to make representations.
66. Iansoft's concern in the request for review was about whether its own tender was responsive and not whether there was any discrepancy in the documents submitted by the rest of the tenderers. This is captured at paragraph 140 of the 1st respondent's decision in the following terms:
- “
- “140. We understand the Applicant's case on this issue to be that its tender was substantially responsive having provided proof of sufficient firm experience in its bid document which is unmatched by any of the other bidders including the Interested Party and that a scrutiny of firm experience of the bidders especially between the Applicant and the Interested Party on line by line basis will ascertain that the Applicant's bid was responsive pursuant to Section 79 and 80 of the Act. Counsel for the Applicant, Mr. Muge, submitted that the uncertainty on existence of the Applicant's projects as submitted in its bid document ought to have been the subject of a clarification by the Procuring Entity. He further submitted that the omission in the Applicant's bid document was not a material deviation and could be cured, and that considering the evaluation criteria at the Technical Evaluation stage, the Board ought to allow room for the recommendation letters submitted by the Applicant to stand in place for the two (2) completion certificates that possibly remain in deficit in the said bid document.”
- Thus, the applicant in the request for review had nothing against the applicant's documentation submitted at the technical evaluation stage.
67. More importantly, the respondent never raised the issue of the discrepancy in the applicant's documents in its decision in review no. 34 of 2024. The request for review in this application, was initiated by Iansoft Technologies Limited and was against the same procurement proceedings whose decision was challenged in the request for review no. 49 of 2024 by the same entity. If the question of discrepancy of the applicant's documents was that material and, considering that it was more or less



introduced suo moto by the 1st respondent, there is no reason why the 1st respondent could not have addressed it in request for review no. 34 of 2024.

68. A look at the respondent's decision shows that the 1st respondent sought clarifications from counsel on issues that it was not clear about during the hearing of the request for review. Yet no clarification was ever sought from the procuring entity why it recommended the applicant for the award of the tender when there was discrepancy in the applicant's completion certificates. In the absence of an opportunity to be heard on this issue it is not possible to tell whether the procuring entity or the applicant considered the discrepancy as a minor deviation that did not materially depart from the requirements set out in the tender document and which, for that reason, would be of no consequence under section 79(2)(a) of the *Public Procurement and Asset Disposal Act*.
69. The point is, at whatever stage the respondent deemed it necessary to introduce this issue of "notable discrepancy", the applicant and the procuring entity ought to have been given an opportunity to address it in the spirit of a fair hearing. As the applicant was bound to be prejudiced by the order, it ought not to have been condemned on an issue that it was never given an opportunity to be heard on.
70. For these reasons I have given, the respondent's decision smacks of procedural impropriety. This ground of judicial review was again explained in Council of Civil Service Unions versus Minister for the Civil Service (supra) as not just "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" but 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".
71. In the ultimate, I am satisfied that the applicant has made out case for me to exercise my discretion in its favour and grant the judicial review relief of certiorari. The application dated 24 June 2024 is allowed to the extent that an order of certiorari is hereby granted quashing in its entirety, the decision of the Public Procurement Administrative Review Board dated 21 June 2024 in PPARB Application Number No. 49 OF 2024 Iansoft Technologies Limited –Versus- Accounting Officer, Nuclear Power and Energy Agency (Nupea) & Green Com Enterprise Solutions Limited. Accordingly, the 2nd respondent may proceed and conclude the remainder of the procurement proceedings with respect to Tender No. NuPEA/OT/DICT/004/23-24 for Supply, Delivery, Customisation, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System and, in particular, in line with the letter of notification to award the tender dated 17 May 2024. Parties will bear their respective costs. It is so ordered.
72. In view of the fact that the court is on August recess, this judgment is posted on the CTS portal to which all parties have access. I have directed the Deputy Registrar to alert the parties and inform them accordingly.

SIGNED, DATED AND POSTED ON CTS 13 AUGUST 2024.

NGAAH JAIRUS

JUDGE

