



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 117 OF 2020**

**BETWEEN**

**PARLIAMENTARY SERVICE COMMISSION.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**ARPRIM CONSULTANTS.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Parliamentary Service Commission, the *ex parte* Applicant herein, is aggrieved by the decision of the Public Procurement Administrative Board (the Respondent herein) delivered on 21<sup>st</sup> May 2020 in Request for Review Application No. 57/2020 that was lodged by the Interested Party. The said decision was in relation to Request for Proposal (RFP) No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172, in which the *ex parte* Applicant was the procuring entity and the Interested Party was a bidder.

2. The Respondent in the impugned decision of 21<sup>st</sup> May 2020 cancelled and set aside the *ex parte* Applicant's letter of notification of termination of the RFP dated 30<sup>th</sup> April 2020; nullified and cancelled and set aside the Procuring entity's professional opinion dated 27<sup>th</sup> April 2020, upheld the evaluation report dated 23<sup>rd</sup> April 2020 and ordered that the procuring entity completes the procurement process to its logical conclusion including issuance of letters of notification of the outcome of RFP No. PJS/RFP/001/2019-2020 within 14 days from the date of the decision.

3. The *ex parte* Applicant consequently moved this Court by way of a Notice of Motion dated 8<sup>th</sup> June 2020 after being granted leave, in which it is seeking the following orders:-

**a) That this Court be and is hereby pleased to call up and bring into this Court and to quash the decision made by the Respondent herein, the Public Procurement and Administrative Review Board (Review Board) dated 21<sup>st</sup> May, 2020.**

**b) That this Court be pleased to issue a declaration that the Letters of Notification of Termination dated 30<sup>th</sup> April, 2020 with regards to Request For Proposal No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 addressed to the Interested Party and other bidders involved in the Request for Proposal be and is hereby upheld and reinstated.**

**c) That costs of this application be provided to the *ex parte* Applicant.**

4. The application is supported by the Statutory Statement dated 29<sup>th</sup> May 2020, and a verifying, supporting and supplementary affidavits deponed to on 29<sup>th</sup> May 2020, 8<sup>th</sup> June, 2020 and 30<sup>th</sup> June, 2020 respectively by Keith Kisinguh, the *ex parte* Applicant's Chief Procurement Officer.. In response to the Application, the Respondent filed a Replying Affidavit sworn on 24<sup>th</sup> June, 2020 by Henock K.

Kirungu, the Respondent's Secretary. The Interested Party also filed a Replying Affidavit sworn on 25<sup>th</sup> June, 2020 by Joseph Maina Kimani, its Principal.

5. The application was canvassed by way of the parties' written pleadings, and the legal arguments were urged by written submissions filed by the parties. Arnold Angaya, the *ex parte* Applicant's advocate on record, filed submissions dated 27<sup>th</sup> May 2020, while Munene Wanjohi, Senior State Counsel in the Attorney General's Chambers filed submissions dated 9<sup>th</sup> September 2020 on behalf of the Respondent. The Interested Party's submissions were dated 31<sup>st</sup> August 2020, and were filed by Mugendi Karigi & Co. Advocates, its advocates on record.

6. The parties' respective cases now follow.

### **The ex parte Applicant's Case**

7. The *ex parte* Applicant's case is that firstly, the Respondent erred in law by dismissing a preliminary issue raised that it had no jurisdiction to hear and determine the Interested Party's Request for Review Application No. 57/2020, since the procurement process had been terminated in accordance with section 63(1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter "the Act"). Further, that section 167(4)(b) of the Act provides that a termination of a procurement or asset disposal proceedings in accordance with section 63 of the Act shall not be subject to the jurisdiction of the Respondent. The *ex parte* Applicant in this respect averred that the evaluation process was not completed within the statutory 21 days as provided for in section 126(3) of the Act and thus the procurement process was overtaken by operation of the law as provided for in section 63(1)(a)(i) of the Act.

8. In addition, that the Respondent erred in law and in fact and distorted the facts in finding that the evaluation process was done within eleven (11) days and therefore well within the statutory 21 days, despite the fact that the Review Board had determined that the Evaluation Committee was appointed on 24<sup>th</sup> March 2020 and concluded evaluation on 23<sup>rd</sup> April, 2020 constituting a total of 31 days of evaluation. Further, that evaluation of bids ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders and recommendation of award, and the Evaluation Committee had also noted in its report dated 23<sup>rd</sup> April 2020 that the evaluation process had surpassed the statutory timelines.

9. According to the *ex parte* Applicant, the Respondent's decision was marred with illegality and irrationality by interpreting that the evaluation period is to be determined by "sitting days" and not concurrent calendar days which decision was not founded on any existing laws and constituted a usurpation of the legislative mandate of Parliament, which did not define the term "sitting day" nor use the term in any of the timelines it prescribes in the Public Procurement and Asset Disposal Act 2015.

10. The *ex parte* Applicant made reference to the decisions in **Republic vs Public Procurement Administrative Review Board and Kenya Revenue Authority** (2008) eKLR where the High Court held that where an evaluation process is not carried out within the statutory period set out by the Act then the same is a nullity, and to the Respondent's own decision in Request for Review No. 76 of 2018 of 31<sup>st</sup> May, 2018 between **Transcend Media Group Limited and Communications Authority of Kenya** that an evaluation process under the provisions of section 126 of the Act should in the absence of any extension for good reason be concluded within a period of 21 days.

11. Secondly, that the Respondent was outrightly biased by failing to determine that the Interested Party had not paid the requisite refundable deposit not being less than 10 per cent of the bid amount as provided for in section 167(2) of the Act and the public procurement regulations, despite being an issue raised by the *ex parte* Applicant. Further, that failure to pay the requisite deposit mandates the Respondent to dismiss a Request for Review, and that the Respondent instead engaged itself in a determination of whether the 2020 Regulations were in force or not, and erred in fact and in law in finding that the Respondent had not proved that the Regulations were tabled and therefore in effect.

12. Thirdly, that the Respondent erred in law by finding that a professional opinion by the *ex parte* Applicant's Head of Procurement only serves to provide guidance on the procurement proceedings in event of dissenting opinions between tender evaluation and recommendations, and such opinion should not be used by the Procuring Entity to justify termination of procurement proceedings; contrary to the express provision of section 84(1) of the Act which makes it mandatory for the Accounting Officer to take into account the views of the Procurement Officer in making a decision to award a tender. In addition, that the Respondent's decision contradicts its earlier decision in **Kensun Enterprises JV Guangdong Honny Power Tech Co. Ltd and Kenya Airports Authority, Application No. 115/2019**

13. Fourthly, that the Respondent used extraneous considerations in arriving at its decision by finding that the Request for Proposal was terminated on account of there being only one bidder evaluated at the financial evaluation stage, whereas the reasons for termination was clear on the termination letters issued to the bidders dated 30<sup>th</sup> April, 2020 and was on account of operation of the law where the evaluation process was not done within the prescribed period.

14. Lastly, that the Respondent in its decision breached the rules of natural justice by identifying and determining the issues *suo moto* without giving the *ex parte* Applicant a chance to be heard by finding that the termination was as a result of there being only one bidder evaluated at the financial stage and that the Professional Opinion by the Head of Procurement Function as required in section 84 of the Act merely serves as a guidance where there is dissenting opinions and should not guide in terminating procurement proceedings.

15. The *ex parte* Applicant annexed copies of the Respondent's ruling dated 21<sup>st</sup> May 2020, and the pleadings filed in Request for Review Application No 57 of 2020, including the termination notices dated 30<sup>th</sup> April 2020.

### **The Respondent's Case**

16. The Respondent averred that on 30<sup>th</sup> April, 2020, it received the Interested Party's Request for Review Application No. 57/2020 dated 30<sup>th</sup> April, 2020, the amended Request for Review dated 11<sup>th</sup> May, 2020 and further statements in support dated 18<sup>th</sup> May, 2020, and that its Secretary immediately directed that the *ex parte* Applicant be served and notified of the pending review as required by the provisions of

Section 168 of the Act, together with all other bidders who participated in the subject tender. Further, that the Applicant, upon service with the Request for Review, filed a response in opposition and on 18<sup>th</sup> May 2020, a Response to the Applicant's further statement dated 18<sup>th</sup> May, 2020 and Defendant's submissions dated 4<sup>th</sup> June, 2020.

17. The Respondent contended that it considered the pleadings before it as well as the submissions of the parties, and delivered its decision on 21<sup>st</sup> May, 2020 allowing the Interested Party's Request for Review, and detailed the orders it gave, as indicated earlier on in this judgment. Further, that in arriving at the said decision, it was alive to all the issues raised by the parties, and was well-informed of all the provisions of the law applicable, including the provisions of the Constitution of Kenya, 2010. The Respondent also averred that it observed the rules of natural justice and acted lawfully, fairly and reasonably in exercise of its statutory mandate under section 28 read together with section 173 of the Act.

18. The Respondent's case is that a proper construction of Section 63 (1) (b) the Act does not ouster the Board's jurisdiction, and that its competence to determine the legality, or lack thereof, of a Procuring Entity's decision terminating a tender as per Section 63 (1) (b) is congruent with the statutory powers of the Board as per Section 173 of the Act. Furthermore, that a review of a Procuring Entity's decision to terminate a procuring process as per Section 63 of the Act requires it to interrogate the reasons cited for the termination. It was averred that it was the Respondent's considered view that the Procuring Entity conducted a bid evaluation for the subject tender within 11 days as per Section 85 as read together with Sections 80 (4) and 126 of the Act, and that evaluation of bids ends once the Evaluation Committee prepares and signs an Evaluation Report containing a summary of evaluation and comparison of tenders and recommendation of award.

19. Further, that the period spent on the process of seeking guidance concerning the *ex parte* Applicant's financial proposal ought not to be included in the computation of bid evaluations, and that its computation of time for bid evaluation was based on the number of sitting days. Lastly, that the Public Procurement and Asset Disposal Regulations, 2020 were not in force at the time of hearing the Interested Party's Request for Review, and that professional opinion is different from bid evaluation as evidenced by the Act, which provides for each process in different sections, and that each process is distinct and independent.

### **The Interested Party's Case**

20. The Interested Party contended that it is a reputable architectural company with over 24 years standing and gave examples of some of its works, and averred that on the 10<sup>th</sup> February, 2020, the *ex parte* Applicant advertised the Request For Proposal for consultancy services for preparation of a master plan, preliminary and detailed design, construction and Supervision of the proposed center for parliamentary studies and training on LR NO. 28172, and that in furtherance to its standing and professional competence, it submitted the most competitive bid entailing the technical and financial proposals in separate envelopes, in conformity with the requirements in the Request For Proposal document and Section 124 (3) of the Act. It annexed a copy of the technical and financial proposals it submitted.

21. The Interested Party contended that the *ex parte* Applicant was required to first subject the tender to evaluation within 21 days from the date of opening the same, which was 20<sup>th</sup> March 2020, he but failed to communicate the outcome thereof necessitating filing of a Request for Review dated the 30<sup>th</sup> April, 2020, and annexed a copy thereof. However, that after the Request for Review had been filed, the *ex parte* Applicant proceeded to terminate the tender process vide its letter dated the 5<sup>th</sup> May, 2020 despite the existence of the automatic stay of procurement proceedings thereby violating Section 168 of the Act. The Interested Party annexed a copy of the said notice of termination, the pleadings filed in its Request for Review, and ruling issued thereon by the Respondent on the 21<sup>st</sup> May, 2020.

22. According to the Interested Party, the instant application is an appeal disguised as a judicial review, and by all intents and purposes invites this Court to re-examine the tender evaluation process, and the Respondent's proceedings so as to arrive at an independent decision and/or replace the decision of the Respondent. Further, that the Respondent is a specialized Tribunal with special technical expertise, and acted within the confines of the Constitution, the Act and the Regulations.

23. In response to the specific grounds raised by the *ex parte* Applicant, the Interested Party stated that the Respondent, is clothed with powers to hear and determine requests for review pursuant to Section 167 (1) of the Act, and issue appropriate remedies as provided under Section 173. Further, that the issuance of a notice of termination of the subject tender by the *ex parte* Applicant under Section 67 (1)(a) (i) does not amount to an automatic ouster of the Respondent's jurisdiction, as it is a settled principle that the Respondent can hear and determine matters appertaining to the validity of the grounds set out in section 63 of the Act whenever they are relied upon in termination /cancellation of a tender. Furthermore, that section 63 is very clear that a procurement can only be terminated on the specified grounds provided therein, which is not the case herein.

24. On the legality of termination of the tender, the Interested Party averred that the procurement was terminated by the *ex parte* Applicant on the basis that the procurement process was overtaken by operation of the law under section 63(1)(a)(i), and that the Respondent attached a proper interpretation to the evaluation process and the period thereof referred to in section 126(3) of the Act, which provides a timeline of 21 days period within which evaluation must be conducted and concluded. Further, that the said period of 21 days is exclusive of the post qualification evaluation and award thereof, that is to say consideration of the professional opinion from the Head of the Procurement function and due diligence pursuant to Section 83 and Section 84 of the Act. Therefore, that the proper construction of the relevant period constituting evaluation was adopted by the Respondent as per the guidance provided in Section 80 (4) and 85 of the Act.

25. On the allegation that it failed to provide a refundable deposit of 10% of the bid amount pursuant to section 167 (2) of the Act and the alleged section 204 of the Public Procurement Regulations, 2020, the Interested Party averred that the said Regulation is non-existent and thus inapplicable, and can only come to existence pursuant to section 5 (1) and section 180 of the Act that stipulate parliamentary approval in line with Section 11 of the Statutory Instruments Act. Further, the *ex parte* Applicant failed to discharge the burden of proof in demonstrating that in fact the alleged Regulations are operational.

26. Lastly, on the allegations of breach of rules of natural justice, the Interested Party stated that the Respondent provided an equal and fair opportunity for parties to present their case, and captured the issues for determination in the ruling having identified them from the

documents on the record and ultimately made determinations within the confines of Section 173 of the Act.

## **The Determination**

### **The Applicable Principles**

27. Before distilling the issues that arise for determination, it is necessary to restate the parameters of this Court's judicial review jurisdiction. These parameters were explained in detail in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

28. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include certain aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.

29. However, even with this shift, this Court as a judicial review court cannot interrogate issues raised as to the merits of a decision in terms of whether it was the right or wrong decision. In addition, judicial review does not entail a re-hearing of the merits of a particular case. The merit review that can be undertaken by the Court is therefore limited to aspects of the lawfulness of the said decision, as delineated by the grounds set out in section 7(2) of the Fair Administrative Action Act which provides as follows:

**(2) A court or tribunal under subsection (1) may review an administrative action or decision, if**

**(a) the person who made the decision**

**(i) was not authorized to do so by the empowering provision;**

**(ii) acted in excess of jurisdiction or power conferred under any written law;**

**(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**

**(iv) was biased or may reasonably be suspected of bias; or**

**(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**

**(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**

**(c) the action or decision was procedurally unfair;**

**(d) the action or decision was materially influenced by an error of law;**

**(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; (f) the administrator failed to take into account relevant considerations;**

**(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;**

**(h) the administrative action or decision was made in bad faith;**

**(i) the administrative action or decision is not rationally connected to**

**(i) the purpose for which it was taken;**

**(ii) the purpose of the empowering provision;**

**(iii) the information before the administrator; or**

**(iv) the reasons given for it by the administrator;**

**(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;**

**(k) the administrative action or decision is unreasonable;**

**(l) the administrative action or decision is not proportionate to the interests or rights affected;**

**(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;**

**(n) the administrative action or decision is unfair; or**

**(o) the administrative action or decision is taken or made in abuse of power.**

**(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that(a) the administrator is under duty to act in relation to the matter in issue; (b) the action is required to be undertaken within a period specified under such law; (c) the administrator has refused, failed or neglected to take action within the prescribed period.**

30. In a nutshell, this court's judicial review jurisdiction is to examine and appraise a decision with the aim of confirming whether or not the decision-maker acted legally and followed the correct legal procedures on the basis of the grounds enumerated hereinabove. It is also not the function of the court in judicial review to substitute its own decision for that of an administrator or tribunal as happens in an appeal, hence the remedies available in judicial review are limited for this reason.

### **The Issues**

31. Having considered the pleadings, submissions and arguments made by the parties herein, and with the above-stated principles of law in mind, I find that the main issue arising for determination herein is whether the Respondent was divested of jurisdiction to hear and determine the Interested Party's Request for Review Application No. 57/2020. There are three limbs to this issue.

32. The first is whether the Respondent erroneously assumed jurisdiction by finding that the Public Procurement Regulations, 2020 were not operational. The second is whether the Respondent's jurisdiction was ousted by the termination of the procurement process under section 63(1)(a)(i) of the Public Procurement and Asset Disposal Act of 2015. The third and last is whether the Respondent made an error of law in its interpretation of whether the termination was in line with section 63 on account of lapse of the period of the evaluation process as provided by section 126 (3) of the Public Procurement and Asset Disposal Act.

33. The secondary substantive issue arising is whether the *ex parte* Applicant merits the prayers sought.

### **On the operation of the Public Procurement and Asset Disposal Regulations 2020**

34. On the first sub-issue, it was the *ex parte* Applicant's submission that the Respondent erred by failing to determine that the Interested Party had not paid the requisite deposit not being less than 15% of the bid amount as provided for in Section 167(2) of the Act and Regulation 204(1) of the Public Procurement and Asset Disposal Regulations 2020. Further, that the Public Procurement and Asset Disposal Regulations 2020 were gazetted through Kenya Gazette Vol. CXXII-No. 78 of 30<sup>th</sup> April, 2020 as Legal Notice No. 69 dated 22<sup>nd</sup> April, 2020, and revoked the Public Procurement and Disposal Regulations, 2006.

35. According to the *ex parte* Applicant, under section 23 (1) of the Statutory Instruments Act which provides for commencement of statutory instruments, the subject Regulations came into operation on 30<sup>th</sup> April, 2020 upon publication in the Kenya Gazette. Further that section 11 provides for laying of statutory instruments before Parliament for approval and remains valid until the expiry of the seven days. Therefore, that the Public Procurement and Asset Disposal Regulations 2020 were in effect at the time the Interested Party filed its Request for Review on 30<sup>th</sup> April, 2020 as well as the Amended Request for Review filed on 11<sup>th</sup> May, 2020. The *ex parte* Applicant in this respect detailed the National Assembly legislative calendar and sittings at the time of the filing and hearing of the Interested Party's Request for Review.

36. The Interested Party's position was that that the Regulations were not in force as at the time of filing the Request for Review for the

reason that section 180 of the Act provides that the regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013, therefore, that the assertion that the Regulations were in effect while pending approval by Parliament pursuant to Section 11(4) of the Statutory Instruments Act is ousted by Section 5(1) as read with 180 of the Public Procurement and Asset Disposal Act which ranks the Procurement Act as superior to the Statutory Instruments Act, 2013. The Interested Party contended that the Applicant did not demonstrate that Parliament had approved the regulations, and urged the court to take judicial notice of a circular by the Cabinet Secretary National Treasury and Planning that indicated that the Regulations came into effect on 2<sup>nd</sup> July, 2020.

37. The Respondent framed the issue before it in this respect as whether the 2020 Regulations are in force and have the effect of law, and if so, whether the Applicant complied with Regulation 204 (1) of the 2020 Regulations which requires the payment of a refundable deposit valued at 15% of the Applicant's tender sum upon lodging its request for review application.

38. Its finding on the issue was as follows:

**“In this Instance, the Board has established that it is not possible to conclusively determine that the 2020 Regulations have been approved by Parliament and therefore have taken effect in accordance with section 180 of the Act. It therefore follows that the Board cannot disallow a request for review application on the basis of failure to pay the fee as prescribed under regulation 204 (1) of the 2020 Regulations, noting that there is no evidence that the same have taken effect.**

**The Board therefore finds that the Applicant in lodging its Request for Review did not need to comply with Regulation 204 (1) of the 2020 Regulations, noting that it is not possible for this Board to conclusively determine that the 2020 Regulations have been transmitted to the Clerk for tabling before Parliament in accordance with section 11 (1) of the Statutory Instruments Act and approved by Parliament and are thus in effect in accordance with section 180 of the Act.”**

39. Section 180 of the Act provides as follows as regards the coming into operation of regulations made under the Act:

**“The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013.”**

40. It is evident that the decision made by the Respondent as regards the application of the Public Procurement and Asset Disposal Regulations 2020 was based on the evidence before it as regards compliance with this section 180, and was to this extent reasonable. In addition, the ex parte Applicant has not brought any evidence to show a contrary position obtained, nor presented any evidence to show that the Public Procurement and Asset Disposal Regulations 2020 had been approved by Parliament at the time of filing and hearing of the Interested Party's Request for Review.

41. Lastly, even if such evidence was placed before the Respondent, then a determination as regards the propriety of the Respondent's findings on the operation of the Public Procurement and Asset Disposal Regulations 2020 would require a review of the evidence before it, and this can only be done in an appeal and not by judicial review. To this extent, this Court sees no justifiable reason to interfere with the Respondent's findings that the Interested Party's application was properly before it irrespective of the provisions of the Public Procurement and Asset Disposal Regulations 2020.

#### ***On the Ouster of Jurisdiction by Termination of the Procurement Process***

42. The ex parte Applicant cited the decision by the Supreme Court in Samuel Kamau Macharia vs Kenya Commercial Bank Limited & 2 others (2012) e KLR and by the Court of Appeal in The Owners Of The Motor Vessel 'Lillian s' vs. Caltex Oil (K) Ltd (1989) KLR 1 to submit that jurisdiction is everything and without jurisdiction, a court or tribunal has no business inquiring into the matter before it. The ex parte Applicant submitted that the Respondent herein acted outside its jurisdiction by proceeding to hear and determine the Interested Party's Request for Review after the procurement process had been terminated pursuant to Section 63(1)(a)(i) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter “the Act”).

43. The ex parte Applicant relied on the provisions of section 167(4) (b) of the Act is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review, and reiterated that in this case, the procurement was terminated pursuant to Section 63(1) (a)(i) of the Act as a result of the evaluation of the Request for Proposal not having been completed within 21 days as provided by Section 126(3) of the Act. Therefore, that the termination was as a result of operation of the law, and that the termination letters sent to the bidders indicated the reason for termination.

44. The Respondent on the other hand submitted that it did not err in law in determining that it had jurisdiction to hear and determine the Interested Party's Request for Review on termination of the procurement process under Section 63(1) of the Public Procurement and Asset Disposal Act, 2015.

45. The Interested Party on its part averred that the ouster of the Respondent's jurisdiction based on termination under section 63 of the Act has been the subject of litigation in several cases, and the court has consistently held that termination does not amount to the automatic ouster of the tribunal's jurisdiction. It was also averred that jurisprudence from several decisions of the court has it that the Respondent ought to go further and interrogate whether the termination met the statutory threshold and/or preconditions of the Act where an applicant challenges the same. In other words, that the Respondent has to examine the reasons for the termination and satisfy itself as to whether the termination meets the threshold of Section 63 before ruling on whether it has jurisdiction.

46. The Interested Party contended that if the Respondent is not satisfied by the reasons for the termination, it then is clothed with the jurisdiction to determine the matter before it. However, that, if the Respondent finds merit in the reasons for termination, it follows then that

its jurisdiction is ousted. The Interested Party referred the court to the decisions in this respect in the cases of **Republic vs Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (interested Party) ex parte Kenya Veterinary Vaccines Production Institute [2018] e KLR**, and **Republic vs Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati [2008] eKLR** and for the position that clauses on ouster of jurisdiction should be construed strictly and narrowly. Therefore, that the Respondent acted well within its powers to examine the reasons cited for the impugned termination.

47. After due consideration of the legal arguments made by the parties, this Court notes that it is not disputed that the applicable law on the issue of the Respondent's jurisdiction is section 167(1) of the Public Procurement and Asset Disposal Act (hereinafter "the Act") which states as follows:-

**“(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.**

**(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.**

**(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.**

**(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.”**

48. A plain reading of section 167(4)(b) is to the effect that a termination that is in accordance with section 63 (and not section 62 as stated therein) of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

49. The termination of procurement proceedings is provided for in section 63 of the Act as follows:

**“(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—**

**(a) the subject procurement have been overtaken by—**

**(i) operation of law; or**

**(ii) substantial technological change;**

**(b) inadequate budgetary provision;**

**(c) no tender was received;**

**(d) there is evidence that prices of the bids are above market prices;**

**(e) material governance issues have been detected;**

**(f) all evaluated tenders are non-responsive;**

**(g) force majeure;**

**(h) civil commotion, hostilities or an act of war; or**

**(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.**

**(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.**

**(3) A report under subsection (2) shall include the reasons for the termination.**

**(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.”**

50. It has previously been held by this Court in **Republic vs Public Procurement Administrative Review Board; Leeds Equipments & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** ; **Republic vs Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR** ; and **Republic vs Secretary of the Firearms Licensing Board & 2 others Ex -parte:Senator Johnson Muthama [2018] eKLR**, that it is the duty of the public body which is the primary decision maker, in this instance the ex parte Applicant as the procuring entity, to determine if the statutory pre-conditions and circumstances in section 63 apply before terminating a procurement.

51. This being the case, the Respondent and this Court upon an application for review have jurisdiction to determine whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made in this regard by applying the principles that apply to judicial review. Therefore, from the outset, the Respondent has jurisdiction to determine if the conditions of section 63 have been met when a tender is terminated on any of the grounds listed thereunder, and a termination under the section does not automatically oust the Respondent’s jurisdiction. It is only upon a finding that the termination was conducted in accordance with section 63 of the Act that the Respondent is then divested of jurisdiction and obliged to down its tools.

52. In the instant case, the Interested Party did raise as one of the grounds for review the illegality of the termination of the tender by the ex parte Applicant in paragraphs 14 to 17 of its Amended Request for Review dated 11<sup>th</sup> May 2020 that it filed with the Respondent. In particular, the Interested Party alleged as follows in paragraph 15 thereof :

**“15. The Applicant contends that the termination does not meet the threshold under the Act and the same is unlawful, clandestine and contrary to section 227 of the Constitution and section 63 of the Act due to the following:**

**(a) The procuring entity did not particularize, identify or explain the nature in which the Request for Proposal had been overtaken by operation of the law;**

**(b) The Applicant is not aware of any changes or developments of the law in a nature warranting termination of the procurement process;**

**(c) The procuring entity issued the termination after filing of the request of the request for review contrary to section 168 of the Act.”**

53. The Respondent accordingly framed one of its issues for determination as being “whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act read together with Article 227 of the Constitution, thereby ousting the jurisdiction of the Board” To this extent, the Respondent was within its jurisdiction to determine if the termination was within section 63 of the Act, and correctly found in this regard that a procuring entity invoking section 63 must put forward sufficient evidence to justify and support the ground of termination of the procurement process relied on.

54. The question whether the Respondent’s jurisdiction was ousted is therefore dependent on whether or not it made the correct interpretation as to whether the termination of the procurement process by the *ex parte* Applicant was in accordance with section 63 (1)(a)(i), which is the subject of the next issue.

***On the interpretation of section 63(1)(a)(i) as read with section 126(3) of the Act***

55. The *ex parte* Applicant outlined the sequence of events leading to the termination, which it submitted was proper and followed due process and thus the Respondent herein ought not to have bequeathed itself with jurisdiction. Further, that the Respondent found that the termination was not proper as the Evaluation process purportedly lasted 11 days, despite the fact that the Review Board had determined that the Evaluation Committee was appointed on 24<sup>th</sup> March, 2020 and concluded evaluation on 23<sup>rd</sup> April, 2020 constituting a total of 31 days of evaluation. He asserted that the Respondent’s position is that the 21 days is exclusive of the Post Qualification Evaluation and thus any professional opinion given therein between did not affect the computation of days.

56. It was the *ex parte* Applicant’s submission that this position is incorrect in law for reasons that that firstly, if that was the legislator’s intention, it would have expressly stated as much in the law, and secondly, this would negate the procurement principles enshrined in the Constitution as well as the procurement laws which require efficiency in public procurement and quoted Article 227 of The Constitution, 2010. Therefore, that the Respondent’s interpretation of Section 126(3) of the Act in its decision of 21<sup>st</sup> May, 2020 is incorrect.

57. The Respondent submitted that it took into account the provisions of Section 63 (1) of the Act and relevant factors when it made the impugned decision and invited the court to look at it decision.

58. The Interested Party submitted that a Request for Review was filed on 30<sup>th</sup> April, 2020 and the *ex parte* Applicant purported to terminate the procurement vide a letter dated 5<sup>th</sup> May 2020 well after the Request had been filed and served. Further, that the Respondent exercised its jurisdiction within the framework permitted by the Act and attached a proper interpretation as to the definition of an evaluation process, the purpose of an evaluation and the period thereof The Interested Party contended that the Respondent using well-defined provisions of the law and its technical understanding of procurement was of the considered view that an evaluation is conducted with a view of recommending a bidder for award of a tender, as provided by sections 85 and 80 (4) of the Act .

59. Further, that under these provisions, an evaluation is deemed to be the process undertaken by the evaluation committee to evaluate bids and prepare an evaluation report. According to the Interested Party, an evaluation does not include all the processes coming after the report

made by the committee or any other extraneous processes done in relation to the procurement. Therefore, that the time taken by the principal procurement officer/head of procurement to give a professional opinion and/or recommendation does not form part of the evaluation process. The Interested Party averred that the interpretation of these provisions by the Respondent is in line with Article 227 (1) of the Constitution, and relied on the case of **Republic vs Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] eKLR**, where it was held that the courts will apply that construction which best carries into effect the purpose of the statute under consideration.

60. I have considered the arguments made by the parties, and note that the Respondent observed that the question that arises in this regard is whether the Procuring Entity's termination of the subject tender on the basis that the Evaluation Committee exceeded the stipulated 21-day period of evaluation as provided for under section 126 (3) of the Act was in line with section 63 (1) (a) (i) of the Act, as the subject procurement had been overtaken by operation of law. It is notable that section 126 of the Act is specific to the evaluation of proposals in procurement for consultancy services, where the method of procurement chosen is that of request for proposals. The said section provides as follows as regards evaluation of proposals:

- (1) An evaluation committee of a procuring entity shall examine the proposals received in accordance with the request for proposals.**
- (2) The procedures for evaluation of the request for proposal shall be by using each selection method set out in section 124 and as may be prescribed.**
- (3) The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement.**
- (4) When a person submitting the successful bid shall be notified, the accounting officer of the procuring entity shall at the same time notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof.**
- (5) The notice of intention to enter into contract in subsection 87(2) shall, as applicable, be publicised on the procuring entity's website and other public notice boards that do not attract a cost.**

61. Part VII of the Act also provides for the basic procurement rules that cut across all the types of procurement methods, and section 80 in this part provides as follows as regards the evaluation of tenders:

- (1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).**
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.**
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—**
  - (a) the criteria shall, to the extent possible, be objective and quantifiable;**
  - (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**
- (4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.**
- (5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations**
- (6) The evaluation shall be carried out within a maximum period of thirty days.**
- (7) The evaluation report shall be signed by each member of evaluation committee.**

62. A tender is defined in the Act to mean an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity. Section 84 is therefore also applicable to the evaluation of proposals. It is evident from an ordinary reading of the two sections is that the evaluation of proposals and tenders is to be undertaken by a number of actors -the evaluation committee, the person responsible for the procurement function and the accounting officer. The evaluation by an evaluation committee is only but one stage of the evaluation process, and it is required to prepare a report with recommendations on the successful tender and submit it to the person responsible for the procurement.

63. As regards professional opinions, section 84 provides as follows:

- (1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as**

secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

**(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.**

**(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).**

64. A contextual, holistic and purposeful interpretation of the said provisions lead to the finding that the evaluation process of proposals commences from the date of examination by the evaluation committee of the proposals received, and includes the submission of the evaluation report to the head of procurement and accounting officer, and the notification of the successful and unsuccessful bidders by the accounting officer of the procuring entity. It is also notable in this respect that a professional opinion or report by the head of procurement can be used to guide both an evaluation committee on the evaluation process as the secretariat's comments, and before notification of the results of the evaluation, and is therefore part and parcel of the valuation process.

65. To adopt any other interpretation and construction would also lead to the absurd result where the purpose of an evaluation, which is to identify and recommend the successful tender or otherwise, is not achieved. This purpose is clearly as stated in section 85 of the Act as follows:

**“Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers”.**

66. The findings by the Respondent in this regard were as follows:

**“The Board observes that the first evaluation process was conducted for a period of ten (10) days from Tuesday 24th March 2020 to Thursday 2nd April 2020. The Evaluation Committee then sought a professional opinion from the Procuring Entity's Principal Procurement Officer and then resumed and concluded evaluation on 23rd April 2020. From this narrative of events, it is evident that the total number of days the Procuring Entity evaluated proposals was eleven days, which include the first ten days with respect to the initial evaluation process and the one day for the subsequent evaluation process.**

**Notably, the Board has established that the period within which the evaluation committee sought an opinion with respect to the Applicant's financial proposal ought not to be included in the computation of time for evaluation of proposals. In this regard therefore, the evaluation committee conducted evaluation of proposals within the twenty-one day period for evaluation in accordance with section 126 (3) of the Act, noting that the evaluation committee conducted evaluation of proposals within a period of eleven days.**

**It is therefore the Board's considered view that this was not a reason for termination of the subject procurement proceedings by the Procuring Entity as contemplated under section 63 of the Act and should not have been used by the Procuring Entity to justify termination of the procurement proceedings under section 63 (1) (a) (i) of the Act.”**

67. There was an error of interpretation made by the Respondent in excluding the period of obtaining the professional opinion from the evaluation process, and particularly given that by its own findings, the said professional opinion was sought by the evaluation committee itself, and was therefore an integral part of the evaluation undertaken by the evaluation committee with the objective of identifying the successful proposal. In addition, the Respondent conflated the evaluation by the evaluation committee, with the evaluation of the proposal. While the evaluation by the evaluation committee indeed ended upon the submission of its report, which in this case was on 23<sup>rd</sup> April 2020, the completion of the evaluation of the proposals however ended with the notification to the successful and unsuccessful bidders, which in this case was the notification of termination on 30<sup>th</sup> April 2020.

68. Either way, both competition dates were outside the time limits for evaluation set by section 126(3) of the Act, and the tender was therefore lawfully terminated by the *ex parte* Applicant pursuant to the said section and section 63(1)(a)(i) of the Act. The end result is that the Respondent's jurisdiction was thereby ousted, and it could not legally consider and determine the Interested Party's Request for Review Application No 57 of 2020.

69. Lastly, to uphold the Respondent's interpretation would also be inimical to the provisions of Article 227 of the Constitution which provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective, as it would result in a situation where some actors can deliberately delay evaluation of proposals by seeking or undertaking lengthy professional opinions. This which would result in an unfair and inequitable situation of an uneven playing field with respect to the time taken by public entities to evaluate proposals and tenders.

#### ***On Whether the Relief Sought is Merited***

70. On the last issue as regards the relief sought, the *ex parte* Applicant has sought orders of certiorari and a declaration. An order of certiorari in this regard nullifies an unlawful decision or enactment. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which orders certiorari can issue as follows:

**“...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

71. The remedy of a declaration on the other hand is normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the existence or extent of a public body's powers and duties, and the rights of individuals or the law on a particular issue. It is however of limited application where it is likely to affect other parties who are not party to the case, or where a court has not heard contested argument on the issue to which the declaration relates.

72. In the present case, the decision by the Respondent herein dated 21<sup>st</sup> May 2020 with respect to the Interested Party's Request for Review Application No. 57 of 2020 has been found by this Court to have been made without jurisdiction, and the order sought of *certiorari* to quash the said decision is thus merited. A declaration is also merited in the circumstances of this case as the legality of the termination notice was sufficiently canvassed by the parties and this Court can therefore make a decision as regards the declarations sought in this respect. In addition, the declaration is also specific to the rights of the parties in this case only.

### **The Disposition**

73. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 8<sup>th</sup> June 2020 is merited to the extent of the following orders:

**I. An order of *Certiorari* be and is hereby issued to remove into this Court and quash the decision dated 21<sup>st</sup> May, 2020 made by the Public Procurement and Administrative Review Board, the Respondent herein, in Request for Review Application No. 57 of 2020.**

**II. A declaration is hereby issued that the Letters of Notification of Termination dated 30<sup>th</sup> April, 2020 with regards to Request For Proposal No. PJS/RFP/001/2019-2020 for the Provision of Consultancy Services for Preparation of a Master Plan, Preliminary and Detailed Design, Tender Documents and Construction Supervision of the Proposed Centre for Parliamentary Studies and Training on L.R. No. 28172 addressed to the Interested Party and other bidders involved in the said Request for Proposal are hereby legal and were issued in accordance with section 126(3) and 63(1)(a)(1) of the Public Procurement and Assets Disposal Act of 2015, and are accordingly hereby upheld and reinstated.**

**III. There shall be no order as to the costs of the *ex parte* Applicant's Notice of Motion dated 8<sup>th</sup> June 2020.**

74. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JANUARY 2021**

**P. NYAMWEYA**

**JUDGE**

### **FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *exparte* Applicant's and Respondent's and Interested Party's Advocates on record.**

**P. NYAMWEYA**

**JUDGE**