



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW APPLICATION NO. E017 OF 2021**

**IN THE MATTER OF: THE LAW REFORM ACT CAP 26**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSETS DISPOSAL ACT NO.33 OF 2015**

**AND**

**IN THE MATTER OF: AN APPLICATION BY THE KENYA PORTS AUTHORITY &**

**ACCOUNTING OFFICER OF THE KENYA PORTS AUTHORITY FOR THE JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST THE DECISION OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD MADE ON 9<sup>TH</sup> MARCH, 2021 IN RESPECT OF REQUEST FOR REVIEW APPLICATION NUMBER 27 OF 2021**

**BETWEEN**

**1. KENYA PORTS AUTHORITY**

**2. THE ACCOUNTING OFFICER, KENYA PORTS AUTHORITY ...EX PARTE APPLICANTS**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**AND**

**RHOMBUS CONSTRUCTION COMPANY LIMITED.....INTERESTED PARTY**

**RULING**

**The Application**

1. Pursuant to Chamber Summons dated 9/04/2021 and filed on 12/04/2021 by the Ex parte Applicants, leave to institute judicial review proceedings in the nature of *certiorari* seeking to remove to this court for purposes of quashing the entire decision and orders of the Public Procurement Administrative Review Board made on 29/03/2021 in Review Application 33/2021 was granted on 12/04/2021. It was further directed that the said leave was to operate as stay of implementation of the said decision. Consequently, the Ex parte Applicants filed a Notice of Motion dated 14/04/2021, the subject matter of this ruling seeking orders as follows:

- a) That the Application be certified as extremely urgent, and determined within the statutory timelines of 45 days of the date of filling this Application as provide for under Section 175(3) of the Public Procurement and Assets Disposal Act No. 33 of 2015.***
- b) That this Court be pleased to grant a judicial review order of Certiorari to remove to this honourable Court for the purposes***

*of quashing the decision of the Public Procurement Administrative Review Board, the Respondent herein made on 29<sup>th</sup> March 2021 under the Request for Review Application No. 33 of 2021 –Rhombus Construction Company Limited vs. the Accounting Officer Kenya Ports Authority & Kenya Ports Authority regarding the Tender No. KPA/095/2020-21/TE for the Design, Manufacture, Supply, Test and Commissioning of Four (4) New Ship to Shore (STS) Gantry Cranes.*

*c) That each party bears its own costs in line with the provisions of Section 175 (7) of the Public Procurement and Assets Disposal Act, 2015.*

2. The motion is premised upon the grounds set out in the Statutory Statement and the accompanying Verifying Affidavit sworn on 19/03/2021 by **Mr. Johnson Gachanja Ngure** who is the Principal Procurement Officer, Stock Control, to the 2<sup>nd</sup> Ex parte Applicant.
3. The 1<sup>st</sup> Ex parte Applicant's case is that on 3/12/2020 and 15/12/2020, it advertised **Tender No. KPA/095/2020-2021/TE** [hereinafter "the Tender"] for Design Manufacture Deliver, Test and Commissioning of 4 New Ships to Shore (STS) Gantry Cranes vide the Daily Newspapers, and the Lloyds List respectively inviting bidders to tender. The deadline for submission of bids was initially fixed for 9/02/2021, but was later extended vide Addendum No. 2 to 9/03/2021. However, upon closing the tender submission on 9/03/2021 at 1000 hrs., and while preparing for the tender opening meeting scheduled at 1030 hrs. on the same day, the Ex parte Applicants were notified by the Respondent that the Request for Review No. 33 of 2021 had been filed by the Interested Party.
4. The 1<sup>st</sup> Applicant's case is that the aforesaid Request for Review was premised on allegations that the procurement process of the tender did not promote the principle of promoting participation of citizen contractors. Consequently, the same was unlawful, irregular, null and void for being in breach of the provisions of the Public Procurement and Assets Disposal Act [hereinafter "the Act"] and Public Procurement Regulations 2020.
5. The Ex parte Applicants aver that the tendering process they undertook was not only fair and non-discriminative, but that it was also open to all eligible tenderers who met the criteria specified in the tender document and that considering the highly complex nature of the equipment that was being procured and not being available locally, the Applicants undertook the procurement process in line with the international procurement as laid out under Section 89 of the Act by inviting international tenderers. And since no local contractors were eligible to participate as manufacturers of the procured equipment, the preference and reservation set out for citizen contractors participating in the subject tender was inapplicable.
6. It is the Applicants' case that Section 157 (8) of the Act requires a margin of preference to be given to candidates offering goods manufactured in Kenya or where the company has local shareholding. Therefore, there being no local manufactures of the equipment to be procured, there was no prescribed margin of preference to be given to prospective bidders, since the equipment being sourced were not manufactured in Kenya and hence the tender falls outside the ambit of preference and reservation group articulated in the Act and Procurement Regulations 2020.
7. The Ex parte Applicants aver that it was only prudent and cost effective for the procuring entity to source the equipment directly from the manufacturer since under Article 227 of the Constitution, the Applicants are required to ensure there is a competitive bidding from all the interested manufacturers. The Applicants are mandated to ensure that there is value for money while procuring equipment and there is efficiency in engaging the manufacturer directly since this will assure on quality and reduced time in commissioning the equipment compared to procuring the said equipment through third parties and/or local agents.
8. The Ex parte Applicants aver that the amendments to the tender document vide various Addenda issued prior to the deadline of submission were in alignment with the Act and the Applicant also separated the disposal process of the Ships to Shore Gantry Cranes from the procuring process thus issuing Addendum No. 1 dated 29/01/2021 so as to comply with the Assets Disposal Provisions articulated in part XIV of the Act. The separation encouraged fair competing platform between prospective bidders and the manufacturers of the current ship to Shore gantry crane who would otherwise have a clear advantage in a trade in. Therefore, the modification of the tender only reduced the scope by removing the trade in component of the old ship to Shore Gantry cranes guided by the various queries received from prospective bidders and was not in any way discriminative.
9. It is the Applicants' case that the Interested Party has failed to demonstrate that it has the technical capability and competence to perform the tender as a local contractor. Therefore, the allegations of failure to allow joint ventures and local contractors in participation to the subject tender are unfounded since regulation 148 is precise that where foreign contractors are engaged, the involvement of a local contractor should be guided by the local contractor's competence to perform.

### **The Response**

### **The Respondent's Response**

10. The Respondent opposed the application through Replying Affidavit sworn by **Philip Okumu** on 6/05/2021. The deponent is the Acting Board Secretary of the Respondent. It is the Respondent's case that pursuant to Section 168 of the Act, and vide letter dated 9/03/2021, the Ex parte Applicants were notified of the pending review before the Respondent, filed on 9/03/2021 by the Interested Party seeking orders to annul and set aside the procurement proceedings in the tender and an order directing the 2<sup>nd</sup> Ex parte Applicant to commence Procurement Proceedings in the said Tender taking into account the Respondent's findings in Review 33/2021. The Respondent also required the Applicants to suspend the procurement proceedings relating to the subject tender and directed the Ex parte Applicants to forward all confidential documents pertaining to the subject procurement proceedings and a list of bidders who participated in the tender. A response to the review was filed on 17/03/2021 together with a Supporting Affidavit sworn on the 16/03/2021.

11. The Respondent avers that having considered each of the parties' pleadings filed before it, and confidential documents submitted by the

Ex parte Applicants herein pursuant to Section 67(3)(e) of the Act, the Respondent framed the following issues for determination;

**a) Whether the subject procurement proceedings are governed by the Public Procurement and Disposal Regulations 2006 or the Public Procurement and Asset Disposal Regulations 2020.**

**b) Whether Clause 4 and 41 of the tender Data Sheet of the Tender Document which exclude participation of joint ventures and Application of preference and reservation schemes in the subject Tender respectively contravenes the provisions of Articles 227(2) of the Constitution, Section 3(i) and (j) , 70(6) € (iv),89(f),155,157(9), read together with regulation 143,144 and 148 (1) & (2) of the Public Procurement and Assets Disposal Regulation ,2020; and**

**c) Whether Addendum No. 1 issued by the 1<sup>st</sup> Ex parte Applicant materially changed the scope of the subject tender in a substantive way in contravention of Section 75(1) of the Act.**

12. On the first issue for determination, the Respondent found that Clause 2 of the Invitation for Tenders, of the tender document, the **Public Procurement and Assets Disposal Regulation, 2020** were stated applicable; while in Clause 3.2 of Section II, Instructions for Tenders of the tender document, the **Public Procurement and Disposal Regulations 2006** was applicable; and the Ex parte Applicants provided no clarification thereafter on which regulation was applicable to the subject. Therefore, the Respondent arrived at a finding that the tender was first advertised on 3/12/2020 when the **Public Procurement and Assets Disposal Regulation ,2020** were already in force and hence applicable to the subject procurement process.

13. On the second issue, the Respondent found that Section 155 of the Act apply by virtue of Section 89(f) in international tendering and competition to afford local and citizen contractors the preference and reservations set out in Section 155 of the Act. The Respondent referred to Regulation 144(1) and (4) of Regulations 2020 which provide:

**144. (1) An accounting officer shall, and in accordance with section 155(5)(b) of the Act, ensure that a procuring entity's tender documents contain a mandatory requirement as preliminary evaluation criteria specifying that the successful bidder shall —**

**(a) transfer technology, skills and knowledge through training, mentoring and participation of Kenyan citizens; and**

**(b) reserve at least seventy-five percent (75%) employment opportunities for Kenyan citizens for works, consultancy services and non-consultancy services, of which not less than twenty percent (20%) shall be reserved for Kenyan professionals at management level**

**(2) In complying with the requirements of paragraph (1), an accounting officer shall ensure that the procuring entity's tender document contains a mandatory requirement specifying that all tenderers include in their tenders a local content plan for the transfer of technology.**

**(3) ...**

**(4) In circumstances where international tendering and competition does not meet the requirement of paragraph (1), an accounting officer shall cause a report to be prepared detailing evidence of the inability to meet this provision and measures to be undertaken to ensure compliance with this regulation, and submit the report to the National Treasury to grant a waiver of the requirement.**

14. It is the Respondent's case that the procuring entity never submitted a report to the National Treasury detailing its inability to meet the requirements of Regulation 144(1) of Regulation 2020, or a waiver it was granted from the National Treasury prior to the preparation of the tender document pursuant to Regulation 144(4) of Regulation 2020.

15. The Respondent found that the Ex parte Applicants' decision of excluding the participation of joint ventures in the subject tender was contrary to Regulation 148(1) and (2) which provide guidance on the margin of preference applicable to joint ventures, which the Ex parte Applicants ought to have used. Therefore, preferential treatment is available to citizen contractors, whether bidding alone or in a joint venture with foreign contractors.

16. On the third issue for determination, the Respondent held that the Addendum No. 1 by the Ex parte Applicants reduced the scope of the subject tender from aspects of design and manufacturing, while retaining the supply, installation, testing and commissioning of 4 new ships to shore cranes. Furthermore, the Ex parte Applicants failed to issue an Addendum directing bidders to take into consideration the implication or reduction of the scope when quoting their tender prices.

### **The Interested Party's Response**

17. The Interested Party in response to the Ex parte Applicants' motion filed Grounds of Opposition dated 7/05/2021 together with a Replying Affidavit sworn on the 15/2/2021 by **Evanson Githinji Kinyanjui** who is the Interested Party's Chief Executive Officer. The Grounds of Opposition are as follows:

**a) That the Ex parte Applicant lack the locus standi to institute and continue the instant Judicial Review Application within the meaning of Section 175 (1) of the Act.**

**b) That Application is incompetent since the Respondent lacks the legal capacity to be sued in its own name having regard to the express provision of Section 27(1) of the Act.**

18. The Interested Party's case is that procurement proceedings are commenced through the tender document and the Addenda in the subject tender are unlawful, irregular, and void since the Ex parte Applicants, inter alia, relied on the Public Procurement and Disposal Rules 2006 which have since been repealed; that the Ex parte Applicants contravened Section 3(b) of the Act by discriminating against citizen contractors through failing to give effect to the provisions of Section 155 of the Act; that the Ex parte Applicants contravened Section 60(1) of the Act by failing to provide specific requirements regarding the participation of citizen contractors which would allow open and fair competition among the bidders; that the Ex parte Applicants contravened Section 70(6) (e) (iv) of the Act by failing to clearly spell out in the tender document the instructions on preparation and submission which ensures that the preference and reservation applicable in accordance to Section 155 of the Act are applied to citizen contractors; that the Ex parte Applicants contravened Rule 143 of the Act's Regulations 2020 by discriminating against citizen contractors; that the Ex parte Applicants contravened rule 144(1) of the Act's Regulations 2020 by failing to ensure that a mandatory provision contained thereunder are provided in the tender document; that the Ex parte Applicants contravened Section 75 of the Act by issuing the Addendum No.1 which materially altered the substance of the original tender and the Ex parte Applicant's contravened Rule 77 of the Act's regulation 2020 by failing to provide financial evaluation criteria which meets the requirement of Rule 77(2) (d) of the Regulations 2020. The Interested Party states that the Ex parte Applicants made bare allegations against the Respondent without demonstrating how the procuring entity has been aggrieved by the decision of the Review Board. Consequently, the instant motion is fatally defective, and should be dismissed.

### **Submissions**

19. Parties filed submissions pursuant to the Court's directions. The Ex parte Applicants submissions and Supplementary submissions were filed on 12/05/2021 and 17/05/2021 respectively while the Interested Party's submissions were filed on 17/05/2021. The Respondent did not file any submissions.

20. **Mr. Ngoya and Mr. Munyao** learned counsel for the Ex parte Applicants reiterated the content of their verifying Affidavit and statement, and submitted that the Respondent's decision requiring the Ex parte Applicants to change the procurement method so as to provide for preference and reservation schemes as well as joint ventures was *ultra vires*, since it purported to redraft the tender document on behalf of the procuring entity, when under Section 70(4) of the Act, it is the accounting officer who is responsible for the preparation of the tender documents in consultation with the user and other relevant departments. Further, Counsel submitted that under Section 167 (4) (a) of the Act, the method of procurement is precluded from Review since the choice of procurement is the prerogative of the procuring entity.

21. **Mr. Munyao** also submitting for the Ex parte Applicants averred that it is not contested that there is no manufacturer of the ship to shore gantry cranes in Kenya. This fact renders the subject tender firmly outside the ambit of the provisions of the law on preference and reservation procurement. Counsel submitted that preference procurement and reservation procurement is excluded both from the perspective of the goods to be procured as well as the perspective of the contractor to supply those goods. Counsel submitted that the Preferential Procurement Master Roll No. 1 of 2021 issued on 8/07/2020 from the State Department for Industrialization provides for a list of goods for preferential procurement by all public agencies the Ex parte Applicants included. However, ships to shore gantry cranes are not listed as one of the goods for preferential procurement by State agencies. From the foregoing, counsel submitted that the Respondent's decision was not only irrational but also unreasonable.

22. Regarding the issue of joint venture in the tender document, counsel cited the provision of Rule 148(3) of Regulation 2020, which provides that a contractor who enters into a joint venture with a foreign contractor must demonstrate technical capability and competence to perform the contract. Therefore, it was irrational and unreasonable for the Respondent to order the procuring entity to alter the tender document to provide for joint venture when there are no manufacturers of cranes in Kenya.

23. On the repealed Regulations 2006 that were referred to in the tender document, counsel submitted that the reference to the repealed regulations was a typing error that arose in the tender document. However, the error did not go to the substance of the tender document and indeed no bidder was confused since no queries were raised by bidders seeking clarification through all the Addenda on the issue of the applicable Regulations.

24. On illegality, counsel submitted that it is only the Accounting officer of a procuring entity that has the legal mandate to extend tender validity period as per the provision of Section 88(1) of the Act. Therefore, the Respondent acted illegally by ordering an extension of the tender validity period by a further period of fourteen (14) days contrary to the provisions of Section 88 of the Act.

25. **Mr. Omolo**, learned counsel for the Interested Party reiterated the content of the Interested Party's Replying Affidavit. Counsel submitted that the Ex parte Applicants have failed to demonstrate that they are persons aggrieved as contemplated under Section 175(1) of the Act and therefore the purported Ex parte Applicants lack *locus standi* to institute the judicial review application herein. Counsel cited **Kenya Ports Authority v Rhombus Construction Company & 2 Others (Mombasa Civil Appeal No. E 11 of 2021** where the Court of appeal dismissed an Appeal because the Appellant failed to demonstrate that they had been deprived of any legal rights and/or suffered any loss or injury from the decision that is subject of the appeal.

26. On the Respondent's capacity to be sued in its own name, Mr. Omolo submitted that the instant motion was fatally defective. Counsel cited **Finmax Community Based Group & 3 others v Kericho Technical Institute [2021] eKLR** where the Court of Appeal found that the applicant being an unincorporated organization had no capacity to be sued in its own name.

27. On the Interested Party's *locus standi* to file a review before the Respondent, counsel submitted that the Interested Party demonstrated that it was a citizen contractor within the meaning assigned by Section 2 of the Act and that the Ex parte Applicants curtailed participation of citizen contractors in the subject tender by providing grossly discriminatory eligibility requirements and evaluation criteria which did not conform to the requirements of the Act and the Constitution and Asset Disposal Regulation 2020.

28. **Mr. Munyao** responding on the issue of the Respondent's capacity to be sued, submitted that unincorporated bodies are treated differently in public law as opposed to private law. Therefore, in public law, lack of capacity does not render the proceedings void, and that courts should dispense justice without undue regard to procedural technicalities.

## **Determination**

29. I have considered the application herein, affidavit evidence in support and the response thereto. I have also taken into account rival submissions by both parties' advocates on record together with relevant applicable law and precedents relied upon. Issues that inevitably arise for determination are.

- a) *Whether the Respondent has the capacity to be sued in its own name.*
- b) *Whether the Ex parte Applicants have the locus standi to institute the judicial review proceedings herein.*
- c) *Whether the Review board acted ultra vires and usurped the functions and mandate of the Ex parte Applicants.*
- d) *Whether the Review Board's decision was unreasonable and/or irrational, or illegal.*

30. The determination of issues (a) and (b) goes to the jurisdiction of this Court. Section 27(1) establishes the Public Procurement Administrative Review Board as an unincorporated board. **Mr. Omolo** argues that, that being so, the board can only be sued through its Chairperson and that in this matter, the unincorporated board has been sued instead. **Mr. Munyao** on his part argued that unincorporated bodies are treated differently in public law as opposed to private law and in light of Articles 22,23 and 159 of the Constitution, the lack of legal capacity does not render the proceedings void.

31. It is evident that the issue raised concerns the jurisdiction of the Court, and it must be dispensed with first. In my view, the dispute to jurisdiction cannot stand for the reasons I stated in **Judicial Review Application No. E011 and E012 of 2021 (Mombasa), Republic v Public Procurement Administrative Review Board Ex parte Kenya Ports Authority and Another; Rhombus Construction Company Limited (Interested Party)** as follows:

**Firstly, the Judicial Review proceedings are of a special nature, where parties seek substantive justice in proceedings, which are highly condensed to be heard within a limited time line and with an attempt to arrest an alleged procedural injustice. Indeed, judicial review proceedings, as often stated, are not concerned with merits as such. Therefore, to purport to import Civil Procedures Rules into judicial review proceedings with the sole purpose of using the Civil Procedure Rules to frustrate judicial review proceedings would not succeed. In my view, Civil Procedure Rules can only be imported into Judicial Review rules if the same support and improve operations of Judicial Review. Secondly, in my view, under Article 159 of the Constitution, this Court is now required to deliver substantive justice, and shall not be restrained by technicalities of procedure. The objection to jurisdiction by the Interested Party herein is based purely on technical consideration. It is my view that this Court cannot down its tool so that an injustice is encouraged. Thirdly, if there is any further doubt on this issue, it is my view that an Interested Party, as in this matter, would not have the leeway to have this Court down its tool herein. This is so because an Interested Party does not have the leeway to expand the case before the Court beyond what was pleaded in the response by the Respondent. An Interested Party's case must not depart from the case between the Ex parte Applicants and the Respondent. An Interested Party cannot plead its own case different from the Respondent's. The Respondent has not raised the issue of jurisdiction with the capacity to strike out this application. Clearly, the Interested Party is expanding the dispute beyond the pleadings as delimited by the Respondent.**

32. However, **Mr. Omolo** had submitted that the Interested Party in this matter is joined to these proceedings by an operation of the law, and that once joined, the Interested Party has the same latitude to defend itself fully. In my view, while **Mr. Omolo's** submissions make sense, it is still clear that the substantive case is between the Ex parte Applicant and the Respondent, and that the Interested Party cannot change the *locus standi* of the Respondent, who also is sued in that capacity through an operation of the law. In any event, as I have said above these are not matters to be determined through technical application of the law, but rather through substantive evaluation of the issues on their merits.

33. From the foregoing it is the finding hereof that the Respondent is properly sued herein, and that the Respondent has not questioned the capacity in which it has been sued, or the jurisdiction of this Court to entertain this application. Therefore, I find and hold that this Court has the jurisdiction to entertain this instant motion.

34. **Mr. Omolo** also argues that the Ex parte Applicants have neither pleaded or demonstrated that they have been aggrieved by the Respondent's decision as contemplated in Section 175(1) of the Act. I find and hold that since the Respondent has not questioned the *locus standi* of the Ex parte Applicant, then the Interested Party is precluded from raising new issues for determination by the Court. Consequently, the issue for determination relating to Ex parte Applicants' *locus standi* suffers the same fate as that of the Respondent's capacity raised by the Interested Party.

### **(c) Whether the Review board acted ultra vires and usurped the functions and mandate of the Ex parte Applicants**

35. **Mr. Munyao** submitted that by ordering the Ex parte Applicant to change the procurement method, so as to provide for preference and reservation schemes as well as joint ventures, the Respondent acted *ultra vires* and usurped the functions and mandate of the Ex parte Applicants. Further, that the Respondent also purported to redraft the tender document, which is the mandate of the 1<sup>st</sup> Ex parte Applicant as provided under Section 70(4), as read with Section 167(4) of the Act, as follows:

***"70.(4) An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments.***

*(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. (Emphasis added)".*

36. What emerges from the above statutory provisions is that the preparation of a tender document is the mandate of the accounting officer and that Section 167 (4) of the Act is clear that the choice of a procurement method is not subject to review. Therefore, the question this Court is grappling with is whether the Respondent directed the Ex parte Applicants on the choice of the procurement method. In interrogating this issue, I am guided by the provisions of Sections 91 and 92 of the Act; Section 91 provides for choice of procurement procedure while Section 92 prescribes a range of procurement methods that an accounting officer of a procuring entity may employ in a procurement; they respectively state as follows:

***“91. Choice of procurement procedure***

*(1) Open tendering shall be the preferred procurement method for procurement of goods, works and services.*

*(2) The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.*

*(3) Despite sub-sections (1) and (2) open tendering shall be adopted for procurement of goods, works and services for the threshold prescribed in the respective national and county Regulations.*

***92. Methods of procurement***

***Subject to this Act and prescribed provisions, an accounting officer of a procuring entity shall procure goods, works or services by a method which may include any of the following—***

*(a) open tender;*

*(b) two-stage tendering;*

*(c) design competition;*

*(d) restricted tendering;*

*(e) direct procurement;*

*(f) request for quotations;*

*(g) electronic reverse auction;*

*(h) low value procurement;*

*(i) force account;*

*(j) competitive negotiations;*

*(k) request for proposals;*

*(l) framework agreements; and*

*(m) any other procurement method and procedure as prescribed in regulations and described in the tender documents.”*

37. It is evident that the subject tender is a restricted tender prescribed under Section 92 (d). The Ex parte Applicants aver that they opted for an international procurement process laid out in Section 89 of the Act. It states as follows:

**“89. If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply**

*(a) the invitation to tender and the tender documents shall be in English;*

*(b) if the procuring entity is required to advertise the invitation to tender under sections 96(2) and 118(2), the procuring entity shall also advertise the invitation to tender in Kenya’s dedicated tenders portal or one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement;*

*(c) the period of time between the advertisement under paragraph (b) and the deadline for submitting tenders shall be not less than the minimum period of time prescribed for the purpose of this paragraph;*

*(d) the technical requirements shall, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;*

*(e) a tenderer submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used; and*

*(f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155.*

*(g) any other conditions as may be prescribed.”*

38. Clearly Section 89 of the Act provides that where local or citizen contractors participate, they shall be entitled to preferences and reservations as set out in Section 155. Section 155 in that Part reads as follows:

**“155. Requirement for preferences and reservations**

*(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.*

*(2) Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.*

*(3) Despite the provisions of subsection (1), preference shall be given to—*

*(a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or*

*(b) firms where Kenyans are shareholders.*

*(4) The threshold for the provision under subsection (3) (b) shall be above fifty one percent of Kenyan shareholders.*

*(5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—*

*(a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and*

*(b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.”*

39. In **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Niavana Agencies Limited; M/S Five Blocks Enterprises Ltd (Interested Party) [2021] eKLR** the Court stated:

**“...the idea behind preferences and reservations is, inter alia, to promote locally manufactured goods or locally available services; it is to promote local industry and, in other instances, to support those who are likely to be disadvantaged by unfair competition and discrimination. This concept is expressly acknowledged in Article 227 of the Constitution. That Article reads as follows:**

227. (1) 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.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

*(a) categories of preference in the allocation of contracts;*

*(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;*

*(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and*

*(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices. (Emphasis added).”*

40. Section 157 (8) of the Act goes further to show how these principles are applied in preferences and reservation. It states as follows:

*“(8) In applying the preferences and reservations under this section—*

*(a) exclusive preferences shall be given to citizens of Kenya where—*

*(i) the funding is 100% from the national government or county government or a Kenyan body; and*

*(ii) the amounts are below the prescribed threshold;*

*(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;*

*(b) a prescribed margin of preference shall be given—*

*(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or*

*(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.”*

41. Regulation 164 2020 stipulates the Margin of preference for international tendering and competition as follows:

*“164. For purposes of section 157(8) (b) of the Act, Regulation 164. Provides for the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be —*

*(a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi processed in Kenya and the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);*

*(b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi processed in Kenya;*

*(c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);*

*(d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and*

*(e) six percent (6%) margin of preference of the evaluated price of the tender, where percentage of shareholding of Kenyan citizens is above five percent (5%) and less than twenty percent (20%).”*

42. It is clear in my view, that under Section 157 (8) (b) of the Act as read together with Regulation 164 of the Public Procurement and Asset Disposal Regulations, 2020, a margin of preference of the evaluated price is accorded to bidders in either of the two ways; to bidders offering goods manufactured, assembled, mined, extracted or grown in Kenya or to bidders offering works, goods and services depending on the percentage of shareholding of the locals on a graduating scale as prescribed in Regulation 164. It is noteworthy that the Ex parte Applicants restricted the subject tender to manufacturers only and stated that joint ventures were inapplicable in the subject tender

43. Regulation 148 of the Act 2020 on joint venture by foreign contractors provides as follows:

**“148.(1) A foreign contractor may benefit from a preference and reservation scheme where it enters into a joint venture or subcontracting arrangements, as evidenced by written agreement, with a firm that is registered in Kenya and where Kenyan citizens have majority shares.**

**(2) Where a citizen contractor has entered into contractual arrangements with a foreign contractor in accordance with paragraph (1), a ten percent (10%) margin of preference in the evaluated price of the tender shall be applied.**

**(3) A citizen contractor referred to in paragraph (2) of this regulation shall demonstrate technical capability and competence to perform.”**

44. The eligibility to bid in a tender is stipulated under Section 55 of the Act as follows:

**“55(1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—**

- (a) the person has the legal capacity to enter into a contract for procurement or asset disposal;**
- (b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;**
- (c) the person, if a member of a regulated profession, has satisfied all the professional requirements;**
- (d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act;**
- (e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;**
- (f) the person has fulfilled tax obligations;**
- (g) the person has not been convicted of corrupt or fraudulent practices; and**
- (h) is not guilty of any serious violation of fair employment laws and practices.**

**(2) A person or consortium shall be considered ineligible to bid, where in case of a corporation, private company, partnership or other body, the person or consortium, their spouse, child or sub-contractor has substantial or controlling interest and is found to be in contravention of the provisions of subsection (1) (e), (f), (g) and (h).**

**(3) Despite the provisions of subsection (2), a person or other body having a substantial or controlling interest shall be eligible to bid where—**

- (a) such person has declared any conflict of interest; and**
- (b) performance and price competition for that good, work or service is not available or can only be sourced from that person or consortium.**

**(4) A State organ or public entity shall require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.**

**(5) State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualification.”**

45. From the foregoing, it is clear that the Ex parte Applicants’ actions of restricting the tender to manufacturers only was discriminatory for disqualifying citizen contractors who would want to bid for the tender through joint venture with foreign manufacturers. The said disqualification was arrived at without affording the citizen contractors their right guaranteed under Regulation 148(3), that is, an opportunity to demonstrate their technical capability and competence to perform, contrary to Regulation 148 (3) of the Act 2020.

46. It is clear to me that the Respondent invoked Section 173 of the Act and made specific orders to cure the flaws that had been identified in the procurement process, and, accordingly the Respondent did not exceed powers and authority it has under Section 173 of the Act.

47. Further, it is noteworthy that once the Ex parte Applicant provided for participation of joint ventures in the subject tender, then the only logical consequence of that act is that the subject tender ought to provide for preference and reservation schemes applicable.

**d) Whether the Review Board’s decision was unreasonable, irrational or illegal.**

48. Having found that the Respondent exercised its mandate as provided under Section 173 of the Act, the inevitable conclusion is that the finding of the Review Board was neither unreasonable, irrational nor illegal.

49. Mr. Munyao, in his submissions raised the issue of the extension of the tender validity period. The said issue did not emanate from the pleadings of the parties. The said issue having been introduced via written submission, it would be an ambush to the Respondent, who is entitled to the right to reply, to consider it now. See **Republic v Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting And Training Limited & another [2014] eKLR** where it was held that:

***“The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”***

50. In any event, the Respondent’s decision under Section 173 can only remain relevant if the same is implemented. Where the decision is arrived at, at the end of procurement period, it is only reasonable that the period for tender is extended to accommodate the decision of the Board. However, when the extension is effected, this decision of extending the time is not the Board’s decision. It is a decision by the procurement entity. Section 173(b) provides that the Board may:

***“(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.”***

Therefore, in my view the direction by the Review Board to the Ex parte Applicants to issue an Addendum within 14 days from the date of their decision is not an extension of the tender. The period of tender is extended by the procurement entity when it acts upon the direction of the Board. So, in my view the Respondent did not usurp the Ex parte Applicants’ power when it directed the Ex parte Applicants to issue addendum within 14 days.

51. **Mr. Munyao** submitted further that the mere allegation that the Interested Party is a citizen contractor is not sufficient to bring the Interested Party within the meaning of a candidate or a tenderer. Further, counsel stated that there is no way of knowing whether the Interested Party is a candidate or a tenderer since the submitted tenders have never been opened. Therefore, it was submitted, the Respondent acted illegally in assuming jurisdiction to hear the request for review.

52. The threshold requirement for any who would file a review before the Board is at **Section 167(1)** of the PPADA;

***“(1) subject to the provisions of this part, a candidate or a tender, 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.”***

53. The Court of Appeal in **James Oyondi t/a Betooyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] eKLR** stated:

***“It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board.”***

54. In my view, the above authority is distinguishable. In the Application for review, the Interested Party described itself as a citizen contractor. The Interested Party stated that it is a leading innovative construction solution provider in East Africa with a proven track record of supply of heavy machinery and equipment including all categories of heavy port equipment. In the Application for review, the Interested Party demonstrated how it believed the Ex parte Applicants had breached their obligations under the Act and Regulations 2020. The Interested Party even went further and demonstrated how the breach of the obligations placed upon the Ex parte Applicants will affect it as a citizen contractor. At paragraph 9 of the Request for Review, the Interested Party states as follows:

***“the Respondent have curtailed participation of citizen contractors in the subject tender by providing grossly discriminatory eligibility requirements and evaluation criteria which do not conform to the requirements of the Constitution, the Act as well as the Regulations 2020.”***

55. Having considered the decision of the Respondent rendered on 29/03/2021, I find and hold that at the time the Request for Review was filed the subject tender was still valid and the period for the submissions of bids by tenderers had not yet lapsed. Therefore, the Interested Party had the *locus standi* to challenge the discriminatory eligibility requirement and evaluation requirement that had prevented it from submitting its bid before the validity period of the tender lapsed.

56. In conclusion this Court restates the rule that a judicial review court will not interfere in any way with the exercise of any power or discretion, which has been conferred on a body unless it has been exercised in a way which is not within that body’s jurisdiction, or where the decision is unreasonable, irrational, or illegal. In the motion before the Court it has not been demonstrated instances of unreasonableness, irrationality or illegalities which warrant interference from this Court.

57. The upshot is that the motion before the Court fails for lack of merit. The same is dismissed. Parties to bear own costs.

**Dated, Signed and Delivered at Mombasa this 26<sup>th</sup> day of May,**

2021.

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Ngoya and Mr. Mutua for Ex parte Applicants

Mr. Omolo for Interested Party

Mr. Makuto for Respondent

Ms. Peris Court Assistant