



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. E063 OF 2021

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

N. K. BROTHERS LIMITED.....2ND RESPONDENT

AND

ACCOUNTING OFFICER, SPORTS ARTS

AND SOCIAL DEVELOPMENT FUND.....1ST INTERESTED PARTY

MILICON'S LIMITED.....2ND INTERESTED PARTY

ex parte:

SPORTS, ARTS AND SOCIAL DEVELOPMENT FUND

JUDGMENT

The application before court is a motion dated 21 May 2021 brought under section 8 & 9 Law reform Act, cap 26, Sections IA, 1B and 3A of the Civil Procedure Act, cap 21, and Order 53 Rule 3 of the Civil Procedure Rules, 2010. The prayers in the motion have been framed as follows:

“1. CERTIORARI to remove to this Honorable Court for purposes of quashing the decision of the 1st Respondent of 26th April 2021 cancelling and setting aside the 1st Respondent's Letter of Notification of Award for Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper-Hill Nairobi dated 19th March 2021 (the decision).

2. CERTIORARI to remove to this Honorable Court for purposes of quashing the decision of the 1st Respondent of 26th April 2021 cancelling and setting aside the 1st Respondent's Letters of Notification of Results for Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper-Hill Nairobi dated 22nd March 2021 notifying unsuccessful bidders of award to Milicon's Limited (the decision).

3. Cost of this application be provided for.”

The application is opposed by the respondents; however, the facts leading to the dispute and which, in my humble view, are fundamental to the suit's determination, are largely not in contest.

On 8 December 2020 the applicant placed in the print media inviting sealed tenders for what I understand to be completion of construction of an office block referred to as SASDEF Plaza, on a parcel of land known as L. R. No. 209/12386 located at the Upper Hill area in Nairobi.

The tender was described as No. SASDEF/T/PROC/002/20202021; I will henceforth refer to it as simply, “the tender”.

By 5 January 2021 which was the extended deadline for submission of bids, the applicant had received a total of 18 bids; amongst the bidders were the 2nd respondent and the 2nd interested party.

The bids were opened at the submission deadline or immediately thereafter and subjected to the evaluation process which, in itself, comprised three stages; preliminary, technical and evaluation stages, in that order.

From what I gather, there were two critical requirements at the preliminary stage; the mandatory requirements for the main contractor and the mandatory requirements for a domestic sub-contractor. According to the tender document, if the main contractor’s bid did not meet the mandatory requirements, it would not be evaluated any further. The sub-contract would, similarly, follow suit and fall by the wayside obviously because its fate would be tied to the success or failure of the main contractor’s bid.

The bids except one were found non-responsive at the preliminary evaluation; 14 of those bids could not qualify past the very first stage of the preliminary evaluation while three others could not go beyond the second stage.

Amongst the unsuccessful bidders was the 2nd respondent; the only bid found to have been responsive was the 2nd interested party’s.

The applicant then subjected the 2nd interested party’s bid to what it described as “an error check analysis.” This process revealed that the 2nd interested party’s bid had an arithmetic error of Kshs. 2,621,800/= which, in the applicant’s view, was a major deviation. For this reason, the 2nd interested party’s bid was also held to be non-responsive as a result of which it was not submitted to the technical evaluation.

Accordingly, the applicant’s technical committee recommended that the procurement proceedings in respect of the tender be terminated in line with section 63 (1) (f) of the Public Procurement and Asset Disposal Act, 2015 since all the 18 bids were wanting and, technically speaking, were non-responsive.

The 2nd interested party was not satisfied with the applicant’s decision and so, it lodged a request for review before the 1st respondent in Application No. 24 of 2021.

The application was allowed on, among other grounds, that the 2nd interested party’s bid ought not to have been subjected to the “error check analysis”. According to the 1st respondent, once it had been established that the 2nd interested party’s bid had surmounted the 1st hurdle of the preliminary evaluation, it ought to have progressed to the technical evaluation since that was the criteria that had been prescribed in the tender document and, according to section 80(2) of the Public Procurement and Asset Disposal Act, the evaluation and comparison of bids can only be done according to such criteria as has been set out in the tender documents.

In allowing the 2nd interested party’s application, the 1st respondent made orders which it framed as follows in its decision dated 8 March 2021:

“

1. The Accounting officer of the Procuring Entity’s letters of Notification of Results of the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi, dated 3rd February 2020 addressed to all tenderers including the applicant herein, be and are hereby cancelled and set aside.

2. The Accounting officer of the Procuring Entity’s letters of Notification of Termination the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi, dated 12th February 2021 addressed to all tenderers including the applicant herein, be and are hereby cancelled and set aside.

3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant’s tender at the Technical Evaluation Stage and conduct an evaluation at the Technical Evaluation Stage in accordance with stage 2. Technical Evaluation of Section III. Tender Evaluation Criteria of the Tender Document read together with section 80(2) of the Act.

4. Further to Order 3 above, the Accounting Officer is hereby ordered to ensure the subject procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi proceeds to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board’s findings in this Review.

5. Given that the subject procurement proceedings have not been completed, each party shall bear their own costs in the Request for Review.”

The applicant complied with these orders and, among other things, submitted the 2nd interested party’s bid for technical evaluation. The results for this evaluation were to the effect that the 2nd interested party had achieved the minimum technical score of 75 points; the actual score was 77.3 points and therefore this bid was found to be responsive at the technical evaluation stage.

The bid also passed the Financial evaluation test and, having surmounted this final hurdle, the evaluation committee recommended award of the tender to the 2nd interested party. The applicant's manager of supply chain management concurred with the evaluation committee's recommendation and advised the applicant's accounting officer accordingly. The professional opinion in this regard was approved on 22 March 2021. The unsuccessful bidders were informed of their failed bids on the same date.

The 2nd interested party was notified of the award vide a letter dated 19 March 2021.

The 2nd respondent whose bid was one of those found to be non-responsive at the preliminary stage requested for review of the applicant's decision to award the tender to the 2nd interested party. In its Request for Review No. 46 of 2021 dated 6 April 2021, it sought for orders framed as follows:

- a) An order annulling and setting aside the decision of the Respondent/Procuring Entity contained in their letter to the Applicant dated 22nd March 2020 and the Applicant be deemed as responsive and allowed to proceed to financial evaluation.***
- b) An order setting aside the procuring Entity's decision awarding the tender to M/s Milicon's Limited;***
- c) An order awarding costs to the Applicants herein; and***
- d) Any other order that the Review Board may deem fit and just to grant."***

The 1st Respondent allowed the application for review and in its decision dated 26 April 2021 it made the following orders:-

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Results on Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of the Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi dated 22nd March 2021 addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.***
- 2. The Accounting Officer of the Procuring Entity's Letters of Notification of Notification of Award of Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of the Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi dated 19 March 2021 addressed to the Interested Party and, (sic) be and is hereby cancelled and set aside.***
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to re-instate the Applicant's and all other bidders' bids at the Mandatory Requirements/Preliminary Examination Stage and conduct a re-evaluation of all bidders' bids at the Mandatory Requirements/Preliminary Examination Stage in the following areas: -***
 - a) Format of Submission of bids under Criteria MR 5 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document;***
 - b) Duly filled, signed and stamped Form of Tender Under Criteria MR. 7 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;***
 - c) Duly filled, signed and stamped Confidential Business Questionnaire Form Criteria under MR 10 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;***
 - d) Pre-Contract Agreements under Criteria MR 12 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;***
 - e) Form of blank Tender Document under criteria MR 17 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document.***
- 4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to complete the procurement proceedings in Tender No. SADEF/T/PROC/002/2021-2021 for the Proposed Completion of the Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi to its logical conclusion within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.***
- 5. Given that the subject procurement proceedings have not been concluded, each party shall bear its own costs in the Request for Review."***

It is this decision that is now the subject matter of the dispute before court.

The Applicant has impeached the decision on the grounds that it is ultra vires and in excess of jurisdiction; that it is tainted with illegality; that it is based on misapprehension of the law and a misdirection of facts; that it amounts to abuse of power. Other grounds are that the 1st respondent considered irrelevant facts and failed to consider relevant facts and also that the decision is unreasonable and irrational.

On the question of ultra vires, it was urged that the 1st respondent erroneously assumed the functions of the evaluation committee of the applicant by re-evaluating the responsiveness of the 2nd respondent's bid.

It was urged, in the same breath, that the decision is an abuse of power and was basically based on misapprehension of the law.

On procedural impropriety, it was urged that while the 1st respondent admitted the 2nd respondent's supplementary affidavit out of time, it declined to accept the applicant's submissions. The applicant was thus not accorded a fair administrative action process and to that extent, the 1st respondent flouted Articles 47 and 50 of the Constitution.

It was submitted on behalf of the 1st respondent that the applicant's motion is all about review of the merits of the decision; more of an appeal than a judicial review application. According to the 1st respondent, it properly exercised its powers with which it is clothed under section 173 of the Public Procurement and Disposal Act in arriving at its decision.

Mr. Munene, the learned counsel for the 1st respondent urged that this Honourable Court should not accept the invitation to determine the merits of the 1st respondent's decision but the process of arriving at that decision. On this argument, counsel cited the decisions in **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR and Municipal Council of Mombasa V Republic & Another (2002) e KLR**. In his view, the process was of reaching the impugned decision was flawless.

The cases of **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43 and Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** were cited for the submission that judicial review is available on grounds of illegality, irrationality and procedural impropriety. According to the learned counsel, none of these grounds had been demonstrated to exist. Other cases cited for the same proposition are the **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR and Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) e KLR**.

For the 2nd respondent, it was submitted that its own tender was responsive in terms of section 79 of the Public Procurement and Asset Disposal Act and ought not to have been declared unresponsive. Counsel relied on the case of **Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party), Ex parte Meru University of Science & Technology 2019 eKLR; Republic v Public Procurement Administrative Review Board & 3 Others Ex-Parte Saracen Media Limited (2018) eKLR**. The applicant, according to the 2nd respondent, disregarded section 86 (1)(a) of the Act and regulation 125 (14) of the Public Procurement and Asset Disposal Regulations, 2020 which provide that the tender ought to be awarded to the lowest evaluated price in rejecting its bid. In its opinion, its bid was the lowest evaluated tender. The case of **Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR** was cited for this submission.

It was also urged that the applicant did not subject all the bidders to the same evaluation criteria set out in the tender document and therefore its decision was irrational and, on this particular point, counsel relied on the cases of **Republic v Public Private Partnerships Petition Committee (The Petition Committee) & 3 Others, Ex Parte A P M Terminals (2015) eKLR** in which the English decision in **Council of Civil Service Unions v Minister for Civil Service (1984) 3 ALL ER 935** was cited with approval.

While invoking Articles 47 and 227 of the Constitution, it was urged on behalf of the 2nd respondent that an organ of State is enjoined to adopt a tender system that is fair, equitable, transparent, competitive and cost-effective. This was emphasised in **Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 Others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR**.

It was also urged that the applicant breached section 126(4) and regulation 82 of the regulations which are to the effect that the accounting officer ought to notify in writing all other persons who had submitted bids that their bids were not successful and give reasons thereof when notifying the successful bidder. The applicant notified the successful bidder on 19 March 2021 yet the unsuccessful bidders were informed of their failed bids on 22 March 2021. These provisions were applied in **Africa Limited v Public Procurement Administrative Review Board & 2 Others (2018) eKLR**. The learned counsel submitted that this omission was fundamental and shouldn't go un-remedied and in this regard counsel relied on **Ederman Property Limited v Lordship Africa Limited & 2 others [2019] eKLR; Kenya Pipeline Company Limited vs. Glencore Energy (U.K) Limited (2015) eKLR** where the English case of **Holman vs. Johnson (1775 — 1802) All ER 98** was cited with approval.

Like the 1st respondent, it was urged on behalf of the 2nd respondent that the 1st respondent acted within its powers in arriving at its decision. Counsel invoked section 28 (a) and Section 173 of the Act in this regard.

Similarly, it was urged that this Honourable Court can only interrogate the process by which the impugned decision was arrived at and not the merits of the decision itself. The cases of **Commissioner of Lands v Kunste Hotel Limited (1997) eKLR Republic v Public Procurement Administrative Review Board & 2 others (2018) eKLR** were cited in support of this submission. Other cases cited on this same point are **Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another (2012) eKLR; Republic v Public Procurement Administrative Review Board & 2 others (2018) eKLR**

The 2nd interested party supported the application. It was urged that the 1st respondent's decision is unreasonable because it is inconsistent with its earlier decision on the same procurement process.

It was urged that the request for review whose decision is now the subject of these proceedings was time barred considering that the Procuring Entity communicated its decision(s) on the responsiveness of all candidates' tenders on 3 February 2021 and furnished the reasons for the decision on 12 February 2021. Under the provisions of Section 167 (1) of the Act, the 2nd respondent ought to have filed the second Request for Review on or before 26 February 2021. Instead, the 2nd respondent lodged the Second Request for Review on 6 April 2020.

Counsel for the 2nd interested party submitted that the expeditious lodging and determination of disputes relating to public procurement is

one of the cardinal objectives of the Public Procurement and Asset Disposal Act, the rationale being that public procurement disputes either delay or disrupt the delivery of important government services. It is for this reason that both the Review Board and the courts have no jurisdiction to entertain time-barred public procurement disputes.

Counsel relied on **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR**, where the decision of the Review Board given outside the prescribed timelines was quashed.

By purporting to breathe life into tenders that had otherwise been rendered non-responsive the 1st respondent's action was not only illegal, but was also irrational and tainted with procedural impropriety.

The decision was also unreasonable because of entertaining time barred second review and readmission of failed tenders.

Again the 1st respondent's decision is irreconcilable with its own earlier decision of 8 March 2021.

After considering the application before court and the submissions made by counsel the immediate question that arises in my mind is whether there was indeed any or any valid application before the 1st respondent capable of determination. The legal basis for this question is found in section 167 (1) of the Act which states as follows:

167. Request for a review

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

This section is plain that only a candidate or a tenderer, "*who claims to have suffered or risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity*" that may seek administrative review. It is equally plain that where he is disposed to have been so aggrieved, then the candidate or tenderer can only initiate the administrative review "*within fourteen days of notification of award or date of occurrence of the alleged breach*".

The 2nd respondent who was the applicant before the 1st respondent in the proceedings out of which the impugned decision arose was, no doubt, a candidate or tenderer, as understood in section 2 of the Act; in that section a "*tenderer*" is defined as "*a person who submitted a tender pursuant to an invitation by a public entity.*" As noted earlier in this judgment, the 2nd respondent was among eighteen other bidders who submitted their bids or tenders in response to an invitation by the applicant and therefore, to that extent, there should not be any dispute that the 2nd respondent fits the description of a tenderer as understood in the Act.

The act which the 2nd respondent complained of in the review was the applicant's decision declaring the 2nd respondent's bid, amongst eighteen others, non-responsive. It is apparent from the 1st respondent's own decisions in Request for Review No. 24 of 2021 and Request for Review No. 46 of 2021 that the bidders, including the 2nd respondent, were aware of the results of their bid as early as 3 February 2020. This is clear from page 6 of the 1st respondent's decision in Application No. 24 of 2021 and pages 5-6 in the Application No. 46 of 2021. In the former decision the 1st respondent noted as follows:

"Notification to Bidders

The Procuring Entity prepared letters of notification of results dated 3rd February 2020 stating that the submission by the tenderers were not successful and thus, the Evaluation committee recommended a re-tender because none of the bidders met the condition during evaluation at the mandatory stage. Further, in letters dated 12th February 2021, the procuring entity notified bidders of the reasons why their bids were non-responsive and further informed bidders that the subject procurement proceedings were terminated pursuant to section 63 (1) (f) of the Act because all evaluated tenderers were non-responsive."

This statement was repeated word for word in the latter decision.

It was also reiterated at page 17 of the decision where the 1st respondent stated as follows:

"The instant Request for Review necessitates this Board to address the import of Order No. 1 and 2 of the decision in Review No. 24/2021 wherein the Board; nullified the letters of notification of results of the subject tender dated 3rd February which were addressed to all bidders and letters of notification of termination of the subject tender dated 12th February 2021 addressed to all bidders. The effect of this is that any communication by the Procuring Entity regarding termination of the subject tender and reasons for non-responsiveness of all bids were nullified."

Under section 167(1), the limitation period within which the request for review of the applicant's action for which the 2nd respondent allegedly suffered or risked suffering loss and damage lapsed upon expiry of 14 days of that action; fourteen days from 3 February 2021 expired on 17 February 2021. And even if it was to be assumed that the operative date was when the notifications were sent on 12 February 2021, the last day within which the review ought to have been lodged was 26 February 2021.

The impugned decision, at page 11 thereof, shows that the Request for Review whose decision is impugned in these proceedings was filed on 6 April 2021, way beyond the deadline and, obviously, in breach of section 167(1) of the Act.

Without belabouring the point, to the extent that the Request for Review No. 46 of 2021 was filed out of time and, in any event, in breach of the express provision of the law, the application, the proceedings that ensued and the purported decision are all a nullity. It follows that the answer to the question whether there was any valid application before the 1st respondent capable of determination in the nature of the purported 1st respondent's decision dated 26 April 2021 is in the negative.

There is a further reason why prayer (b) of the request for review could not be considered by the 1st respondent. The reason is this: the 2nd respondent's bid had been determined to be non-responsive at the preliminary stage. Since the decision to declare the 2nd respondent's bid as non-responsive had neither been varied nor set aside and, in any event, the period within which it could possibly have been challenged had lapsed, the 2nd respondent could not be regarded as a candidate or a tenderer, who had either suffered or risked suffering loss or damage as a result of the award of the tender to the 2nd interested party. In short, having had its bid declared non-responsive and therefore disregarded in the subsequent technical and financial evaluations, there was no basis for the applicant to invoke section 167(1) of the Act as long as the decision to declare its bid as non-responsive remained intact or unchallenged. The 2nd respondent had no further stake in the procurement process upon which he could lay any claim on the tender award or, alternatively challenge it.

I note the 2nd respondent invoked the letter from the applicant dated 22 March 2020 purportedly notifying the rest of the bidders why their bids were unsuccessful. All I can say about this letter is that it did not, and could not, extend time within which the 2nd respondent ought to have taken action on the applicant's decision to find its bid non-responsive. In any case, there is nothing in law that suggests that an aggrieved part can only move for a review once the procurement process is complete and parties have been notified accordingly. To the contrary, section 167(1) is clear that proceedings for review of a procuring entity's action that an aggrieved party deems to be breach of the procuring entity's duty and which breach has caused or may cause loss or damages, can be taken at any stage of the procurement process or disposal process. The 2nd respondent cannot therefore be heard to argue, that it is only after the letter of 22 March 2021 notifying the parties of their failed bids and the reasons for such failure was sent that they could be jolted into action when it is clear that it was aware of the fate of its bid long before the tender was eventually awarded to the 2nd interested party.

That the 1st respondent was aware that the 2nd respondent's request for review was out of time should not be in doubt. It has acknowledged in **Application No. 48 of 2021, Fahmyasin Company Limited versus The Accounting Officer, Kenya Urban Roads Authority & Another** that the application for review for any alleged breach must be filed timeously and, in any event, not later than 14 days from the date of the alleged breach. In that case where the applicant alleged a breach at the technical review stage but waited until the award had been made to seek for review, the 1st respondent accepted as the correct interpretation of the law the argument that the applicant ought to have filed its application for review within 14 days of the breach. The pertinent part of its decision reads as follows:

“In the Respondent's view, if the applicant was not satisfied by the technical evaluation criteria, it ought to have sought clarification from the Procuring Entity. In the absence of any clarification, it is the Respondent's view that any complaint raised before the Board is time barred pursuant to section 167(1) of the Act.

In addressing this issue, the Board observes that one of the scenarios provided in section 167(1) of the Act read together with Regulation 203(2) (c) of Regulations 2020 within which a request for review can be filed is fourteen days from the date of occurrence of the breach complained of where the request is made before the making of an award.

With that in mind, the Board observes the statutory timeline provided under section 167(1) of the Act provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review challenging a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

This Board has noted the rising number of bidders who abuse options under section 167(1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded. If the outcome of the bids is favourable, such applicants never raise any alleged breaches they might have identified at any stage of the procurement process or disposal process.

The applicant participated in the subject procurement processes by submitting a tender by the tender submission deadline of 11th February 2021 without challenging those technical specifications in a request for review filed before this Board as opposed to participating in the procurement process.

The applicant could have approached the Board within fourteen days after the tender submission deadline raising an allegation that the Tender Documents did not meet the provisions of the law.

Had it been awarded the subject tender, the Board is persuaded that the applicant would not raise any complaint with the tender document. The applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging the Tender Document, so late in the day after sleeping on its right to seek administrative review.”

The circumstances in the proceedings that culminated in the decision that is now impugned in this case are more or less on all fours with the circumstances in Review Application No. 48 of 2021. Yet the same Board that determined this latter application reached a totally contrary decision in Review Application No. 46 of 2021. This is baffling, to say the least.

Having held that the entire proceedings that culminated in the impugned decision were a nullity, and therefore of no consequence in law, it would be moot to interrogate the extent to which the applicant has demonstrated the existence of each of the grounds of judicial review. But if I have to say anything more I can only refer to the case of **Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410** on what the judicial review grounds of illegality, irrationality and procedural impropriety entail with specific reference to the application before me.

To that extent, I would say that the proceeding before the 1st respondent and its ultimate decision were illegal because the 1st respondent misapprehended the import of section 167 (1) of the Public Procurement and Asset Disposal Act on who “*a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty*” is. If the making of the tender award was to be described as “*the breach of duty*”, the applicant in the review application which the 1st respondent upheld and who is now the 2nd respondent in these proceedings, could not have been such a person, its bid having been declared unresponsive earlier in the procurement process and the period within which that declaration could have been challenged having lapsed as at the time the tender award was made.

The 1st respondent’s decision smacked of irrationality for this reason: considering that the applicant lacked standing to bring proceedings before the 1st respondent at the time the award was made, it was unreasonable, in the Wednesbury sense (see **(Associated Provincial Picture Houses Limited vs. Wednesbury Corporation (1948) 1 K.B. 223)**, for the 1st respondent not only to entertain the 2nd respondent’s application but also to allow it. It was also unreasonable to reintroduce bids that did not meet the requirements spelt out in the tender document and had, in any event, been declared unresponsive in the procurement process.

Finally, the decision was deficient of procedural propriety because the proceedings out of which it was conceived were instituted way out of time. And has been noted, the purported applicant had no *locus standi* to institute such proceedings. Subjecting the applicant and the 2nd interested party to proceedings that were invalid *ab initio* is another reason why the 1st respondent’s decision is impeachable for procedural impropriety.

Considering that the proceedings were contrary to the express of the law, the entire exercise that culminated in the impugned decision was nothing more than an exercise in futility.

In ultimate, the applicant merits the order of judicial review sought the motion dated 21 May 2021. It is allowed in terms of prayers (1) and (2). For the avoidance of doubt:

1. The decision of the 1st respondent dated 26 April 2021 cancelling and setting aside its own Letter of Notification of Award for Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper-Hill Nairobi dated 19 March 2021 is hereby removed into this Honourable Court and quashed.
2. The decision of the 1st respondent of 26 April 2021 cancelling and setting aside the 1st Respondent's Letters of Notification of Results for Tender No SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L. R. No 209/12386 for Sports, Arts and Social Development Fund at Upper-Hill Nairobi dated 22 March 2021 notifying unsuccessful bidders of award to Milicon's Limited is hereby removed into this Honourable Court and quashed.

The applicant shall also have the costs of the application. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 21ST JUNE 2021

NGAAH JAIRUS

JUDGE