



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 318 OF 2018

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF ARTICLES 10, 47(1), 50(1) and 165(6) &(7) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT, NO. 4 OF 2015

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF ORDER 53 (1) OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF SECTION 167 AND 175(1) OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF THE RESTRICTED TENDER FOR SUPPLY OF FRESH MEAT (BEEF) ON BONE TO NAIROBI BASED UNITS- TENDER NO. MOD/423(01011)/2017/2018)

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

JOJEN BUTCHERY.....1ST INTERESTED PARTY

EX PARTE: MINISTRY OF DEFENCE

JUDGMENT

The Application

1. The ex-parte Applicant herein is the Ministry of Defence, (hereinafter “the Applicant”), and it was the procuring entity in the Restricted Tender for Supply of Fresh Meat(Beef) on Bone to Nairobi Based Units (Tender No. MOD/423(01011)/2017-2018). Jojen Ltd, the Interested Party herein, was a bidder in the said tender. After the opening of the tender and its evaluation, the Applicant awarded the said tender to

Kenya Meat Commission and proceeded to award the said successful tenderer the contract.

2. The Interested Party thereupon challenged the decision of the Applicant by way of a Request for Review Application No. 83 of 2018, which was filed on 27th June 2018 with the Public Procurement Administrative Review Board, the Respondent herein. The Respondent is a statutory body created under section 27 of the Public Procurement and Assets Disposal Act of 2015, and mandated to review, hear and determine public tendering and asset disposal disputes.

3. On 18th July 2018, the Respondent delivered its decision on the said Request for Review and made the following Orders:

a) The Request for review dated and filed by the Applicant on 27th June 2018 in respect to Tender No. MOD/423(01011) 2017/2018, for the supply of fresh meat (beef) on bone to Nairobi Based Units for the Ministry of Defence be and is hereby allowed.

b) The contract entered into by the Procuring Entity and the Kenya Meat Commission in respect of the subject tender be and is hereby declared unlawful and the same is set aside.

c) The entire procurement process in respect of the subject procurement be and is hereby annulled.

d) The Procuring Entity is directed to commence fresh procurement proceedings for the subject tender within forty five (45) days from the date of this decision.

e) The Procuring Entity is directed to reinstate and extend the contract of the current supplier of the subject item of procurement, Messrs Jojen Butchery, until a new supply contract is in place.

f) Owing to the fact that the Applicant will have an opportunity to participate in a fresh procurement process, each party shall bear its own costs of this Request for Review.

4. The Applicant, being aggrieved with the Respondent's decision, then filed the instant judicial review proceedings by way of a Notice of Motion Application dated 13th August 2018, and is seeking an order of Certiorari to remove into this Court the Respondent's decision of 18th July 2018 for purposes of the same being quashed, and that the costs of this application be provided for.

5. The application is supported by the grounds on its face ; the application for leave by way of Chamber Summons dated 1st August 2018, a statutory statement of the same date , supporting affidavit sworn on 1st August 2018 by Daniel Omondi Odeny, a Legal Officer at the Ministry of Defence, and a Verifying Affidavit and Further Affidavit both sworn on 1st August 2018 and 9th October 2018 respectively by Anne Nyakio Kamaru, a Procurement Officer at the Ministry of Defence.

6. It is the Applicant's case that the Respondent acted in excess of jurisdiction and illegally in entertaining the Interested Party's Request for Review and contrary to the provisions virtue of section 167(1) of the Public Procurement. According to the Applicant, the Interested Party in the said Request for Review alleged two breaches by the Applicant, namely the unlawful termination of its contract being Contract No. MOD/423(01011)/2015-2016, on 18th September 2017 leading to the commencement of the restricted tender which opened on 24th August 2017, and the refusal to pay for deliveries made.

7. Therefore, that the Interested Party failed to move the Respondent within 14 days from the date of the alleged breaches, and the Respondent lacked jurisdiction to entertain the application by the Interested Party, and to entertain an application on an alleged breach of contract that occurred outside the procurement proceedings.

8. Further, that the Respondent acted in excess of its jurisdiction, illegally and unreasonably by considering issues that were not pleaded or raised by the Interested Party or Applicant in their pleadings, and created issues *suo moto* and proceeded to determine the same. In particular, that the question as to whether the Interested Party had been notified of the outcome of Tender No. Tender No. MOD/423(01011)/2017-2018 was not placed before the Respondent by the parties; and that Issue No. II as framed by the Respondent, namely, the procurement method used by the Applicant, was not an issue arising out of the parties' pleadings, neither was it a ground for review.

9. The Applicant contended that the only issue raised by the Interested Party with respect to Tender No. MOD/423(01011)/2017-2018 was that it had not been invited to participate in the tender, which the Respondent found that it had been properly invited. The Applicant averred that the Interested Party was a bidder in Tender No. MOD/423(01011)/2017-2018, and participated in the said tender by preparing and submitting the relevant tender documents and attending the opening of the tender on the 24th August 2017.

10. In addition, that the Interested Party was the supplier of beef on bone to Nairobi based units under Contract No. MOD/423(01011)/2015/2016, and supplied meat up to the 17th September 2017 as opposed to 26th June 2018 as it alleges, and that this fact is borne by the averment in its Request for Review filed with the Respondent on 27th June 2018. It is the Applicant's case that contrary to the averment by the 1st Interested Party, its contract with the Interested Party for the supply of meat on bone Nairobi based units issued under tender no MOD/423(01011)2015/2016 expired on 22nd May 2017, and no other contract extending the same was signed by the parties. Therefore, that the Applicant never terminated any contract on the 26th June 2018 as alleged by the 1st Interested Party, as the contract had expired on 22nd May 2017.

11. The Applicant stated that it did not admit that it owed money to the 1st Interested Party in respect of the expired contract, and stated that it only requested the said Interested Party to forward any unpaid bills for purposes of verification and reconciliation. Lastly, the Applicant

averred that the decision of the Public Procurement Administrative Review Board dated 18th July 2018 was stayed on 2nd August 2018 by the High Court of Kenya in Judicial Review No 318 of 2018.

The Responses

The Respondent's Response

12. The Respondent opposed the application through a replying affidavit sworn on 21s November 2018 by its Secretary, Henock K.Kirungu. He confirmed that the Interested Party filed a Request For Review challenging the decision of the Applicant in Tender No MOD/423 (01011)2017 /2018 for the supply of fresh meat (beef on bone) to Nairobi based Units. That after receiving the said Request for Review, the Respondent served a copy on the Applicant notifying it of the pending review, and requiring it to make an appearance for the hearing of the Review, in accord with Regulation 74(1) and 74(2) of the Public Procurement and Disposal Regulations 2006.

13. It was the Respondent's case that it heard the parties on 10th, 12th and 16th July 2018, and delivered its ruling on the 18th July 2018. Further, that the issues that the Request for Review raised were whether the Board lacks jurisdiction to consider the Request for Review, and whether the procuring entity used a procurement method not recognised in law in the subject tender thereby defeating the objective of public procurement contrary to the provisions of section 3 of the Act.

14. The Respondent explained that it allowed the Request for Review, cancelled the contract between the Procuring Entity and Kenya Meat Commission, directed fresh commencement of procurement proceedings for the subject tender within 45 days from the date of the decision, and reinstated and extended the contract of the current supplier being the Interested Party, until a new contract was in place.

29. The Respondent contended that it considered everything placed before it and its decision was within its mandate and grounded in law, specifically section 173 of the Act. Lastly, that the Applicant has not demonstrated that the Respondent in arriving at its decision was guilty of illegality, procedural impropriety and irrationality, to warrant the variance of the order.

The Interested Party's Response

15. The Interested Party's response was in a replying affidavit sworn on the 14th September 2018 by its proprietor, John Mbugua Nduba. He stated that he moved the Respondent within the fourteen day period as provided in law, upon occurrence of the breach by the Applicant. It was his case that under tender No.MOD/423(010110)2016/2017, he consistently supplied Meat to Nairobi based units up to the 26th June 2018, when the Applicant refused to collect the meat from him. That he thereafter filed the Request for Review with the Respondent on 27th June 2018, which was a day after the occurrence of the breach.

16. The Interested Party contended that he never participated in the Tender process for tender no MOD/423(01011)2017/2018, nor was he present in the tender opening as he had already been granted an extension as a previous supplier, and that the Applicant through misrepresentation of facts only summoned him to their offices and coerced him to sign documents making him believe they were made with the aim of validating the 2018 Tender extension.

17. It was the Interested Party's case that the Applicant's tender process for Tender No.MOD/423(01011)2017/2018 was muddled with irregularities and not done in compliance with the provisions of the Public Procurement Disposal Act. In particular, that the Applicant illegally terminated his contract without giving him 60 days' notice for termination which is contrary to section 153 of the Public Procurement and Asset Disposal Act. Further, that he was not notified of the Applicant's intention to cancel his contract in line with section 63 of the said Act, and the Applicant therefore acted against the law, as the process of issuing a new tender during the pendency of an existing tender was illegal.

18. According to the Interested Party, the Respondent acted within its mandate as provided in law to issue the orders in the Request for Review in his favour, and reinstated him to supply Meat(beef) on Bone to Nairobi based units in line with the letter of extension dated 25th May 2017 that had been issued to him by the Applicant. Further, that the Respondent had Jurisdiction to hear the Request for Review which merely challenged the procedure of terminating a contract. In addition, that the Applicant in its response to the Request for Review dated 4th July 2018 admitted to owing the Interested Party money which they have refused to pay currently standing at KShs 19,700,000/=.

19. Lastly, the Interested Party averred that the Applicant failed to comply with the Respondent's judgement delivered on 18th July 2018 and failed to reinstate him to the initial position as the supplier of Meat in Nairobi based units, and also disregarded the letter forwarded to them by his Advocates on record . Therefore that the Applicant is in contempt of court and has not come to Court with clean hands.

The Determination

20. The instant application was canvassed by way of written submissions which were highlighted during a hearing held on 2nd August 2018. Mr. K. Biomdo, a Special State Counsel filed submissions dated 6th November 2018 on behalf of the Applicant. The Respondent's submissions were dated 26th November 2018 and were filed by Judith Chimau, a Senior State Counsel at the Attorney General's Chambers, while Munyasya & Company Advocates filed submissions dated 14th November 2018 for the Interested Party.

21. I have considered the pleadings, submissions and arguments made by the parties, and find that the issues arising for determination are firstly, whether the Respondent had jurisdiction to consider the Request for Review by the Interested Party. If the Court finds in the affirmative, it will then proceed to consider the two other substantive issues namely: whether the Respondent acted fairly in making its decision of 18th July 2018 and, whether the Respondent's decision of 18th July 2018 was unreasonable. The last issue for determination is whether the Applicant merits the prayers sought .

22. The issue of the Respondent's jurisdiction will of necessity be dealt with first, as it is a preliminary procedural issue that may affect the outcome of this case. The Applicant in its submissions on the issue reiterated its arguments that under section 167(1) of the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act"), the Respondent's jurisdiction is premised upon the filing of request for review within 14 days of the notification of the award or date of occurrence of the alleged breach. The Applicant relied on the case of **R vs Public Procurement Administrative Review Board and 2 Others Ex-parte Kenya Power And Lighting Company Limited, (2017) eKLR** for this proposition.

23. There were four limbs to the Applicant's arguments on the Respondent's lack of jurisdiction. The first limb was by virtue of the Interested Party's averment and the Respondent's finding that there was no evidence of service of notice of the award on the Interested Party as per the requirements of section 87(3) of the Act. Therefore, that the right to invoke jurisdiction on account of notification of the award had not accrued by 27th June 2018, and the Interested Party could not invoke the Respondent's jurisdiction on this account.

24. The second limb was with regard to the filing of the Request for Review within 14 days from the date of occurrence of a breach, and the Applicant submitted that the Interested Party in its pleadings and submissions before the Board averred that the breach occurred on 18th September 2017, when the Respondent terminated its contract prematurely. Additionally, that the Respondent in its decision made a finding that "the coming into force of Kenya Meat Commission as the new supplier under 2017/2018 tender, through a contract known as basic Ordering Agreement on 25th January 2018 prompted the Applicant to launch the request for review on 27th June 2018".

25. Therefore, according to the Applicant, if this was the case, the cause of action arose on 25th January 2018 and as per section 167(1) the Act, and the Interested Party had 14 days from 25 January 2018 to file the request for review. The Applicant submitted that 14 days window lapsed on 8th February 2018, and the Request for Review dated 27th June 2018 was filed out of time and the Respondent thus lacked jurisdiction to entertain the application.

26. The third limb of the Applicant's arguments on jurisdiction was on account of Section 167(4)(a) and (c) of the Act. It was its submission that section 167(4) provides for the matters which shall not be subject to review of procurement proceedings, and includes under subsection (a) the choice of a procurement method, and under subsection (c), where a contract is signed in accordance with section 135 of the Act.

27. However, that despite the ousting of the Respondent's jurisdiction in these two areas, the Respondent in its decision delivered on the 18th July 2018 framed Issue II as "whether the Procuring Entity used a procurement method not recognised in law in the subject tender thereby defeating the objective of public procurement contrary to section 3 of the Act". It was there submission that the respondent in addressing this issue went to consider matters related to choice contrary to section 167(4)(a) of the Act, and despite the fact that none of the parties had complained about the choice of procurement method.

28. On section 167(4)(c) of the Act, it was the Applicant's submission that the Respondent lacked jurisdiction to entertain the application since a valid contract had been signed. That in assuming jurisdiction, the Respondent acted unreasonably and irrationally by failing to consider material facts relating to execution of contract between the applicant and the Kenya Meat Commissions on 25th January 2018.

29. The last limb of the Applicant's arguments on jurisdiction was that section 174 of the Act provides that the right to seek review is additional to any other legal remedies available in law. The Applicant submitted that the claims by the Interested Party were primarily focussed on termination of contract and breach of contract on account of alleged non-payments of claims. It was there submission that it is evident that the Interested Party had other forums to address the alleged breach as the same is premised upon contractual matters outside the purview of the Respondent.

30. The Respondent in its submissions reiterated its arguments that it complied with the provisions of the Act, and did not specifically address the arguments made about its jurisdiction to hear the Interested Party's Request for Review.

31. The Interested Party on its part submitted that it approached the Respondent within the fourteen days of the occurrence of the breach by the Applicant which occurred on the 26th June 2017. Further, that the Applicant flouted the provisions of the Act by cancelling the existing Tender No MOD/423(01011)2017/2018 and awarding it to Kenya Meat Commission, and also entered into a written contract with the alleged successful bidder on 18th September 2017, the same date the said supplier took up the contract. Lastly, that the other bidders were not informed why their bids were not successful contrary to section 87(3) of the Public Procurement Act.

32. The Interested Party also submitted that the accounting officer of the Applicant entered into restrictive tendering without justification, contrary to section 102 of the Act. That the process of tendering arising from Tender No. MOD/423(010011)2015-2016 was muddled with irregularities and therefore the Respondent had jurisdiction to hear its Request for Review. It was his submission that in order for section 167(4)(c) to act as a bar to any proceedings the contract executed by the accounting officer must be executed in accordance with the law, which is not what happened.

33. Lastly, the Interested Party contended that tribunals are specialised bodies and have the technical knowledge of all matters concerning the dispute, and the Courts ought not to interfere with them. They relied on the case of **Kenya Pipeline Company Ltd vs Hyosung Ebara Ltd & 2 Others 2012 eKLR** and **Diana Kethi Kilonzo vs IEBC and 2 Others Petition no 359 of 2013**.

34. After due consideration of the legal arguments made, 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.”

35. There are three aspects of the issue of the Respondent’s jurisdiction that are raised by the arguments made in this application. The first is as regards when time started to run within the meaning of section 167(1) of the Act with respect to the breach alleged by the Interested Party in its Request for Review. The second, is whether the Interested Party’s Request was filed in time for the Respondent to be seized of jurisdiction to hear the same. The third aspect only arises if the Respondent is found to have had jurisdiction under section 167(1), and this is whether the Respondent considered matters that are not subject to review by virtue of section 167(4) of the Act.

36. To appreciate the arguments made by the parties in this regard, it is necessary to reproduce the grounds for review raised by the Interested Party in its Request for Review that was filed with the Respondent on 27th June 2018, and the Respondent’s findings on the issue of whether its jurisdiction to entertain the said Request for Review. A copy of the Interested Party’s Request for Review was produced as Annexure “ANK 3” to the Applicant’s Verifying Affidavit sworn on 1st August 2018 by Anne Nyakio Kamaru. The decision thereon by the Respondent dated 18th July 2018 was produced as Annexure “ANK 2” to the said Verifying Affidavit.

37. The Interested Party in the said Request for Review requested the Respondent to extend the contract ending 23rd April 2018 for supply of Meat (Beef) to Nairobi Based Units, and to order for payments due to the Interested Party for the meat supplied therein on the following grounds:

1. THAT the applicant and the respondent entered into an extension of contract to supply meat within Nairobi Based Units dated 22nd May 2017 all of which were duly executed.

2. THAT it is the contention of the applicant that there was a breach of contract by Ministry of Defence contrary to the legitimate expectation of the applicant as the supplier. The applicants contract was prematurely terminated on 18th September, 2017 when he had gone to deliver 3000 kilos of meat at LANGATA BARRAACKS DHQ, CAU, KABETE BARRACK, NDC, DSC, DFMH and the meat was rejected without any explanation and this act caused the applicant huge financial loss.

3. THAT the respondent failed to give any audience to the applicant the reason for termination of contract despite having had a previous good relationship with the applicant for about 6 years without any breach of the part of the applicant.

4. THAT the applicants advocate has written numerous letters to the respondent but unfortunately the same has not been responded to. We invite the Board to take Judicial notice of the letter.

5. THAT the Ministry of Defense illegally advertised the contract herein despite the applicant having a running contract for a period of one year.

6. THAT we shall invite the board to take judicial notice of the injustice committed by the Ministry of Defence and to examine the conduct of the procuring entity in the recent advertised letter.

7. THAT we learnt of the advertisement for a new tender for the supply of Meat (Beef) On Bone to Nairobi Based Units which was an open tender yet we were impliedly denied an opportunity to participate in the said tender being the current supplier with a valid contract and we shall invite the board to cancel the new tender and allow us to continue with supply pending the hearing and determination of this request.

8. THAT the procuring entity has a mandate to renew the applicants contract that was prematurely terminated for a period of one year as there is evidence to show that there was no breach on the part of the applicant.

9. THAT the contract was supposed to last for a period of one year from 22nd May 2017 to 23rd April 2018 but on the contrary the contract run for about 3 months until the 18th September, 2017 when it was unfairly terminated without notice or explanation.

10. THAT it is also worthy to note that this is not the period envisage in the initial original contract.

11. THAT applicant was not paid for the supplied at the point of termination which was amounting to the sum of 19,000,000/= as

per the delivery notes duly issued by the applicant to the respondent. Annexed hereto and marked 2 are copies of the delivery notes.

12. THAT it therefore means that the new tender that was advertised and parties invited to participate was done contrary to the existing valid contract and in breach of the law of contract.

13. THAT it is therefore our contention that we have not fully satisfied the contract as envisaged in the rules and procedure that a contract of such magnitude should last for 1 year without interruptions.

14. THAT it will be prejudicial to the applicant if the contract is not extended for a minimum period of one year as it will result to a huge financial crunch, detriment and setback on the applicant whose legitimate expectation that the contract was to remain valid for 1 year.

15. THAT the respondent will not be prejudiced if this the applicant's contract is extended.”

38. The Interested Party thus sought the following relief from the Respondent in its Request for Review:

1. THAT the board do order for cancellation/nullification or set aside any subsequent tenders issued to any person/Company in respect to tender Number MOD/423(01011) 2017/2018 after the termination of the applicant's tender.

2. THAT the Board do issue directions to the respondent's accounting officer to reinstate the applicant's Tender No. MOD/423(01011) 2017/2018 to compensate for the financial loss incurred by the applicant and the time not covered for the terminated contract.

3. THAT the Board do order for payment of the supply of meat supplied by the respondent in respect to tender number MOD/423(01011)2017/2018 as at the time of termination of the contract amounting to Kshs 19,700,000/=

4. THAT the Board do order for termination of the procurement process touching on supply of tender No. MOD/423(01011) 2017/2018 for the supply of Fresh Meat (Beef) On Bone to Nairobi Based Units and commencement of a new procurement process with the existing as part of the firms to participate in the process. For avoidance of doubt the Board does hereby issue annul the contract, if any.

5. THAT for avoidance of doubt, the applicant continues serving as the supplier under the initial original contract dated 22nd May 2017 and the supplementary contract.

6. THAT the costs of this application be awarded in favour of the applicant.

39. Upon the filing of the Request for Review, the Applicant raised the issue of the Respondent's jurisdiction to hear and determine the said Request for Review on the following grounds: that the alleged breach was outside the procurement process and hence outside the jurisdiction of the Board; that the alleged breach occurred on 18th September 2017 which was the date of termination of the contract and the Request for Review was thus brought outside the period of 14 days provided under section 167 of the Act; and that the procurement proceedings in Tender No MOD/423(01011)2017/2018 had resulted in a valid contract being entered with the Kenya Meat Commission which was already being performed, and no submissions had been made as to the said contract having been unprocedurally entered into.

40. The Respondent in its decision dated 18th July 2018 made the following findings on the issue of its jurisdiction, after explaining and observing that the procurement process in Tender No MOD/423(01011)2017/2018 culminated in the Applicant signing a contract referred to as a Basic Ordering Agreement with the Kenya Meat Commission on 25th January 2018 :

“... The coming to the fore of Kenya Meat Commission as the new supplier under the 2017/2018 tender prompted the Applicant to lodge this request for review, dated and filed with the Board on 27th June 2018. The Board has considered the submissions by the Procuring Entity that the Board lacks jurisdiction to hear and determine this Request for Review.

To decide the preliminary objection, the Board has looked at the facts of the case and the applicable law and observes that it is imperative to first determine which tender is the subject matter of this Request for Review.

It is evident that the Applicant participated in the tender floated by the Procuring Entity for the supply of fresh meat (beef) on bone to Nairobi based units under Tender Number MOD/423(01011) 2017/2018 and the previous one, under Tender Number MOD/423(01011) 2015/2016. It is further evident that the 2015/2016 tender was awarded to the Applicant and was performed for one year-between 22nd May 2016 and 21st May 2017- with an extension upto 18th September, 2017.

It is also evident that the Applicant was invited to participate in and it submitted a tender in the 2017/2018 procurement proceedings. It is also clear from the heading of the Request for Review that what the Applicant is challenging is the 2017/2018 tender although there is an overlap of the facts that the Applicant was relying upon to challenge the new tender.

The Board having determined that the 2015/2016 tender and the contract arising therefrom is not in contention in the instant Request for Review, it follows that the first and second limbs of the grounds of preliminary objection have been overtaken by events.

On the third ground of preliminary objection namely that the procurement proceedings in the 2017/2018 tender had resulted in a valid contract being entered into with Kenya Meat Commission in 2017, the Board takes cognisance of the provisions of Section 167(4) of the Act, which states as follows.....

Section 87(3) of the Act is unambiguous that the Procuring Entity shall, in all tender process, disclose the successful tenderer and give reasons as to why an unsuccessful bidder's tender was unsuccessful.

The Board notes that the successful bidder was notified of the outcome of its tender vide letter dated 15th December, 2017 that its tender was successful. The Board further notes that although the Procuring Entity stated that it served the Applicant by ordinary post on the same day, there was no evidence of postage which was placed before the Board.

As the Board has previously stated where the issue of service of a letter of notification is disputed, the burden of proving service of the letter lies with the Procuring Entity. In the tender the subject matter of the instant Request for Review, the Procuring Entity did not discharge that burden.

The Board further finds that in order for Section 167(4)(c) to act as a bar to any proceedings, any contract executed by the Procuring Entity and the successful bidder must have been executed in accordance with the law and further that where a contract is executed without first complying with the provisions of Section 87(3) of the Act, the same cannot be said to have been signed in accordance with the provisions of the Act.

Based on the totality of the facts and circumstances of this case, the Board finds that there is no valid contract in place since the purported contract signed by the Procuring Entity and the successful bidder on 15th January 2018 was not signed in accordance with the law. The same is therefore a nullity and is of no effect.

Consequently, this limb of preliminary objection also fails and is disallowed.”

41. This Court notes that there are two applicable instances when time will start to run for purposes of filing a request for review with the Respondent that are provided by an ordinary reading of section 167 (1) of the Act, namely the date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process..

42. A reading of the grounds in the Interested Party's Request for Review shows that the breach alleged by the Interested Party is the premature termination of its existing contract by the Applicant arising from Tender No MOD/423(01011)2015/2016, and the advertisement of a new tender for the same items supplied by the Interested Party in Tender No MOD/423(01011)2017/2018. The Interested Party specifically stated in this regard in its Request for Review that “*the Ministry of Defense illegally advertised the contract herein despite the applicant having a running contract for a period of one year*” and that “*the new tender that was advertised and parties invited to participate was done contrary to the existing valid contract and in breach of the law of contract*” .

43. The Respondent in its summary of the Interested Party's case in its decision did also capture the main grievance of the Interested Party as the termination of the Interested Party's contract by the Applicant and concluded its summary by stating that “Counsel for the Applicant therefore urged the Board to find that the floating of the new tender was illegal, null and void”.

44. Therefore, the relevant act when time started to run for purposes of the Interested Party's Request for Review was the alleged termination of the Interested Party's contract by the Applicant. As regards how the date of occurrence of this breach is to be determined, I am persuaded by the decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

“....In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know. The paragraphs of the judgment in Uniplex which I wish to emphasise are paragraphs 30 and 31:

“30However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings. “

I accept that the question under reply by the Court of Justice only required the Court to decide whether the three month period began with the date of the date of the infringement or on the date when the claimant knew or ought to have known of the infringement, but it is clear that in paragraphs 30 and 31 the Court of Justice moved to consider the degree of knowledge necessary to constitute knowledge for the purpose of starting the three month period.

The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can “come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings” reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what

happens if the information which the unsuccessful tenderer has is incomplete? It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realise the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough..."

45. The answer then to the question when time started to run in the present application can only be reached upon an examination of when the Interested Party had knowledge of the alleged breach by the Applicant. It is in this regard clearly and severally stated in the Request for Review in the grounds reproduced in the foregoing that the Interested Party became aware of the premature termination of its contract by the Applicant on 18th September, 2017. As this is the only alleged breach put forward by the Interested Party in its Request for Review, the Request for Review was obviously filed out of time as the 14 day limit that is specified in section 167(1) of the Act had long lapsed by the time the Request for Review was filed on 27th June 2018.

46. The Interested Party in this respect alleged in its pleadings and submissions that the operative date was 26th June 2018. It is specifically stated in this regard in paragraph 5 of its replying affidavit filed herein on 14th September 2018 and sworn by John Mbugua Nduba as follows:

"I consistently supplied meat to Nairobi based units for Tender No. MOD/1423(01011) 2016/2017 upto the 26th day of June 2018, when the Applicants refused to collect meat from me, and thereafter I filed my request for review at the Public Procurement Review Board on 27th June 2018, which was just a day after the occurrence of the breach."

47. However, in its Request for Review filed on 27th June 2018 with the Respondent, the Interested Party averred as follows:

"THAT it is the contention of the applicant that there was a breach of contract by Ministry of Defence contrary to the legitimate expectation of the applicant as the supplier. The applicants contract was prematurely terminated on 18th September, 2017 when he had gone to deliver 3000 kilos of meat at LANGATA BARRACKS DHQ, CAU, KABETE BARRACK, NDC, DSC, DFMH and the meat was rejected without any explanation and this act caused the applicant huge financial loss."

48. There was no pleading or submissions made as regards the refusal by the Applicant to accept the Interested Party's meat on 26th June 2018 in the Request for Review, and that date was not considered nor a point of reference as to whether the Respondent had jurisdiction or not in its decision. It is evident that the said date is an afterthought by the Interested Party in an attempt to bestow jurisdiction upon the Respondent after the fact, and clearly contradicts its own statements in its Request for Review.

49. On the submissions made and findings by the Respondent on the lack of notification of the award to the Applicant, and its significance as regards whether the Respondent had jurisdiction thereby, it must be borne in mind that the reason why notification of an award is a watershed period for the filing of a Request for Review, is so that an aggrieved party can then raise any objection as regards the substance of the award, or the procurement processes leading to the award.

50. In the present application, a perusal of the Request for Review shows that on the contrary, the Interested Party's grievance was not with the award given pursuant to Tender No MOD/423(01011)2017/2018 or the procurement processes preceding that award, but with the termination of its own contract given pursuant to Tender No MOD/423(01011)2015/2016, which it alleged in its Request for Review made Tender No MOD/423(01011)2017/2018 illegal. Clearly therefore, the substance of the award in Tender No MOD/423(01011)2017/2018 was not in issue in the Interested Party's Request for Review and all the Applicant sought was its termination of the said award to facilitate the extension of its previous contract. The notification of or lack thereof of the said award was also not pleaded by the Interested Party in the said Request for Review.

51. Lastly, it is notable in this respect that the Respondent did not indicate in its decision when time started to run, to support the finding it made that it could assume jurisdiction to hear the Interested Party's Request for Review. This was despite the Respondent expressly stating in its decision that there was an overlap of facts that the Interested Party was relying on to challenge the new tender.

52. The Respondent appears to have assumed jurisdiction on the basis that the 2015/2016 tender and the contract arising therefrom was not in contention in the Request for Review, and that as regards the 2017/2018 tender, there was no valid contract in place since the purported contract signed with the successful bidder was not signed in accordance with the law. This basis and rationale by the Respondent for its jurisdiction ignored and sidestepped the critical triggers that are provided by law for jurisdiction to arise, which is the date of notification of an award and/or the date of alleged breach by a procuring entity. This triggers were not considered by the Respondent, and it thus ended up assuming jurisdiction when it had none. And thereby acted in error.

53. Arising from the findings in the foregoing, this Court finds that the Respondent did not have jurisdiction to consider the Interested Party's Request for Review filed on 27th June 2018, as the same was filed beyond the statutory limit of 14 days.

54. The above findings render the issues as regards the fairness and reasonableness of the Respondent's decision moot, as the Court will then have to consider the merits of the Respondent's decision of 18th July 2018, which it has found to be null and void. There is thus only one outstanding issue, which is whether the Applicant is entitled to the relief sought.

55. The Court of Appeal held in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the order sought by the Applicant of certiorari:

“...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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

56. I find that as the Respondent has been found to have acted without jurisdiction and *ultra vires* section 167(1) of the Act, the Applicant is entitled to the order sought of certiorari to quash the impugned decision by the Respondent made on 18th July 2018. In the premises this Court finds that the Applicant’s Notice of Motion dated 13th August 2018 is merited to and orders as follows:

I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the decision in the Respondent’s ruling dated 18th July 2018 on the Interested Party’s Request for Review Application No. 83 of 2018.

II. The Respondent and Interested Party shall meet the Applicant’s costs of the Notice of Motion dated 13th August 2018.

57. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2018

P. NYAMWEYA

JUDGE