



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 100 OF 2017

**IN THE MATTER OF: AN APPLICATION BY KENYA RURAL ROADS AUTHORITY FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF ORDERS OF CERTIORARI**

AND

**IN THE MATTER OF: SECTIONS 39, 78, 79, 80, 83, 84, 165, 173 AND 175 OF THE PUBLIC
PROCUREMENT AND ASSET DISPOSAL ACT NO 33 OF 2015 LAWS OF KENYA**

AND

**IN THE MATTER OF: ARTICLE 201 OF THE CONSTITUTION OF KENYA 2010, ORDER
53 RULE 1 OF THE CIVIL PROCEDURE ACT, SECTIONS 8 AND 9 OF THE LAW REFORM
ACT AND SECTIONS 7 (1) & (2), 9(1) AND 11 (1) (e), (h) & (i) OF THE FAIR
ADMINISTRATIVE ACTION ACT 2015**

AND

IN THE MATTER OF: SECTIONS 6 AND 7 OF THE KENYA ROADS ACT NO 2 OF 2007

AND

**IN THE MATTER OF: TENDER NO. RWC 373 FOR THE PROPOSED IMPROVEMENT TO
BITUMEN STANDARD AND MAINTENANCE OF JAMBO (JN A2) –KAGOCHI- HOMBE-
KWA WAMBUI- STATE LODGE-GIAGATIKA (JN A2) AND MURANGA- KIRIANI ROADS.**

AND

**IN THE MATTER OF: A DECISION AND RULING BY THE PUBLIC PROCUREMENT
ADMINISTRATIVE REVIEW BOARD DELIVERED ON 20TH FEBRUARY 2017 IN
APPLICATION NUMBER 11 OF 2017**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

ROBEN ABERDARE (K) LIMITED.....INTERESTED PARTY

AND

EXPARTE APPLICANT: KENYA RURAL ROADS AUTHORITY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 8th March, 2017, the ex parte applicant herein, **Kenya Rural Roads Authority**, seeks the following orders:

1. An order of Certiorari to issue to remove to this Honourable Court for purposes of quashing the entire decision of the Public Procurement and Review Board in Application Number 11 of 2017 delivered on 20th February 2017 purporting to compel the Applicant to award the Tender No. RWC 373 for the Proposed Improvement to Bitumen Standard and Maintenance of Jambo (JN A2) –Kagochi- Hombe- Kwa Wambui- State Lodge-Giगतिका (JN A2) and Muranga- Kiriani Roads to Roben Aberdare (K) Limited, the interested party herein.

2. An order of Certiorari to issue to remove to this Honourable Court for purposes of quashing the entire decision of The Public Procurement and Review Board in Application Number 11 of 2017 delivered on 20th February 2017 purporting to compel the Applicant to award the Tender No. RWC 373 for the Proposed Improvement to Bitumen Standard and Maintenance of Jambo (JN A2) –Kagochi- Hombe- Kwa Wambui- State Lodge-Giगतिका (JN A2) and Muranga- Kiriani Roads purporting to compel the applicant to complete the procurement process for the said tender within seven (7) days from 20th February 2017 and file its award thereto within the said seven (7) days.

3. An order of Certiorari to issue to remove to this Honourable Court for purposes of quashing the entire decision of The Public Procurement and Review Board in Application Number 11 of 2017 delivered on 20th February 2017 purporting to compel the Applicant’s procurement officer to write a professional opinion that concurs with the purported Tender Evaluation Committee Report.

4. An order of Certiorari to issue to remove to this Honourable Court for purposes of quashing the entire decision of The Public Procurement and Review Board in Application Number 11 of 2017 delivered on 20th February 2017 purporting to award the Respondent costs amounting to Kshs 250, 000/=.

5. Cost of application be in the cause.

Applicant’s Case

2. According to the applicant, Kenya Rural Roads Authority (hereinafter referred to as “KURA”), it is a state corporation established pursuant to section 6 of the **Kenya Roads Act** No. 2 of 2007 of the Laws of Kenya and it was established with the responsibility for management development, rehabilitation and maintenance of rural roads.

3. According to the applicant, by way of Public advertisement in the media on the 28th of April, 2016, it invited bids for Tender No. RWC 373 for the proposed improvement to Bitumen Standards and Maintenance of Jambo (Junction A2) Kigochi – Itombe – Kwa Wambui State Lodge – Chaka State Lodge Giगतिका (Junction A2) and Muranga – Kiriaini Road whose closing date was 26th October, 2016.

4. It was averred that subsequent to the opening of the tenders and in accordance with the procurement laws, the Applicant was required to evaluate the bids submitted by the bidders and make a decision on the bids submitted and that the evaluation committee appointed by the accounting officer pursuant to section 46 of the **Public Procurement and Asset Disposal Act**, was to evaluate and compare the responsive tenders other than tenders rejected. To the applicant, the process is normally that the evaluation committee prepares an evaluation report containing a summary of the evaluation and comparison of tenders and submits the report to the head of the procurement function for his or her review and recommendation. The person responsible for procurement is then required upon receipt of the evaluation report prepared to submit such report to the accounting officer for approval as may be prescribed in regulations.

5. It was averred that in this case the person responsible for procurement for the ex parte Applicant was the Procurement Manager who upon receipt of the evaluation report was under a duty under section 80(4) of the **Public Procurement and Asset Disposal Act** to review evaluation reports and prepare professional opinions in respect of the evaluation reports.

6. Accordingly, the evaluation committee made a report which was submitted to the Procurement Manager who made her reviews and recommendation vide an internal memo Ref:KeRRA/011/33/Vol.III(09) wrongly dated 13th January 2016 instead of 13th January 2017. The said recommendation made by the procurement manager was then forwarded to the Director General who made his remarks and observations on the face of the said recommendation and returned the same back to the Procurement Manager for further action.

7. It was deposed that on 3rd February 2017 the Procurement Manager then wrote a letter to the Tender Evaluation Committee outlining its recommendations and referred the tender applications back to the committee for re-evaluation. Upon receipt of the procurement managers letter dated 3rd February 2017, the chairman of the Tender Evaluation committee then responded via a letter dated 14th February 2017 recommending that **Roben Aberdare (K) Ltd**, the interested party herein be awarded the said tender. Subsequent to the above mentioned letter dated 14th February 2017, the Procurement Manager further wrote an opinion pursuant to the aforesaid section 80(4) of the **Public Procurement and Asset Disposal Act** that in her professional opinion that the entity recommended by the evaluation committee had not satisfied the requirements of the tender documents and the statutory requirements of the **Public Procurement and Asset Disposal Act**. The recommendations were as follows:

a. The recommended Bidder did not satisfy the criteria set out in the bid document in Section 5 clause 3.1 – Financial Performance where the Bidder is required to provide Audited Accounts for the last 3 years (2015, 2014 and 2013). Out of the three statements required, the Bidder provided only one statement of accounts for the Financial Year 2013.

b. The bidder’s financial position in terms of cash flow could not be determined as the accounts provided are too old (2013) while the letter of credit provided is not a credit facility but rather a letter of intent from the Cooperative Bank of Kenya. The Bidder does not therefore satisfy the criteria on the capacity to have a cash flow of Kshs.100 Million as required in the tender document. The Bidder fails on the financial capability to undertake the project.

c. The Bidder altered (deleted item for AutoCAD Civil 3D 2016 and their licenses under the appendix Item No.1.06A. This is considered a major deviation as it affects the rights of the employer as provided under the condition of bid and instruction to Bidders Clause 28.2 of the tender document.

d. Bill No.1 is overpriced examples; Appendix to Bill No.s.

i. 1.05; A/104/2.07, 2.08, 2.09, 2.10, 2.15, 3.06, 3.07, 3.12, 3.13, 3.14, 5.09-5.11, 6.07, 9.16, 9.22-9.23, 9.33. 9.41

ii. **1.06A Items on Engineers Office furniture and equipment, especially computers, laptops, office desks, printers and digital cameras.**

iii. **1.06B survey equipment digital Total station and levelling machines 6 million and 1 million respectively.”**

8. It was averred that as a result of the above, and having reviewed the documents, the Director General concurred with the opinion of the Procurement Manager and referred the matter to the evaluation committee for consideration. To the applicant consequently, there was no final evaluation report before the Applicant.

9. It was explained by the applicant that all the above processes are necessary for procurement purposes to ensure that procurement by the Applicant complies with the law and the said tendering processes were still ongoing.

10. However, before the tendering process could be completed and a decision made, the interested party filed a case before the Public Procurement Administrative Review Board, the Respondent herein (hereinafter referred to as “the Board”) Case No. 11 of 2017 requesting for review of the tendering and evaluation decision and or processes relating to the said Tender No. RWC 373. This application was opposed by the ex parte applicant on amongst other grounds, the ground that the tendering process was still ongoing and or the procuring process was yet to be completed by the procuring entity. The Applicant on request by a letter dated 3rd February 2017 from the Board Secretary also submitted documents as per Form 5, Schedule 1 as required from the procuring entity from which it was clear that there was no report from the evaluation Committee that was supplied to the public procurement and administrative review board because the same had been referred back to the evaluation committee for further consideration.

11. It was averred that upon conclusion of the review by the Board the said documents provided to the board by the applicant were then returned via a letter dated 22nd February 2017 by the Board Secretary to the applicant. It is clear from the list of ‘returned documents’ that no report by the evaluation committee was returned as part of the documents supplied to the review board.

12. However, the Respondent Board in its decision dated 20th February 2017 in total disregard of the law purported to award the tender to the Interested Party and therefore purported to usurp the powers of the procuring entity. It was further averred that the Respondent purported to compel the head of the Procurement function to give an expert opinion in concurrence with the purported evaluation committee yet the Respondent does not have such powers. Accordingly, it was contended that the Respondent’s decision was *ultra vires*.

13. To the applicant, the decision of the Respondent is without jurisdiction and is unreasonable. In the applicant’s view, the revised report now prepared by the Tender Evaluation committee confirms that none of the Bidders met the requirements and therefore the tender should be re-advertised and fresh bids or tenders received. To it, the procurement manager having received the revised final report by the evaluation tender committee as stated above then communicated the same to the Director General of the applicant via Letter dated 27th February 2017 wrongly dated as 27th January 2017.

14. It was the applicant’s case that the decision of the Respondent violates the principles of public finance under Article 201(d) of the Constitution of Kenya 2010 and the provisions of the **Public Finance Management Act of 2012**. To the applicant, the decision of the Respondent will lead to non implementation of the road works in this project as the Respondent is not only not qualified but also lacks capacity to undertake the project. It was therefore contended that the Respondent’s decision is illegal, unreasonable, and violates the Constitution.

15. It was submitted that the evaluation report dated November 2016 which was allegedly relied on by the respondent in its decision was never supplied to the respondent, as the procurement process was still ongoing and the tender applications had been referred back to the evaluation committee for re-evaluation. It was therefore contended that the application for review was filed prematurely as the tendering process

was still ongoing at the time. The Court was invited to note that the interested party filed its Application no. 11 of 2017 before the Public Procurement and Administrative Review Board on 3rd February 2017 that is the same day the Procurement Manager after receiving a response from the Director General wrote a letter to the evaluation committee outlining its recommendations and referred the tender applications back to the committee for re-evaluation. From the report submitted by the evaluation committee it is clear that the interested party was named as the **'Recommended successful bidder'** as the evaluation report was still scheduled to undergo scrutiny by the Procurement Manager and the Director general.

16. It was submitted that the above information clearly confirms that the tender process was ongoing at the time of filing the application for review before the Public Procurement and Administrative Review Board. The applicant in support of its submissions referred to section 173(c) of the ***Public Procurement and Asset Disposal Act*** which was previously section 98(c) of the ***Public Procurement and Disposal Act*** and its interpretation in **Republic vs. Public Procurement Administrative Review Board Ex parte Athi Water Services Board & 2 others [2017]** in which this Court relied on **Republic vs. Public Procurement Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] eKLR** where it was stated that;

“...this provision [section 98(c)] cannot be read in isolation to other provisions. In my view the power to substitute the decision of the procuring entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally.”

17. In the case herein, it was submitted that the Procuring entity was lawfully required to carry out an evaluation of the tender proposals as per the procedure laid out at sections 80, 81, 82, 83, 84 and 85 of the ***Public Procurement and Asset Disposal Act, 2015*** and in the event the said procedure was not completed as prescribed by the law then equally the respondent would not have the power to substitute the procuring entity's decision.

18. It was submitted that taking into account section 80(2) of the ***Public Procurement and Disposal Act, 2015*** which states that the evaluation and comparison shall be done as per the procedures and criteria set out in the tender documents, the respondent acted *ultra vires* by seeking to usurp the powers and mandate of the exparte applicant when it did not have the power to award a tender to a bidder who has not qualified as per the requirements set in the tender document. In this respect the applicant relied on **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited**, a passage by **Professor Wade** in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983]2 WLR 458, 475.**

19. It was submitted that by awarding the interested party the tender, the respondent acted contrary to sections 79, 80, 83 and 84 of the ***Public Procurement and Disposal Act, 2015***, where before awarding a tender to a bidder the tender process needs to have been complete. In this respect the applicant relied on **Republic vs. Public Procurement Administrative Review Board Ex parte Athi Water Services Board & 2 others [2017] eKLR** where **Republic –vs- The Public Procurement and Administrative Review Board, The Attorney General, Daniel Outlets exparte Numerical machining Complex Limited – Nai JR No.261 of 2015** was cited with approval for the position that:

“In this case the impugned decision was taken before the financial evaluation was undertaken. Regulation 50(1) of the Regulations provides that:

Upon completion of the technical evaluation under Regulation 49 the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

The effect of compelling the Applicant to award the tender to the interested party was to compel the Applicant to ignore the aforesaid provision. The 1st Respondent in my view had no power to compel the Applicant to act unlawfully. By so doing it clearly exceeded its

jurisdiction. It could only issue such directions and make decisions that the Applicant itself was lawfully permitted to issue or make.”

20. According to the applicant, by purporting to award the tender to the interested party herein based on the findings in the evaluation report made in November 2016, but which report was not submitted into evidence during the hearing of the application for review by the respondent, the Respondent’s decision was irrational and unreasonable and in this respect the applicant relied on **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [supra]** and submitted that compelling it to comply with the decision of the respondent to award the tender to the interested party would be forcing the exparte applicant to commit an unlawful act which is against public interest and would occasion unfair advantage to the public and taxpayers in general.

21. It was further submitted that the respondent in its decision dated 20th March 2017 sought to compel the head of the procurement entity to give an expert opinion in concurrence with the purported evaluation committee report recommending the interested party as the successful bidder based on section 84(2) of the Procurement Act. It was however contended that this was a coerced opinion which was not the standing of the exparte applicant’s procurement manager. To the applicant, section 84(2) of the ***Public Procurement and Assets Disposal Act*** should not be read in isolation but together with section 84(1) and (3). The said sections provide as follows;

(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.

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

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

22. To the applicant the procuring entity as seen in section 84(1), has a mandatory duty to review the tender evaluation report and give a professional opinion to the accounting officer on the procurement proceedings. Here it is clear that there must be a professional opinion prepared in the course of the tendering process. It was noted that sub section (2) further provides that the professional opinion done under sub section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations. Consequently, the act cannot be assumed to disregard the professional opinion of the procurement manager in the event that there are no dissenting opinions between tender evaluation and award recommendations, as the same is not expressly stipulated as so in the provision. Further if subsection (2) is read with subsection (3) it is clear that the decision to award the tender still rests with the accounting officer (in this case the Director General) who as per subsection (3) in under a duty to take into account the views of the head of procurement (in this case the procurement manager) as made in the signed professional opinion referred to in subsection (1). In this respect the applicant relied on this Court’s holding in **Republic vs. Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd [2017] eKLR** that:

“According to the Respondent the role of the head of the procurement in the evaluation process is limited to providing professional opinion to the accounting officer in the event of dissenting opinions between tender evaluation and award recommendations. Here there is no evidence that there were dissenting opinions. With due respect if the Respondent’s view was that the opinion of the head of the procurement is only to be taken into account where there are dissenting opinions, that interpretation would be clearly incorrect since section 84(3) does not condition the taking into account of the said opinion on the existence of

dissenting opinions.”

23. To the applicant, from the reading of section 84 we are of the view and submit that the procurement manager of a procuring entity is not bound to write a professional opinion based on what is recommended by the evaluation committee but has a duty to perform his/her functions with due diligence and in conformity with the guidelines in the tender document. As such if even after reading the evaluation report by the committee, the procurement manager establishes that the recommended successful bidder has not complied with some requirements as per the tender document then it is only reasonable and in the public interest that a professional opinion containing a true reflection of the circumstances at hand be prepared. Board was therefore accused of acting ultra vires the provisions of the **Public Procurement and Assets Disposal Act** as they do not have the power to compel the head of the procurement function to give an expert opinion in concurrence with the purported evaluation committees report when the tendering process is still underway and /or incomplete. In any case a professional opinion had already been done but was not placed before the board as the evaluation process was still underway, as the tender applications had been referred back to the evaluation committee for re-evaluation. The professional opinion could not have been prepared unless the re-evaluation was done and the report by the committee forwarded back to the procurement manager. To the applicant, an opinion should not be influenced or coerced and thus for a professional opinion to have been provided re-evaluation of the tender needed to have been done.

24. According to the applicant, upon evaluation by the evaluation board, the interested party herein, was the recommended successful bidder being the lowest evaluated bidder although the interested party had not met all the requirements of the completeness criteria as per the . By not meeting all the requirements set in the tender document, the interested party was not eligible to be awarded the tender. The interested party being the lowest bidder and not qualified the procuring entity was left without any eligible bidder eligible to be awarded the tender. It was therefore submitted that the Board made a decision on Review Application 11 of 2017 to award the interested party the tender even when not qualified to be awarded.

25. It was the applicant’s case that the respondents’ decision is/was unreasonable for it is illegally awarding a tender to a disqualified person and it defeats natural justice. Natural justice is concerned with procedural fairness and should enhance public confidence in the process. By not allowing procedure for the tendering process to be complete and awarding the tender to a bidder who is not qualified destroys all public confidence for it is an illegal act. In the case of **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [Supra]** relying on **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** it was held that;

“...to maximize economy and efficiency as well as to increase public confidence in those procedures.....The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved...The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant.”

26. It was contended that in such a case it is the duty of this Honourable Court to consider public interest and safeguard the rights of Kenyans by ensuring that the respondents’ decision is not implemented at the detriment of the public at large. They submitted that awarding an unqualified bidder the said tender would amount to an illegality. This is supported by the case of **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2017] eKLR** where it was held that;

“If it turns out that by making provisions for additional services all the parties who are before this Court and who tendered for the project ought to have been disqualified, by awarding the tender to any of them, this Court would have abetted an illegality. This Court cannot countenance illegalities under any guise since the High Court has a supervisory role

to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role to do so.”

27. The ex parte applicant therefore prayed that for the ends of justice to be met and in the best interest of the public this being a project of high importance and which may infringe of the rights of very many Kenyans under article 204 (2) of the Constitution of Kenya, this Court be pleased to grant the orders prayed for in the application.

Respondent’s Case

28. According to the Respondent, it received the Applicant’s Requests for Review in the matter of Tender No. RWC 373 for Improvement to Bitumen Standards and Maintenance of Jambo (Jn A2) – Kagochi – Hombe – Kwa Wambui – State Lodge – Giगतिका (Jn A2) and Muranga – Kiriani Roads, filed on 3rd February, 2017 and proceeded to assign the Request for Review the Applicant Number 11 of 2017. Thereafter it notified and invited the Interested Party and other parties interested in the matter to a hearing on 16th February, 2017 whereat it heard all parties who attended the hearing, considered their submissions, determined the application for review and delivered its ruling on 20th February, 2017.

29. It was averred that in its ruling delivered on 20th February, 2017 the Board allowed the request for review by the Interested Party herein, ordered that the Applicant to forthwith and within a period of not less than seven (7) days complete the procurement process therein and in doing so award the subject tender to the Interested Party herein **M/s Roben Aberdare (K) Ltd** in compliance with the Tender Evaluation Committee’s recommendation and upon compliance with section 84(2) of the **Public Procurement and Asset Disposal Act, 2015**. Further, the Board ordered that the professional expert shall give a professional opinion in concurrence with the recommendations of the Tender Evaluation Committee in the absence of any dissenting opinion and provided for under section 84(2) of the Act. The Board further ordered that the Applicant herein shall file the letter of award with the Board within seven (7) days from the date of the Board’s decision and directed the ex-parte Applicant to pay costs of Kshs. 250,000 together with all the filing fees paid by the Interested Party in filing the impugned Request for Review.

30. According to the Respondent, in arriving at the above decision, it was alive of all facts raised by all the parties and was well informed of all the provisions of the law applicable to the raised facts and issues, including the provisions of the Constitution of Kenya, 2010, the **Public Procurement and Asset Disposal Act, 2015** (“the Act”) and the **Public Procurement and Disposal Regulations, 2006**, and other legislation. Further, the Board observed the rules of natural justice and acted lawfully, fairly and reasonably in exercise of its statutory mandate under the Act.

31. It was expounded that the Board, in its Decision, made the findings that the Applicant in an unanimous evaluation report produced in November, 2016 signed by all members of the tender evaluation committee, at the hearing of the Request for Review the Applicant conceded that it had carried out a preliminary, technical, and a financial evaluation for the tender and recommended the award of the same to the Interested Party at the Interested Party’s proposed price of Kshs. 6,081,865,936.29.

32. It was averred that the Board further made findings that the Applicant did not submit all the documents with its tender and the 2nd Respondent would not be able to draw up a contract, which would be in violation of section 135(6) of the Act for lack of a complete tender document. It further made findings that there was no divergent opinion by any member of the tender evaluation committee and that the committee’s decision to recommend award to the Interested Party was in fact unanimous. To the Board, it further established that under the provisions of section 84(2) of the Act, where there is no dissenting opinion by any committee member it cannot fall within the competence of the professional expert to substitute his/her opinion with that of the tender evaluation committee and any attempt to do so would be illegal on his/her part.

33. To the Board, it considered all the relevant factors in arriving at its decision and its decision was

reasonable, rational and lawful.

34. According to the Respondent Board, the Applicant's application is made in bad faith, has no merit and is only calculated to harass the credibility of the 1st Respondent's mandate and functions, while ultimately eroding the public's confidence in procurement procedures and processes yet the Board has continued to uphold procurement procedures as required by law and has promoted the integrity and fairness of these procedures and processes, and has not flouted any law nor acted in excess of their powers.

35. It was submitted on behalf of the Respondent that the Ex parte applicant's case is majorly premised on an argument that the matter was taken before the respondent before the tendering process was complete. However, it was the respondent's submission that the interested party was rightfully before it since there was a blatant breach of section 80(6) of the **Public Procurement and Asset Disposal Act 2015** by the ex parte applicant which requires that evaluation of tender bids be carried out within thirty (30) days from the tender opening day. It is not in dispute that in this particular matter tenders were advertised on 4th of July 2016 and opened on 26th October 2016. It is saddening that as at 3rd February 2017 the interested party was not informed of the results of the tender evaluation if at all there was any. This delay, in excess of 90 days from the opening date, was not only illegal but also unexplained to the bidders. The interested party then petitioned the respondent based on section 167(1) of the **Public Procurement and Asset Disposal Act** which provides thus:

“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.”

36. It was submitted that the interested party had reason to believe that there was foul play by the applicant owing to the unexplained delay and the natural party to approach was the respondent and the respondent rightfully gave audience to both parties and gave its ruling within the required framework. In this respect the Respondent relied on **Pastoli vs. Kabale District Local Government Council and Others (2008) 2 EA 300**, and contended that the ex parte applicant has not informed the Court of any single rule of natural Justice that was breached and neither has the ex parte applicant demonstrated any provision of the law breached.

37. Concerning the challenge to the legality of the order that the professional expert shall give a professional opinion in concurrence with the recommendations of the tender evaluation committee, it was submitted that the order was nothing but a reminder on the provision of section 84 of the **Public Procurement and Asset Disposal Act** after it came to the knowledge of the Board during the proceedings that all the tender committee members found the interested party the only successful bidder. The board was therefore of the view that a professional opinion under section 84 is bound to concur with that of the tender evaluation committee if there was unanimity by the tender evaluation committee. Reliance for this was placed on section 84(2) of the Act which provides thus:

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

38. To the Respondent Board, the other order of directing the Ex parte applicant to conclude the process within 7 days was not only legal but rational.

39. In the Respondent's view, the ex parte applicant does not merit the orders sought. This is because after knowing that they have not provided the Court with enough reasons to give the judicial reviews remedies they have furnished the court with additional information which they had not given the board. This is intended to persuade the Court to give a ruling based on merit and not the procedure as required in judicial review and reference was made to **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** and the Court was urged to dismiss the application with costs.

Interested Party's Case

40. According to the interested party, by way of public advertisement in the media on 4th July, 2016, KERRA invited sealed tenders for the subject tender whose closing date was 26th October 2016 at 11.00a.m and the tender validity period was initially 210 days but was later extended to 255 days. The interested Party being an eligible bidder submitted its duly filled in bid document on the 26th October, 2016 and on the date set for tender opening, sent its representative who noted that 5 bidders including Roben Abardare (K) Limited participated.

41. Having participated in the tender as bidder, the Interested Party had a legitimate expectation that the bids would be evaluated within the time set in the law, *i.e.* within a maximum period of 30 days from the date of tender opening. However KERRA, as the Procuring entity inordinately delayed beyond the statutory time limit to notify the Interested Party of what had transpired and the results of the tender evaluation.

42. According to the interested party, on or about 3rd February and on account of the unreasonable and illegal delay, the Interested Party being aggrieved by the illegality filed a Request for Review before the Public Procurement Administrative Review Board(the Board) in Application No. 11 of 2017 seeking orders that:-

- a. KERRA'S decision not evaluate and/or award the Tender No. RWC 373 be set aside and nullified.
- b. The Board be pleased to review all records of the Procurement process relating to Tender No. RWC 373 and be pleased to order KERRA to complete the tendering process ,evaluate all bids and award the tender to the lowest evaluated bidder as provided in the tender document.
- c. In the alternative, to (b) above KERRA be ordered to award Tender No. RWC 373 to the Interested Party in case the said Interested Party was determined/found to be the lowest evaluated bidder.
- d. KERRA be ordered to pay costs of and incidental to the said proceedings.
- e. Such other or further relief or reliefs as the Board shall deem just and expedient to grant.

43. According to the interested party immediately after the filing of the Request for Review, the Board notified KERRA of the pendency of the review application and indeed on the 9th February, 2017 KERRA filed a Response to the Application and upon hearing the parties and reviewing the tender documents that had been placed before it, the Board made among other findings that:-

- a. On the evidence of the evaluation report placed before the Board, the unanimous report produced in November 2016 and signed by all members of the tender evaluation committee indicated that the Procuring Entity, KERRA had carried out a preliminary, technical and a financial evaluation for the tender and recommended the award of the tender to **Roben Abardare (K) Limited** at the proposed price of Kshs. **6,081,865,936.29**;
- b. The procuring entity through its counsel (Mr Rapando) conceded and confirmed to the Board that during the evaluation process, there was no divergence of opinion by any member of the tender committee and that in fact the decision was unanimous;
- c. No professional opinion prepared pursuant to section 84(2) of the Public Procurement and Asset Disposal Act, 2015 was placed before the Board to show that the professional expert disregarded or did not follow the recommendation of the tender evaluation committee; and
- d. The undated response by the procuring entity (**signed by Eng. J.O Ogango**) to the effect that it

had not concluded the tender evaluation process was found to be false and misleading to the Board- a conduct that the Board took a dim view of.

44. Consequently, and in a ruling/decision delivered on the 20th February, 2017 the Board allowed the request for review by the Board allowed the Request for Review Application by **Roben Abardare (K) Limited** and granted the following orders:-

a. The Procuring Entity shall forthwith and within a period of not less than Seven (7) days complete the procurement process herein and shall in doing so award the subject tender to the Applicant **M/s Roben Abardare (K) Limited** in compliance with the tender evaluation committee's recommendation and upon compliance with Section 84(2) of the Act.

b. For avoidance of doubt the professional expert shall give a professional opinion in concurrence with the recommendations of the tender evaluation committee in the absence of any dissenting opinion and provided for under Section 84(2) of the Public Procurement and Asset Disposal Act, 2015.

c. The procuring officer/procuring entity shall file the letter of award with the Board within Seven (7) days from today's date.

d. The procuring entity shall pay costs of Kshs. 250,000/= together with all the filing fees paid by the Applicant in filing this Request for Review.

45. According to the interested party, the Board confirms that it granted the orders in view of the findings made and in exercise of the powers conferred upon it by the provision of Section 173 of the Public Procurement and Asset Disposal Act, 2015.

46. It was contended that KERRA was afforded an opportunity to respond to the case lodged against it before the Board and it would be prejudicial to the Board and parties who participated for KERRA to produce new documents like the ones listed above as a basis of challenging the decision of the Board when such documents did not inform the submissions made and the final decision of the Board.

47. It was the interested party's case that under Section 168 of the Act, upon filing the request for review, the procurement proceedings being carried out by the Procuring entity were in effect automatically suspended to await the outcome of the review proceedings before the Board. However, in flagrant breach of the law and express directions of the Procurement Board, it is now clear from the documents on record that KERRA was conducting an unlawful procurement process during the pendency of the review application before the Board. Yet again and in utter contempt of the Procurement Board's decision and directions made on 20th February, 2017, KERRA purported to proceed and conduct a tender re-evaluation process to defeat the Board's orders.

48. To the interested party, the application before this Honourable Court is largely a clever attempt to obtain orders of this Honourable Court to rubberstamp KERRA's obviously unlawful and contemptuous procurement processes undertaken during the pendency of the review application and after the decision of the Board delivered on 20th February, 2017.

49. It was reiterated that it is evident from the body of the ruling and the orders sought in the Review Application that the Board considered the documents filed, afforded parties an opportunity to appear and make arguments in support of their rival positions, and considered the arguments and the law in arriving at its decision.

50. To the interested party, under section 173 of the Act and in light of the Board's findings, the orders granted in the ruling of 20th February, 2017 were properly granted within the jurisdiction of the Board. Further, the conduct of KERRA as deprecated by the Board's in its ruling and the subsequent unlawful, opaque and contemptuous subsequent procurement process (after filing the review application) as

demonstrated herein do not deserve the grant of discretionary judicial review orders of this Honourable Court.

51. The interested party therefore asserted that the application filed herein clearly has no merit and only amount to an abuse of the court process and should be dismissed with costs.

Determinations

52. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

53. The crux of the matter herein is that having reviewed the documents, the Director General while concurring with the opinion of the Procurement Manager referred the matter to the evaluation committee for consideration hence there was no final evaluation report before the Applicant. This process, according to the applicant was necessary for procurement purposes of ensuring that procurement by the Applicant complies with the law. The applicant therefore asserted that the subject tendering processes were still ongoing by the time the proceedings before the Respondent were instituted hence the said proceedings were premature.

54. However, it was the respondent's submission that the interested party was rightfully before it since there was a blatant breach of section 80(6) of the **Public Procurement and Asset Disposal Act 2015** by the ex parte applicant which requires that evaluation of tender bids be carried out within thirty (30) days from the tender opening day. In this case however, there was unexplained delay in excess of 90 days from the opening date which according to the Respondent was illegal.

55. Section 80 of the Act provides as follows:

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7)The evaluation report shall be signed by each member of evaluation committee.

56. Regulation 46 of ***The Public Procurement and Disposal Regulations, 2006*** which apply by virtue of section 24 of the ***Interpretation and General Provisions Act*** on the other hand provides that:

A procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of thirty days after the opening of the tender

57. It was this provision that the interested party herein relied upon in invoking the jurisdiction of the Respondent pursuant to section 167(1) of the ***Public Procurement and Asset Disposal Act*** which provides thus:

“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.”

58. It is therefore clear that the interested party was clearly within its rights to invoke the Respondent’s jurisdiction. Its case however was clear that the ex parte applicant had not made a decision within the time stipulated hereinabove.

59. This now brings me to the powers of the Review Board.

60. Section 173(c) of the ***Public Procurement and Asset Disposal Act of 2015***, provides that:

Upon completing a review, the Review Board may substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.

61. That the Respondent has the power to substitute its decision for that of the Procuring Entity was appreciated has by this Court in **Republic vs. Public Procurement Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] eKLR** when the Court held that:-

“...this provision [section 98(c)] cannot be read in isolation to the other provisions. In my view the power to substitute the decision of the procuring entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally.”

62. In other words what this Court was saying is that whereas the Respondent has the power to substitute its decision for that of the procuring entity such power must be lawful. In this case no serious challenge was taken to the lawfulness of the decision of the Board and the issue of the lawfulness of the decision of the procuring entity cannot be competently raised in these proceedings.

63. The question however is whether the Respondent could lawfully award the tender to the interested party in the circumstances of this case. This Court while addressing itself on the issue in **Republic vs. Public Procurement Review Board & 2 Others ex-parte MIG International Ltd & Another [2016] eKLR** expressed itself as hereunder:

“Whereas this court cannot fault the reasoning of the Board on this issue, the Court however finds the Board’s decision to award the said tender to the interested party irrational. Having found that there were other bids which ought to have been considered, the Board ought not to have stepped into the shoes of the procuring entity and made a decision awarding the tender to the interested party without considering the bids of the other bidders. The primary duty of considering the bids in order to determine whether they are in accordance with the tender documents rests on the procuring entity and therefore where the entity has not made

a decision thereon, the board cannot step in and make that decision. This, in my view is the spirit of the holdings in *JGH Marine A/S Western Marine Service LTD CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Vs. Public Procurement Administrative Review Board & 2 others (2015) eKLR* and *Republic vs. Public Procurement Administrative Review Board & 3 Others Ex parte Olive Telecommunication PVT Limited (2014) eKLR* in which it was variously held that the board has no power to ignore the express provisions of a tender document and go ahead to award the tender to another bidder, otherwise it crosses its statutory boundaries acts outside jurisdiction. Further, whereas the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the procuring entity totally useless. In other words where the procuring entity has, in the Board's view, unlawfully or unreasonably declined to exercise its statutory mandate as was alleged in this case, the only option is for the Board to direct the entity to carry out the same in accordance with the directions of the Board. It follows that the award to the interested party of the tender NO. KPS/ICB/T/11/2015- 2017 for supply and delivery of motorized vehicle hot stamping foils size 220 X 305m cannot stand."

64. In this case the ex parte applicant's case was that no final decision had been made by it and that the alleged report relied upon by the Respondent in its decision was not before the Respondent. The Respondent has not disclosed where it obtained the said report.

65. If the evaluation process was not complete it is clear that to make a determination in the manner the Respondent did was clearly unlawful and unreasonable. This Court in *Republic –vs- The Public Procurement and Administrative Review Board, The Attorney General, Daniel Outlets exparte Numerical Machining Complex Limited - Nai JR No. 261 of 2015* expressed itself on the issue as follows:

"In this case the impugned decision was taken before the Financial Evaluation was undertaken. Regulation 50(1) of the Regulations provides that:

Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

The effect of compelling the Applicant to award the tender to the interested party was to compel the Applicant to ignore the aforesaid provision. The 1st Respondent in my view had no power to compel the Applicant to act unlawfully. By so doing it clearly exceeded its jurisdiction. It could only issue such directions and make decisions that the Applicant itself was lawfully permitted to issue or make."

66. Article 227 of the Constitution provides that:

When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

67. This Court has held before that Article 227(1) provides the minimum threshold that any public procurement must meet. This Court has appreciated that Parliament is empowered to enact legislation to prescribe a framework within which policies relating to procurement and asset disposal are to be implemented and may in so doing provide for categories of preference in the allocation of contracts; the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination; sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and 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. Pursuant to the said power, Parliament enacted the **Public Procurement and Asset Disposal Act**, No. 33 of 2015.

68. Section 3 of the *Public Procurement and Asset Disposal Act*, provides as follows:

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- (a) the national values and principles provided for under Article 10;***
- (b) the equality and freedom from discrimination provided for Under Article 27;***
- (c) affirmative action programmes provided for under Articles 55 and 56;***
- (d) principles of integrity under the Leadership and Integrity Act, 2012, No. 19 of 2012;***
- (e) the principles of public finance under Article 201;***
- (f) the values and principles of public service as provided for under Article 232;***
- (g) principles governing the procurement profession, international norms;***
- (h) maximisation of value for money;***
- (i) promotion of local industry, sustainable development and protection of the environment;***
and
- (j) promotion of citizen contractors.***

69. It is however my view that in public procurement and disposal, the starting point is the Constitution. A procurement must therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any legislative consideration which does not espouse these ingredients can only be secondary to the said Constitutional dictates. In my view, cost-effectiveness for example does not infer that the Procuring Entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest. My view is reinforced by the decision in **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** in which the Court held that:

“To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness.”

70. This was the position adopted by this Court in Nairobi JR No. 513 of 2015 - **Republic –vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited** in which the Court held the view that:

“It is therefore clear that apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest.”

71. In other words the spirit of section 86(1)(a) of the Act which provides that the successful tender shall be the tender with the lowest evaluated price required that an evaluation be first undertaken and only after the tender passed all the stages of evaluation would the consideration of the lowest tender come into play.

72. In this case, the Respondent advanced no reason why it decided to award the tender to the interested party and to no other bidder when clearly the ex parte applicant had not arrived at its final decision. I associate myself with the decision in **South Bucks District Council & Another vs. Porter [2004] UKHL 33** to the effect that:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”. Disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds.”

73. The Court in the case of **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728** held that the Procuring Entity’s failure to give reasons for terminating the Applicant’s tender amounted to breach of one of the fundamental principles of natural justice expressed itself as follows:

“Failure by the 2nd Respondent to render reasons for the decision to terminate the applicant’s tender made the decision amenable to review by the Court since the giving of reasons was one of the fundamental tenets of the principle of natural justice.”

74. The case before the Respondent was clearly that the ex parte applicant had failed to make a decision within the prescribed period. The best that the Respondent could do was to compel the ex parte applicant to consider the tender and make a decision within the period prescribed by the Act and the Regulations. By short-circuiting the process and making that decision the Respondent fell in error.

75. I have considered the issues raised in this application and it is my view and I so hold that the Respondent’s decision awarding the subject tender to the interested party cannot be upheld. Its decision was therefore prematurely arrived hence the decision amounts to irrationality.

Order

38. In the result, I issue the following orders:

1. An order of Certiorari is hereby issued removing to this Court for purposes of being quashed the entire decision of the Public Procurement and Review Board in Application Number 11 of 2017 delivered on 20th February 2017 purporting to compel the Applicant to award the Tender No. RWC 373 for the Proposed Improvement to Bitumen Standard and Maintenance of Jambo (JN A2) –Kagochi- Hombe- Kwa Wambui- State Lodge-Giagatika (JN A2) and Muranga- Kiriani Roads to Roben Aberdare (K) Limited, the interested party herein which decision is hereby quashed.

2. An order of Certiorari is hereby issued removing to this Court for purposes of being quashed and quashing the entire decision of The Public Procurement and Review Board in Application Number 11 of 2017 delivered on 20th February 2017 purporting to compel the

Applicant to award the Tender No. RWC 373 for the Proposed Improvement to Bitumen Standard and Maintenance of Jambo (JN A2) –Kagochi- Hombe- Kwa Wambui- State Lodge-Giगतिका (JN A2) and Muranga- Kiriani Roads purporting to compel the applicant to complete the procurement process for the said tender within seven (7) days from 20th February 2017 and file its award thereto within the said seven (7) days.

3. An order of Certiorari is hereby issued removing to this Court for purposes of being quashed and quashing the entire decision of The Public Procurement and Review Board in Application Number 11 of 2017 delivered on 20th February 2017 purporting to compel the Applicant's procurement officer to write a professional opinion that concurs with the purported Tender Evaluation Committee Report.

4. An order of Certiorari is hereby issued removing to this Court for purposes of being quashed and quashing the entire decision of The Public Procurement and Review Board in Application Number 11 of 2017 delivered on 20th February 2017 purporting to award the Respondent costs amounting to Kshs 250, 000/=.

5. The ex parte applicant is hereby directed, if it is still desirous of proceedings with the tender to complete the same within 14 days from the date of this decision.

6. Each party will bear own costs of these proceedings and the costs before the Respondent Board.

39. Orders accordingly.

Dated at Nairobi this 31st day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Maramba for the applicant

Mr Wanga for the interested party

CA Mwangi