



**Republic v Public Procurement Administrative Review Board; Accounting Officer Kenya Medical Supplies Authority & 2 others (Interested Parties); First Assurance Company Limited (Exparte) (Application E189 of 2022) [2023] KEHC 734 (KLR) (Judicial Review) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 734 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E189 OF 2022  
J NGAAH, J  
FEBRUARY 10, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**AND**

**ACCOUNTING OFFICER KENYA MEDICAL SUPPLIES AUTHORITY ..... INTERESTED PARTY**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... INTERESTED PARTY**

**JUBILEE HEALTH INSURANCE LIMITED ..... INTERESTED PARTY**

**AND**

**FIRST ASSURANCE COMPANY LIMITED ..... EXPARTE**



## JUDGMENT

1. The application before court is a motion dated January 3, 2023 stated to be filed under article 23(3) (f) and 165(6)(7) of Constitution and order 53 rule 3 of the Civil Procedure Rules. It seeks for the judicial review order of *certiorari*; the prayer for this order has been framed thus:

“ 1. An order of *certiorari* to remove to the High Court the proceedings and the decision of the respondent dated 20<sup>th</sup> December for the purposes of being quashed.”

2. The application is supported by a statutory statement dated December 28, 2022 and an affidavit sworn on even date in support of the facts relied upon.

The affidavit has been sworn by Rufus Kirigwi Maina who has described himself as the applicant’s business development manager in its medical department.

3. According to the statement and the affidavit, on September 27, 2022, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties invited a tender for provision of insurance services cover for Kenya medical supplies authority (KEMSA) staff.
4. In response to this invitation, the applicant submitted its bid, as did several other tenderers. The tenders were opened on October 12, 2022. No tenderer requested for any clarification or registered any objection to the tender document during the tender opening exercise. On November 15, 2022, the applicant received the notification of the award of the tender from the 1<sup>st</sup> interested party.
5. The notification is a requirement under section 87(1) of the Public Procurement & Asset Disposal Act which provides that before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.
6. The applicant was not aware of any communication or objection from any tenderer to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties in respect of the evaluation of the tenders.
7. On November 29, 2022, the respondent notified the 1<sup>st</sup> and 2<sup>nd</sup> interested parties that the 3<sup>rd</sup> interested party, which had also bid for the same tender, had filed a request for review of the evaluation and the award of the tender. According to this request for review, the 3<sup>rd</sup> interested party’s bid had been found non-responsive for failure to comply with one of the mandatory requirements in the tender document. In particular, its senior staff member one Mboroki Mwiti Muriithi had submitted a bachelor of commerce degree in banking and finance and a diploma in insurance which apparently fell short of the criteria set forth in the said mandatory requirement. The requirement in the tender document was a degree and advanced diploma in insurance or its equivalent.
8. It is the applicant’s case that the 3<sup>rd</sup> interested party did not seek any amendment or clarification of this particular academic or professional qualification. The 3<sup>rd</sup> interested party ought to have invoked section 75(2) of the Public Procurement and Asset Disposal Act which provides that an amendment to a tender document may be made on the procuring entity’s own initiative or in response to an inquiry by a candidate or tenderer.



9. In the request for review, the applicant not only opposed the request but it also filed a preliminary objection on the ground that the request had been filed out of time. However, at the conclusion of the proceedings before the respondent, the 3<sup>rd</sup> interested party's request for review was allowed.
10. The applicant was aggrieved by this decision hence the instant application.
11. The applicant contends that the respondent acted in excess of its jurisdiction to the extent that it purported to clarify the mandatory requirement which the 3<sup>rd</sup> interested party had not complied with. Such clarification, according to the applicant, could only have been given by the procuring entity.
12. The applicant is also alleged to have considered matters which it ought not to have considered by questioning the qualifications of one of its officers when such qualifications were not in issue.
13. In any event, the decision is said to have been rendered outside the period within which the respondent ought to have determined the request for review.
14. The respondent has opposed the motion. James Kilaka, its acting secretary swore a replying affidavit in which he has defended the respondent's decision. He has narrated the events relating to proceedings before the respondent which commenced with the initiation of the 3<sup>rd</sup> interested party's request for review and culminated in the impugned decision. According to Kilaka, the decision was delivered on December 20, 2022. An email informing the parties of the decision was sent on the same date at 11.58 pm. However, the decision itself was inadvertently omitted in the email. The email on which the decision was attached was resent on December 21, 2022 at 12.48 am.
15. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed grounds of objection in response to the applicant's application and, by and large supported the applicant's application. They defended the award of the tender to the applicant and urged that the procurement process was fair, transparent and accountable and, in any event, in accordance with sections 79, 80(2) of the [Public Procurement and Assets Disposal Act](#) as read with regulation 74(1) of the regulations and article 227(1) of the [Constitution](#).
16. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties denied that there was any ambiguity in mandatory requirement 13(b) in the tender document. Further, the evaluation committee did not introduce any new criterion in this requirement and, in particular, the requirement of five years' experience for any of the tenderers' senior staff.
17. It is also urged that the respondent acted *ultra vires* section 173 of the [Public Procurement and Asset Disposal Act](#) by excluding the application of the mandatory requirement listed as 13(b) in the tender document. Again, the respondent is said to have also acted without jurisdiction contrary to section 167(1) of the Act by entertaining a request for review filed outside the limitation period.
18. Njeri Jomo, the 3<sup>rd</sup> interested party's chief executive officer swore a replying affidavit on behalf of the 3<sup>rd</sup> interested party and opposed the applicant's application. She has deposed that the 3<sup>rd</sup> interested party participated in the tender by preparing its bid in accordance with the invitation to tender and instructions to tenderers, as issued under the tender document.
19. After the conclusion of the tender evaluation exercise, the 1<sup>st</sup> interested party issued a notification letter dated November 15, 2022 to the 3<sup>rd</sup> interested party via email informing the 3<sup>rd</sup> interested party that its bid was unsuccessful for the reason that:

“Senior staff 1 has bachelor of commerce in banking and finance option instead of the required degree in insurance or related field and also had diploma in insurance instead of the required advanced diploma in insurance.”



20. In the same notification, the 3<sup>rd</sup> interested party was informed that the tender had been awarded to First Assurance Company Limited at an annual premium of Kshs 72,212,977.00 which sum included the value added tax.
21. The 3<sup>rd</sup> interested party was dissatisfied with the decision and hence filed the request for review. The request for review, as noted, was allowed.
22. The 3<sup>rd</sup> interested party's case before the respondent was that the procuring entity had breached sections 79, 80 (2) and 86 of the [Public Procurement and Asset Disposal Act](#) and regulation 74 of the [Public Procurement and Asset Disposal Regulations, 2020](#).
23. It generally defended the respondent's decision and reiterated that the respondent was seized of jurisdiction to dispose of the review and that its decision was legal.
24. As far as the notice of the alleged breach is concerned, it has been deposed on behalf of the 3<sup>rd</sup> interested party that the breach occurred during evaluation of its bid at the preliminary evaluation stage and therefore the breach could not have been possibly discovered until after the notification of the award of the tender. This notification was received on November 16, 2022. Accordingly, the question whether the request for review was lodged within the stipulated time should not arise.
25. The 3<sup>rd</sup> interested party denied ever having argued before the respondent that that the tender document was either defective or ambiguous.  
That is as far as the parties' cases go.
26. The applicant's application is based on two grounds of judicial review; viz. illegality and procedural impropriety. These grounds were enunciated in the english decision of [Council of Civil Service Unions v Minister for the Civil Service](#) (1985) AC 374,410. In that case Lord Diplock explained these grounds as follows:  

“By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.”
27. On procedural impropriety, the learned judge noted as follows:  

“I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”
28. The question that stands out in this application is whether the applicant has demonstrated that the respondent's decision is impugned on any or both of these grounds. In answering this question, I need not address each of these grounds in isolation because, more often than not, these grounds overlap. A decision may turn out to be illegal and, based on the same facts, it may also be deemed to be not only lacking in procedural propriety but also irrational.
29. Much of the of the submissions by the parties has centered on a certain mandatory requirement in the tender document. And this is not surprising because the impugned decision very much turned on this particular requirement which was listed as requirement number 13 (b) in the tender document.



Perhaps, to illustrate this point, it is necessary I reproduce what the respondent singled out as issues for determination. They were framed in the judgment as follows:

1. Whether the board has jurisdiction to hear and determine the instant request review.
  2. What is the interpretation of the provisions of MR 13(b) of section iii-evaluation and qualification criteria of the tender documents amended by addendum No 3 dated October 11, 2022 that the respondent's evaluation committee ought to have applied while evaluating and comparing tenders in the subject tender.
  3. Whether the 2<sup>nd</sup> respondent's evaluation committee evaluated and compared tenders in the subject tender with respect to mr13(b) at the preliminary examination (mandatory requirement) stage in accordance with section 79 and 80(2) of the Act read with regulation 74 of the regulations 2020 and article 227 (1) of the Constitution.
  4. What orders should the board grant in the circumstances?"
30. The question of whether the respondent was seized of jurisdiction to dispose of the request for review was determined as a preliminary point, as it ought to be. The issue arose out of the contention that the 3<sup>rd</sup> interested party knew of what it appreciated to be the ambiguity in the tender document as early as September 27, 2022 when it accessed the tender document or on October 25, 2022 when the tender was opened.
31. It was the applicant's case before the respondent that according to section 167 (1) of the Act as read with regulation 203(2) (c) (ii) of the Public Procurement and Asset Disposal Regulations 2020, the application for review ought to have been filed within fourteen days of the date the 3<sup>rd</sup> interested party knew of the alleged breach.
32. The respondent dismissed this argument and came to the conclusion that the 3<sup>rd</sup> interested party became aware of the breach upon notification of the award of the tender which is the same date that the 3<sup>rd</sup> interested party was informed that its bid was unsuccessful. The respondent established as a fact that all the parties who participated in the tender were notified of either the award of the tender or failure of their bids on November 18, 2022 and, therefore, when the 3<sup>rd</sup> interested party filed its request for review on November 29, 2022, it was well within the fourteen-day limitation period.
33. It is not for a judicial review court to evaluate the evidence afresh and come to its own conclusion on whether the respondent's decision on the notification was sent by the procuring entity and received by the tenderers. To do so would be assuming the appellate jurisdiction which a judicial review court is not seized of when sitting as such a court. All it would be concerned about in such an application as the instant one is the process by which the decision was reached.
34. Of course the court would not hesitate to intervene where it is so obvious that the request for review was filed and subsequently entertained outside the statutorily prescribed timelines. In such a case, it would not be a question of interrogation of facts but case of blatant breach of section 167 (1) of the Public Procurement Act which limits the time within which to file a request for review to fourteen days from the date of notification of award or from the date of occurrence of the breach complained of, at any stage of the procurement process. Breach of this provision of law would very well taint the respondent's decision on all or any of the grounds of judicial review of illegality, irrationality or procedural impropriety.
35. Turning back to the question of the mandatory requirement on academic qualification of three senior officers of the service providers, it was captured in the tender document as follows:



MR 13 qualifications and experience of key staff Attach CV's and academic/professional certificates of:

- a) Chief executive officer-(mandatory)
- b) 3 Senior staff handling the medical scheme with degree and advanced diploma in insurance or equivalent-(mandatory)
- c) 2 care managers handling the medical scheme-(mandatory)

NB: The attached CV's must be signed by key staff”

The term mandatory is not employed here in jest because under section 79(1) of the Act, a tender is considered not responsive if it does not conform to the ‘mandatory’ requirements in the tender document. That section reads as follows:

79. Responsiveness of tenders

- (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents. (emphasis added).

36. In addressing this particular requirement, the respondent did not dispute its mandatory nature. Its remarks on this requirement were, *inter alia*:

We note the provisions of MR 13 (b) did not provide for any documents to be submitted by the tenderers to support or prove an equivalent of a degree, an equivalent degree in insurance and an equivalent of an advance diploma in insurance.

37. To the extent that the provisions of MR 13 could be interpreted in more than one meaning, like it happened in this case of the applicant having a different interpretation of the same from that of the respondents and the interested party, we are of the considered view that the provisions of M13 is ambiguous.

38. Having have come to this conclusion, the respondent then held as follows:

“As such, to allow for a level playground for all tenderers and promote the principle of fairness in accordance with article 227(1) of the Constitution, we deem fit and just that the provisions of mandatory requirement No 13 (b) of the preliminary examination (mandatory requirement) as amended by addendum No 13 dated October 11, 2022 should not be applied in the evaluation of any tenders submitted in response to the subject tender due to its ambiguous nature as already held by the board. Effectively, any tender that was determined non-responsive at the preliminary examination (mandatory requirement) stage on account of having not complied with only mandatory requirement No 13 (b) as amended by addendum No 3 dated October 11, 2022 should be admitted to the technical evaluation stage. For the avoidance of doubt, a tender that failed to meet any other mandatory requirements at the preliminary examination (mandatory requirement) in addition to mandatory requirement No 13 (b) should not be admitted for evaluation at the technical evaluation stage.”

And among its ‘final orders’ the respondent ordered as follows:

- “4. The first respondent is hereby ordered to direct the evaluation committee to admit the applicant’s tender, together with all other tenders that were determined non-responsive at the preliminary examination (mandatory requirement) stage of evaluation on account of non-compliance with only



MR 13(b) of preliminary examination (mandatory requirement) criterion of evaluation as amended by addendum No 3 dated October 11, 2022, to the technical evaluation stage and proceed with evaluation of the applicant's tender together with the aforementioned tenders and all other tenders that were determined eligible to proceed to the technical evaluation stage by conducting a re-evaluation at the technical evaluation stage taking into consideration the board's findings in this request for review."

39. The conclusion by the respondent that the mandatory requirement 13 (b) was ambiguous is neither supported by the evidence nor the pleadings placed before it. The applicant was categorical as it has been categorical in this application that its case is not that the tender document or any of the requirements in the document was ambiguous. Rather, its case against the procuring entity is that it complied with the mandatory requirement 13 (b), as it understood it. And nowhere is this clearer than in the affidavit sworn by Njomo Njeri in response to the instant application.
40. In answer to the applicant's contention that the 3<sup>rd</sup> interested party was aware of the defect or ambiguity in the tender document as soon as it obtained it, Njeri swore as follows:
- 18.
- c. Parties are bound by their pleadings. The *ex-parte's* applicant's erroneous statements that the 3<sup>rd</sup> interested party's case is that the tender document was defective and ambiguous and therefore filed out of time can be proved wrong by simply reviewing the pleadings filed by the interested party before the board.
  - f. Before the respondent, the 3<sup>rd</sup> interested party did not allege any defects in the tender document or contend that MR13 (b) was ambiguous and defective. Instead, the 3<sup>rd</sup> interested party contended breaches of the act during evaluation that is, the manner in which the criteria were interpreted and applied by the procuring entity's evaluation committee during preliminary examination of its bid."
41. The respondent's position that the tender document was defective and ambiguous in particular respects when it is patently clear from the depositions made on behalf of the 3<sup>rd</sup> interested party that its case before the respondent had nothing to do with the alleged ambiguity or defects in the tender document leads to the conclusion that, in arriving at its decision, the respondent considered matters which it ought not to have considered. That in itself would taint its decision on the ground of illegality for considering irrelevant matters and ignoring relevant matters.
42. And if it was to be assumed that the respondent was right, that the mandatory condition MR 13(b) was defective, ambiguous or, generally lacking in some material respect, the correct course would have been to invoke clause 9.1 of the tender document under which a tenderer could seek any clarification of the tender document. The clause provided in part:
9. 1 A tenderer requiring any clarification of the tender document shall contact the procuring entity in writing at the procuring entity's address specified in the TDS or raise its enquiries during the pre-tender meeting and the pre-arranged pretender visit of the site of the service if provided for in accordance with ITT 8.4."
43. In the event of need for such clarification, a tenderer would submit in writing its enquiry to the chief executive officer of the procuring entity not later than seven days to closing date of the tender. The procuring entity would in response to the clarification publish its response on its website.



44. While it is true that the 3<sup>rd</sup> interested party has denied that it had any reason to question the tender document on grounds that it was defective or ambiguous as far professional or academic qualifications of its three senior staff members are concerned, the fact that the respondent came to the conclusion that the tender document was characterised by such defect or ambiguity placed the burden on the 3<sup>rd</sup> interested party to have invoked clause 9.1 of the tender document and sought the necessary clarification.
45. It has been noted that according to section 79 of the Act, a tender is only responsive if it complies with such mandatory requirements as are prescribed in the tender document. Responsiveness of the tender is not necessarily dependent on what a tenderer understands the mandatory requirements in a tender document to mean. Rather it is what the requirements say that counts. In the instant case, the particular requirement in issue was:
- “ 3 Senior staff handling the medical scheme with degree and advanced diploma in insurance or equivalent-(mandatory)”
46. In purporting to comply with this requirement, the 3<sup>rd</sup> interested party presented a bachelor of commerce degree in banking and finance for what I understand to be one of its senior officers prescribed in this requirement. From Njeri’s depositions which I have reproduced in this judgment, the 3<sup>rd</sup> interested party did not provide an advanced diploma in insurance.
47. According to its case before the respondent, the requirement did not prescribe the nature of the degree required; in other words, the requirement was not specific that it was a degree in insurance or any other field for that matter, that was required. It followed that a degree in any field was sufficient. It was also the 3<sup>rd</sup> interested party’s case that if the procuring entity was interested in a degree in insurance it would have stated so. It also urged that the requirement for advanced diploma in insurance were additional requirements apart from the degree requirement. In the 3<sup>rd</sup> interested party’s understanding, a bachelor of commerce degree ought to have sufficed because it is ‘a relevant degree for insurance practitioners’ and, in any event, one of the modules offered in the study of the bachelor of commerce degree is an insurance module. The 3<sup>rd</sup> interested party also urged that the ‘advanced diploma in insurance’ was not a requirement as such because the specific criterion in the tender document was ‘advanced diploma in insurance or its equivalent.’
48. These are the same arguments that the 3<sup>rd</sup> interested party escalated in the instant application. The respondent, as earlier noted, approached the mandatory requirement in issue as being ambiguous and defective and therefore, it did not necessarily take the path which the 3<sup>rd</sup> interested party suggested.
49. My reading of the 3<sup>rd</sup> interested party’s argument is that it simply did not comply with the mandatory requirement. Rather than concede that its bid failed in this respect, it sought to justify the qualifications it presented in place of the prescribed qualifications.
50. If the 3<sup>rd</sup> interested party’s arguments are anything to go by; that the requirement did not specify the field of the degree; that it was necessary to state the specific field of the degree if it was mandatory; and that an advanced diploma in insurance was an additional requirement which could be dispensed with, nothing stopped it from seeking confirmation from the procuring entity that indeed this was the case by way of a clarification under clause 9.1 of the tender document.
51. Still on this requirement, the procuring entity as the user of the goods or service sought to be procured would be in an ideal position to set the prescription of the character or quality of goods or services procured, and for this reason, it would be entitled to prepare a tender document and come up with such requirements as are necessary in order to procure services or goods that are fit for the purpose



for which they are procured. As a matter of fact, section 60 of the Act enjoins the accounting officer of a procuring entity to prepare specific requirements relating to goods required. That section reads as follows:

60. Specific requirements

- (1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.
- (2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

61. And section 70 (4) of the Act states that the tender document shall be prepared by the accounting officer in consultation with the user and other relevant departments. That section reads as follows:

70.

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

62. When these provisions are read together with section 79 of the Act on the responsiveness of tenders, there is no doubt that mandatory requirements are not included in a tender document for cosmetic purposes. They serve a specific purpose. That being the case, it is not open to the respondent or any other entity, for that matter, to direct the procuring entity to dispense with any mandatory requirement in the tender document as long as that requirement is consistent with the law. Doing so would certainly be in breach of sections 60, 70 and 79 of the Act.

63. Yet this is exactly what the respondent did when it ordered a fresh evaluation of the tenders on all the criteria in the tender document except the mandatory requirement MR 13(b) for the reason that it is ambiguous or defective. As noted earlier in this judgment, the tender document provided room to clear the ambiguity. Similarly, the Act and the regulations, by necessary implication, allow clarifications to be made. As far as defects are concerned, a candidate or a tenderer, who may have suffered or risked suffering, loss or damage as a result of the defect has an avenue for administrative review under section 167(1) of the Act.

64. It follows that by requiring the procuring entity to dispense with a particular requirement, the respondent breached sections 60, 70 and 79 of the Act and, for this very reason, its decision was *ultra vires* the respondent's powers under section 173 of the [Public Procurement and Asset Disposal Act](#).

65. For the reasons I have given, the impugned decision was tainted, at least, on the ground of illegality.

66. It is deficient of legality because the respondent overstepped its powers under section 173 of the [Public Procurement and Asset Disposal Act](#). That section reads as follows:

173. Powers of review board

Upon completing a review, the review board may do any one or more of the following—

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;



- (c) substitute the decision of the review board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
  - (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
  - (e) order termination of the procurement process and commencement of a new procurement process.
67. These powers can only be exercised within the four corners of the [Public Procurement and Asset Disposal Act](#). Put differently, the respondent cannot purport to flout the rest of the provisions of the [Public Procurement and Asset Disposal Act](#) on the pretext of exercising the powers with which it is bestowed in section 173 of the Act. And to the extent that it has done so, the respondent has demonstrated that it did not understand correctly the law that regulates its decision making power and neither did it give effect to it.
68. The decision would also fall on ground of illegality because the respondent took into account matters which it ought not to have taken into account. In [Halsbury's Laws of England](#), 4th edition para 77 page 170 several aspects of this ground are explained and they include the omission to consider relevant facts or to consider irrelevant facts. It is noted as follows:
- “The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself *ultra vires*; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”( emphasis added).
69. I would also say that the arguments the applicant has raised as constituting procedural impropriety are more of grounds of illegality than of the propriety of the procedure adopted by the respondent. I would not, however, take it on the applicant for the reason I stated earlier in this judgment that grounds of judicial overlap so that the facts from which the ground of illegality emerge would at times be the same circumstances out of which the grounds of procedural impropriety and irrationality arise. For instance, it has been noted that the respondent acted *ultra vires* the Act when it ordered the procuring entity to dispense with the mandatory condition MR 13 (b). It may also be argued that based on the same facts, the respondent’s decision was irrational for it is a clear violation of certain provisions of the [Public Procurement and Asset Disposal Act](#). I am minded that irrationality is not one of the grounds upon which the application is founded and therefore it is unnecessary to delve into this ground any further.
70. In the final analysis, I am satisfied that the applicant’s application has merits. It is hereby allowed in terms of prayer 1. The applicant will also have costs of the application. It is so ordered.

**DATED, SIGNED AND DELIVERED ON 10 FEBRUARY 2023**

**NGAAH JAIUS**

**JUDGE**

