



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E064 OF 2021

**IN THE MATTER OF AN APPLICATION FOR
ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

THE ACCOUNTING OFFICER,

KENYA NATIONAL LIBRARY SERVICE.....2ND RESPONDENT

AND

XRX TECHNOLOGIES LTD.....INTERESTED PARTY

EX PARTE:

MFI DOCUMENT SOLUTIONS LTD

JUDGMENT

The Application

1. On 21st April 2021, the Public Procurement Administrative Review Board (the 1st Respondent herein) made a decision in PPARB Application No. 43 of 2021, with respect to Tender Number KNL/HQ/TOOB/2020-21 for Supply, Delivery, Installation, Testing, and Commissioning of an automatic book scanner for KNLS Virtual Library Digitization LAB (hereinafter referred to as "The Tender"). The Procuring Entity for the said Tender was the Accounting Officer of the Kenya National Library Service, 2nd Respondent herein.

2. Pursuant to the said decision, the 1st Respondent cancelled and set aside the Procuring Entity's letters of Notification of the Tender addressed to MFI Document Solutions Ltd (the *ex parte* Applicant herein), and all other unsuccessful bidders, and the Letter of Notification of Award of Tender addressed to the XRX Technologies, the Interested Party herein. The 2nd Respondent was also directed to issue letters of notification to all bidders who participated in the Tender in accordance with section 87 of the Act read together with Regulation 82 of the 2020 Regulations within seven (7) days from the date of the decision, and to proceed with the procurement process of the Tender to its logical conclusion.

3. Being aggrieved by the said decision, the *ex parte* Applicant herein consequently filed an application by way of a Notice of Motion dated 5th May 2021, seeking the following orders:

1. THAT this Court be pleased to issue an Order of Certiorari to remove into the High Court and quash the decision of the Public Procurement Administrative Review Board dated 21st April 2021 handed down in Application No 43 of 2021.

2. THAT this Court be pleased to issue an Order of Certiorari to remove into the High Court and quash the decision of the 2nd Respondent to award Tender No. KNL/HQ/TOOB/2020-21 for Supply, delivery, installation, testing, and Commissioning of an automatic book scanner for KNLS virtual Library Digitization LAB to the Interested Party.

3. THAT this Court be pleased to issue an Order of Prohibition to restrain the 2nd Respondent and the Interested Party from entering into a contract over and /or concerning Tender No. KNL/HQ/TOOS/2020-21 for Supply, delivery, installation, testing, and Commissioning of an automatic book scanner for KNLS virtual Library Digitization LAB until the Judicial Review Application is heard and determined.

4. THAT this Court be pleased to issue an order of Mandamus to compel the 2nd Respondent to conduct a re-evaluation of the tender at the technical evaluation stage with respect to Tender No. KNL/HQ/TOOS/2020-21 for Supply, delivery, installation, testing, and Commissioning of an automatic book scanner for KNLS virtual Library Digitization LAB upon the outcome of the judicial review proceedings.

5. Costs of the application be awarded to the Applicant.

4. The grounds for the application are stated in the *ex parte* Applicant's statutory statement dated 27th April 2021, and a verifying affidavit sworn on the same date by Bhaji Raj, the *ex parte* Applicant's Product Manager. The 2nd Respondents filed a replying affidavit sworn on 11th May 2021 by Jack Wafula, its acting Chief Executive Officer, while the Interested Party filed Grounds of Opposition dated 26th May 2021 in response to the application. The 1st Respondent on its part did not file any response to the application, nor participate in the hearing thereof.

5. A summary of the parties' respective cases is set out in the following sections

The *ex parte* Applicant's Case

6. In summary, the *ex parte* Applicant averred that the 1st Respondent, erred in law and in fact in reaching a finding that the technical specifications issues it raised in its application ought to have been raised immediately after obtaining the tender documents, and not after the announcement of the tender award. The *ex parte* Applicant in this respect explained that the 2nd Respondent advertised an invitation for sealed bids from eligible candidates for the Tender whose closing date was 9th March 2021 at 10.00 am, which is the date the *ex parte* Applicant Company submitted its tender as per the required criteria as stated in the tender document and the advertisement.

7. Further, that through a letter dated 19th March 2021 and received on the same date, the *ex parte* Applicant was notified by the 2nd Respondent that its tender bid had not been successful and was disqualified at the financial stage, and that the Interested Party was the successful bidder for the tender. Being aggrieved by the decision of the 2nd Respondent contained in the Letter of Notification dated 19th March 2021, the *ex parte* lodged a Request for Review dated 31st March 2021 with the 1st Respondent.

8. The *ex parte* Applicant averred that it raised the following grounds in the said Request for Review:

a) That the procurement process by the 2nd Respondent did not meet and contravenes the requirements of the Public Procurement and Asset Disposal Act 2015, in that during the evaluation process, the technical evaluation criteria applied was flawed and conflicted with the objective of the entire procurement process and further violated Section 3 of the Act.

b) That the technical evaluation process of the tenders was flawed having been applied in a defective manner and led to the tender being awarded to a tenderer who did not meet the crucial technical specifications.

c) That the meaning of "**Minimum technical capacity to enter into a contract**" under Part B of the technical specifications was disregarded or mis-applied during the technical evaluation.

9. In view of the fact that there was another application relating to the same tender, namely Application No. 44 of 2021, the *ex parte* Applicant averred that the said application was consolidated by the 1st Respondent with its application, and that the *ex parte* Applicant was designated as the 1st Applicant in the consolidated applications. Further, that the 1st Respondent in hearing the consolidated applications, framed the first issue for determination as whether it had jurisdiction to entertain the Request for Review filed by the 1st Applicant.

10. Additionally, that the 1st Respondent identified the following questions as arising for determination in the said issue:

a) Whether the 1st Applicant has the requisite locus standi required under section 2 read together with section 167 (1) of the Act to invoke the jurisdiction of the Board

Depending on the outcome of the first limb of the first issue:-

b) Whether the 1st Applicant's Request for Review was filed within the statutory period of 14 days specified in section 167 (1) of the Act **Depending on the outcome of the second limb of the first issue:-**

c) Whether the Board has jurisdiction to entertain the 1st Applicant's allegation that the technical evaluation criteria provided under Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document does not meet the requirements of section 3

(e) & (h) and 60 of the Act.

d) Whether the Board has jurisdiction to entertain the 1st Applicant's allegation that the technical evaluation criteria outlined under Part A and Part B of the Appendix to Instructions to tenderers of the Tender Document would be evaluated out of a minimum technical score of 100% (and not 80%) so as to proceed to Financial Evaluation.

11. The *ex parte* Applicant is aggrieved by the determination by the 1st Respondent on questions (c) and (d) above, that it did not have jurisdiction to determine the issues of technical specifications, because the *ex parte* Applicant did not approach it within the 14 days after obtaining the tender documents. The *ex parte* Applicant contends that the 1st Respondent erred in law and in fact in reaching a finding that the technical specifications issues it raised ought to have been raised immediately after obtaining the tender documents and not after the announcement of the tender award. According to the *ex parte* Applicant, the issues it raised related to the evaluation process at the technical evaluation stage, and the application of the technical specifications by the evaluation committee, which process it argued were defective and contrary to the Act.

12. Further, that the 1st Respondent in determining the issues disregarded the fact that the technical evaluation process can only take place after the tenders have been submitted, the results thereof can only be announced after the tender has gone through the preliminary evaluation, technical evaluation and then financial evaluation stage, and that the *ex parte* Applicant could only complain about the evaluation process after the result of the tender were announced.

13. In addition, that the 1st Respondent also misconstrued the issue on the interpretation of Part B of the Technical specifications in its framing of question (d) above, since the *ex parte* Applicant had not alleged that the technical specifications ought to have been evaluated at a score of 100% as the 1st Respondent determined in its decision, but had argued that the technical specifications in Part B was required to be applied in mandatory terms, and as a result, the 1st Respondent found that it had no jurisdiction to decide on the matter on the ground that *ex parte* Applicant ought to have raised the issue before submitting the tender.

14. Therefore, that the 1st Respondent arrived at an irrational and unreasonable decision as its decision to oust its jurisdiction to determine the issue amounted to a violation of the *ex parte* Applicant's right to be heard and the right to a fair administrative action under Article 47 of the Constitution of Kenya. In addition, that the *ex parte* Applicant had a legitimate expectation that the 1st Respondent would appreciate that some of the issues raised in its application related to the technical evaluation exercise and application of the technical specifications thereof, and required the 1st Respondent to scrutinise the evaluation process during the evaluation stage.

15. Lastly, that by dismissing the *ex parte* Applicant's claim that the technical evaluation process was flawed and in breach of section 3 of the Act, Article 291 and 227 of the Constitution, the ousting of the 1st Respondent's jurisdiction is tainted with illegality since it acted on powers not within its mandate, contrary to the provisions of section 173 of the Act.

The 2nd Respondent's Case

16. The 2nd Respondent in response averred that the subject tendering process was conducted in accordance with the requirements of the Public Procurement and Asset Disposal Act, 2015 and the provisions of the Constitution, using open tendering. Furthermore, that the entire evaluation process of the Tender was carried out in respect of the evaluation criteria spelt out in the Tender document, which was divided into 4 stages, namely: stage 1 on mandatory requirements; stage 2 on the technical requirements made up of Part A on capacity to deliver the contract, and Part B on capacity to enter into contract; stage 3 on financial evaluation; and stage 4 on due diligence.

17. According to the 2nd Respondent, the evaluation process was clear cut and straight forward, and the *ex parte* Applicant did not seek any clarification at any stage of the tendering process with regard to any anomaly in the Tender documents. Consequently, that at the conclusion of the evaluating process, only two bidders obtained the mandatory requirements and attained the minimum technical score of 80% as set out in the Tender documents, namely the *ex parte* Applicant and the Interested Party; upon which the Interested Party was declared the lowest bidder and awarded the Tender.

18. Therefore, that in the circumstances, the complaints by the *ex parte* Applicant were an afterthought aimed at delaying the tendering process, having not demonstrated reasons before the 1st Respondent, or raised the issues within the statutory timelines as required by law, and that the impugned decision was based on sound legal principles and was based on the issues raised by the parties in their pleadings. That in any event, the *ex parte* applicant has not set out how the technical requirements of the Tender documents violated the law.

19. In conclusion, the 2nd Respondent averred that in the circumstances, the instant review application has been clothed as a fresh review application, and that the *ex parte* Application has used the ruling of the 1st Respondent to purport to rectify the flaws in its review application that it had filed before the said Respondent.

The Interested Party's Case

20. The Interested Party's grounds for opposing the application were that the *ex parte* Applicant has not averred or prayed that it has suffered any loss or damage, due to any alleged breach of duty imposed on the 1st and 2nd Respondent while dealing with Tender. Further, that the instant application amounts to a fresh review application that does not flow from the review filed before the 1st Respondent, as the *ex parte* Applicant has introduced new issues.

21. According to the Interested Party, the *ex parte* Applicant should have filed an application for review within 14 days with regard to the issues relating to its complaint on matters that occurred during the technical evaluation stage. In addition, that in light of section 3 of the

Public Procurement and Assets Disposal Act and Articles 201 and 232 of the Constitution of Kenya, 2010, the 1st and 2nd Respondents' decision was well merited and in compliance with the law, and hence should not be interfered with.

The Determination

22. The *ex parte* Applicant's application was canvassed by way of written submissions. Mwamuye, Kimathi & Kimani Advocates who are on record for the *ex parte* Applicant filed two sets of submissions dated 5th May 2021 and 31st May 2015. The 2nd Respondent's advocates on record, Mwaura & Wachira Advocates filed submissions dated 13th May 2021, while Gikandi & Company Advocates for the Interested Party filed submissions dated 26th May 2021. A preliminary issue was raised by the 2nd Respondent and Interested Party as regards the competence of the instant application that needs to be disposed of at the outset.

23. The 2nd Respondent and Interested Party in this regard urged that the instant application has been clothed as an appeal on merits, contrary to the set out requirements on judicial review applications. Reliance was placed by the 2nd Respondent on the decision in **Republic vs Kenya Revenue Authority Ex parte Yaya Towers Limited, (2008) eKLR** that the remedy of judicial review is not concerned with reviewing the merits of a decision, but the decision making process itself, and it was submitted that there is no indication by the *ex parte* Applicant of how the decision making process by the 1st Respondent was flawed, illegal or procedural. Further, that the instant application requires this Court to delve into the merits of the case and return another verdict in the *ex parte* Applicant's favour.

24. The 2nd Respondent also relied on the cases of **Pastoli vs Kabale District Local Government Canal & Others (2008) 2 EA 300** and **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 others, (2016) KLR**, on the nature and limits of judicial review.

25. This Court is in this regard expressly granted supervisory jurisdiction over decisions made by quasi-judicial bodies such as the 1st Respondent under Article 165(6) of the Constitution, and to this extent the *ex parte* Applicant's application is properly before this Court. The broad grounds for the exercise of its judicial review jurisdiction were stated in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

26. After the enactment of the Constitution of 2010 and the provision of the right to fair administrative action in Article 47 thereof, **there are now established grounds for judicial review that require Courts to review the substance of a decision, quite apart from the jurisdictional and procedural aspects of decision making. These grounds are now explicitly provided for in section 7 of the Fair Administrative Action Act, and include the grounds of relevant and irrelevant considerations in a decision, the rationality and reasonableness of a decision, its proportionality, whether legitimate expectations have been violated by the decision, and whether the decision was made for proper or improper purposes. These grounds are questions of law on which there are settled applicable principles, and which of necessity also entail a merit review of the impugned decision in the context of the adduced evidence.**

27. It was however emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** that while Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

28. The *ex parte* Applicant has in this respect urged that the 1st Respondent's decision was illegal and unreasonable, and the instant application therefore properly falls within the review jurisdiction of his Court.

29. There are two substantive issues that arise for determination as follows:

a) Whether the 1st Respondent acted unlawfully in its finding that it had no jurisdiction to determine the grounds on technical evaluation in the *ex parte* Applicant's Request for Review.

b) Whether the relief sought by the *ex parte* Applicant is merited.

On Whether the 1st Respondent acted unlawfully

30. The *ex parte* Applicant reiterated its averments on the errors made by the 1st Respondent in its finding that it had no jurisdiction to hear and determine issues relating to the technical requirements of the Tender, and further submitted that in ousting its jurisdiction pursuant to section 167(1) of the Act, the 1st Respondent failed to take into account the guiding principles relating to ouster clauses. Further, that the provisions of section 167(1) of the Act are not absolute but are dependent on the happening of the event, and that the 1st Respondent in this respect failed to consider when the evaluation exercise happened relating to technical specifications and when the *ex parte* Applicant was notified of the outcome.

31. The *ex parte* Applicant relied on the case of **R vs Public Procurement Administrative Review Board & 2 Others ex parte Team Engineering Spa [2014] e KLR** where the Court applied the finding in the case of **Anisimic Limited vs. Foreign Compensation Commission and Another [1969] 1 All ER 208** that ouster clauses should be construed strictly.

32. The 2nd Respondent's submissions were that the *ex parte* Applicant has raised a new issue in their submissions, which is not raised in the pleadings, by purporting to claim that the 1st Respondent's interpretation of section 167(1) of the Public Procurement and Asset Disposal Act was contrary to principles relating to "ouster clauses". Nevertheless, that the position on ouster clauses was clearly expounded in **Animistic vs Foreign Compensation Commission (supra)**, and that section 167(1) is not an ouster clause as the judicial review jurisdiction of this Court has not been disregarded in anyway.

33. According to the 2nd Respondent, the plain meaning of section 167(1) is that a complaint can be filed before the 1st Respondent at any stage of the evaluation process when the breach occurs or after notification of award within 14 days. However, that the complaint by the *ex parte* Applicant before the 1st Respondent was on the basis of the wording and/or format of scores of the technical specifications, which allegedly made the evaluation process flawed, and was within the knowledge of the *ex parte* Applicant and only raised after the mandatory statutory period of 14 days had lapsed. Reliance was placed on the decision in **R vs Secretary of State for the Environment; ex parte Ostler (1976)**, where the English Court of Appeal upheld the validity of a partial ouster clause that gave the applicants six weeks to challenge a decision.

34. The Interested Party on its part submitted that the *ex parte* Applicant has made complaints with regard to matters that occurred at the technical stage, but which matters were not complained of within the 14 days' period referred to in Section 167 (1) of the Public Procurement and Assets Disposal Act. Furthermore, that even if the Board had jurisdiction to deal with that issue, the *ex parte* Applicant cannot possibly succeed has not alleged, leave alone proved, that the *ex parte* Applicant has suffered or risks to suffer any loss or damage due to the breach of duty imposed on the 1st and 2nd Respondents. The cases of **James Oyondi t/a Betoyo Contractors & Another vs Elroba Enterprises Limited & 8 Others, [2019] eKLR**, and **Kenya Ports Authority & Another vs Rhombus Construction Company Limited & 2 Others, Civil Appeal No. E11 of 2021**, were cited in this regard.

35. It is however notable that the argument by the Interested Party that the *ex parte* Applicant has not demonstrated any loss or damage due to the breach of duty imposed on the 1st and 2nd Respondents was raised in, disposed of and dismissed by the 1st Respondent in its findings on the *ex parte* Applicant's *locus standi* at page 21 of its ruling of 21st April 2021, and is thereby *res judicata* as submitted by the *ex parte* Applicant. The ruling of the 1st Respondent was as follows:

“The 1st Applicant's participation in the subject tender as a tenderer is sufficient evidence that the 1st Applicant must have obtained the Tender Document either at the Procuring Entity's procurement offices upon payment of a non-refundable tender fee of Kshs. 1000.00 or by downloading the same free of charge from the Procuring Entity's website, (www.knls.ac.ke) or the Public Procurement Information Portal (www.tenders.go.ke). This in the Board's view, suggests the 1st Applicant participated in the subject tender as a candidate by obtaining the Tender Document and as a tenderer by submitting a tender in response to an invitation by the Procuring Entity.

Accordingly, the Board finds that the 1st Applicant has the requisite locus standi provided in section 2 of the Act. To that end, the first limb of the 2nd Respondent's Notice of Preliminary Objection dated 12th April 2021 fails.”

36. The Interested Party ought to have sought for a review of, or appealed the specific findings of the 1st Respondent in this regard, and cannot purport to relitigate this ground in the instant proceedings.

37. On the other hand, the law on the trigger of the Respondent's jurisdiction as regards the timelines within which requests for review of procurement processes should be filed, which is the issue in dispute, is in section 167(1) of the Public Procurement and Asset Disposal Act (hereinafter “the Act”). The said provisions are as follows:-

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

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.”

38. An ordinary reading of section 167(1) of the Act shows that that there are two instances when time will start to run for purposes of filing a request for review with the 1st Respondent. These are the date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process.

39. This Court in determining the issue at hand, is guided by the circumstances when a public body shall be deemed to have made an error of law as expounded in Halsbury’s Laws of England, 4th Edition at paragraph 77 as follows:

“... 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.”

40. It is notable that the 1st Respondent in this respect initially found that it was properly seized of the *ex parte* Applicant’s Request for Review as follows:

“The 1st Applicant filed its Request for Review on 1st April 2021, thus the same is within the statutory period of 14 days specified in section 167 (1) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the 1st Applicant's Request for Review. The effect of this finding is that the 1st Respondent's Notice of Preliminary Objection dated 13th April 2021 and the second limb of the 2nd Respondent's Notice of Preliminary Objection dated 12th April 2021 fail.”

41. Having made this finding, the 1st Respondent then proceeded to make the impugned finding on some of the grounds raised by the *ex parte* Applicant in its Request for Review as follows, at pages 27 to 28 of its ruling:

“The 1st Applicant could have approached the Board within fourteen days after the tender submission deadline raising an allegation that the technical evaluation criteria did not meet the requirements of section 3 (e) & (h) and 60 of the Act having noted that as at 9th March 2021, the Procuring Entity would apply the technical evaluation criteria specified in the Tender Document. Taking the provisions of section 57 (a) of the Interpretation and General Provisions Act and the period of 14 days under section 167 (1) of into consideration, the 1st Applicant ought to have challenged the technical evaluation criteria by 23rd March 2021. This is because; the 1st Applicant obtained the Tender Document before the tender submission deadline of 9th March 2021, was well aware of the technical evaluation criteria stated therein but opted to participated in the subject procurement process without raising any issue with the Technical Evaluation Criteria.

The technical evaluation criteria was challenged in a Request for Review filed by the 1st Applicant on 1st April 2021, only because the 1st Applicant's bid was found non-responsive. Had it been awarded the subject tender, the Board is persuaded that the 1st Applicant would not raise any complaint with the technical evaluation criteria.

The 1st Applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging the technical evaluation criteria in the Tender Document, so late in the day after sleeping on its right to seek administrative review.

Having established that this ground is time barred, the Board finds that it lacks jurisdiction to entertain the 1st Applicant's allegation that the technical evaluation criteria provided under Part A and Part B of the Appendix to Instructions to Tenderers of the Tender Document does not meet the requirements of section 3 (e) & (h) and 60 of the Act.”

42. Similar findings were also made by the 1st Respondent at pages 30 to 31 of its ruling that it lacked jurisdiction to entertain the *ex parte* Applicant’s allegations on the minimum technical score provided in the Tender Document, and for similar reasons. I will, for full effect, reproduce the relevant grounds for review raised by the *ex parte* Applicant in this regard, which were in paragraphs 11 to 17 of its Request for Review as follows:

“11. THAT the procurement process by the 1st Respondent did not meet and contravenes the requirements of the Public Procurement and Asset Disposal Act hereinafter referred to as "the Act".

12. THAT the Technical evaluation process of the Tenders was flawed in that the technical evaluation criteria in Part A and B of the 1st Respondent's Tender Document on pages 18 to 24 was crafted in a manner that conflicted with the objective of the entire procurement process and further, violate the guiding principles in section 3 of the Act particularly section 3 (e) and (h) which respectively prescribes for the principles of public finance under Article 201 of the Constitution to be applied as well as maximization of value for money.

13. THAT the Technical evaluation process of the Tenders having been carried out through a defective evaluation criteria formula on Part A and B of the Technical Specifications was therefore flawed and resulted to the 1st Respondent awarding the tender to a tenderer who did not meet the crucial technical specifications of the tender.

14. THAT the Applicant further avers that page 19 of the tender Document which Reads- :

"PART B: MINIMUM TECHNICAL CAPACITY TO ENTER INTO A CONTRACT"

Could only be interpreted to mean that every tenderer was required to meet all the technical specification outlined therein to achieve the minimum capacity status to enter into a contract and that any tenderer who did not meet any of the technical specification could not achieve the status of minimum technical capacity to enter into a contract.

15. THAT the Applicant in its tender application did comply with all the requirements as articulated in the 1st Respondent's tender document particularly in Part A and B of the Technical Specifications.

16, THAT the 1st Respondent in its tender document on pages 18 provided that both Part A and B would be evaluated out of 100% to determine the technical score. That the pass mark was 80% and that tenderers who attained a score of 80% and above would proceed to financial stage.

17. THAT the Applicant and the 2nd Respondent are the only tenderers who made it to the technical stage and upon the conclusion of the evaluation process at this stage, the 1st respondent's evaluation committee awarded the Applicant a score of 99.5% while the 2nd Respondent obtained a score of 92.5%."

43. A reading of the grounds in shows that the *ex parte* Applicant was aggrieved by tender technical evaluation process and the application of the technical criteria and scores therein, which it stated did not meet the threshold expressed in the Act and Constitution. Therefore, the relevant act when time started to run for these grounds in the *ex parte* Applicant's Request for Review was when it was notified of the outcome of the tender evaluation process which was by a letter dated 19th March 2021.

44. In determining the date of occurrence of this breach, I am persuaded by the decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 the Court extensively discussed when time starts to run with respect to a breach in procurement proceedings and concluded as follows:

"The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete? It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realise the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough..."

45. In addition, the Court of Appeal identified the permissible limitations to a Court's or Tribunal's jurisdiction in the case of Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1 as follows:

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist.

46. The 1st Respondents jurisdiction in this respect is very wide under section 28 of the Public Procurement and Assets Disposal Act, and there is no limit to the types and nature of the tendering and asset disposal disputes that it has powers to review, hear and determine. In this

respect, the 1st Respondent relied on its regulations to decline jurisdiction, whereas it is a general principle of statutory interpretation that unless the enabling Act so provides, delegated legislation cannot override any Act or any rule of general law (see **Bennion on Statutory Interpretation, Fifth Edition** at section 50) .

47. In addition, where a power is conferred on a public body, the public body must at the very least interrogate on whether or not the power should be exercised in the circumstances of a particular case, and the extent of its jurisdiction if any, and it cannot at the outset disable itself from exercising its discretion and giving proper consideration to the issues raised in a complaint or issue before it. The 1st Respondent in the circumstances fettered its discretion and abdicated its statutory duty to hear and determine the grounds in the *ex parte* Applicant's Request for Review on the basis of the pleadings filed, and therefore unlawfully declined jurisdiction.

48. It is also evident that there are internal contradictions and inconsistencies in the logic of the 1st Respondent's ruling, for reasons that not only did it initially find it had jurisdiction; it then proceeded to decline jurisdiction to hear some grounds for the reasons that the technical evaluation criteria and scores urged therein had been provided in the Tender document and were therefore time barred; yet still proceeded to frame and decide its third issue for determination based on grounds raised on the technical specifications stated in the same Tender document! (at pages 40 to 43 of its ruling).

49. In addition, the 1st Respondent conflated the tender requirements in the tender document, with the tender evaluation process pleaded by the *ex parte* Applicant, and severally made observations and assumptions not supported by any facts or an interrogation of the pleadings and submissions filed by the parties, as regards the motivation of the *ex parte* Applicant in filing its Request for Review. This is shown by the section of the 1st Respondent's ruling reproduced in the foregoing, and also at page 27 of its ruling where it stated as follows:

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

50. To this extent, it is also the finding of this Court that the ruling by the 1st Respondent was irrational and unreasonable.

On Whether the Relief sought are merited.

51. The *ex parte* Applicant has sought the remedies of certiorari, prohibition and mandamus. An order certiorari nullifies an unlawful decision or enactment, while an order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. Mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties.

52. The Court of Appeal in the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which these orders can issue, and they are available where unlawful conduct or a breach of duty has been demonstrated on the part of a public body or official. Section 11 (1) of the Fair Administrative Action Act also provides for additional orders that this Court can make in judicial review proceedings, which have now been greatly expanded.

53. In the present case, the impugned findings in the ruling delivered by the 1st Respondent on 21st April 2021 on PPARB Application No. 43 of 2021 have been found to have been unlawful, and that the 1st Respondent abdicated its duty to hear and determine the *ex parte* Applicant's Request for Review. To this extent, the remedies of certiorari, mandamus and prohibition that are sought are therefore merited, so as to accord the *ex parte* Applicant an opportunity for a fair consideration of its Request for Review.

54. Section 11 (1) (e) and (h) of the Fair Administrative Action Act in this respect permits this court to remit a matter back to the decision maker for reconsideration, and the 1st Respondent can therefore be compelled to determine the *ex parte* Applicant's Request for Review *de novo*.

The Disposition

55. In light of the foregoing observations and findings, the *ex parte* Applicants' Notice of Motion dated 5th May 2021 is found to be merited to the extent of the following orders:

I. An order of Certiorari be and is hereby issued to remove into this Court for purposes of quashing, the decision of the 1st Respondent dated 21st April, 2021 in PPARB Case Number 43 of 2021.

II. An order of Mandamus be and is hereby issued compelling the 1st Respondent to re-hear PPARB Case Number 43 of 2021, and to consider all the grounds raised therein by the *ex parte* Applicant, and the pleadings and submissions filed therein and served by all the parties.

III. The *ex parte* Applicants' Request for Review in PPARB Case Number 43 of 2021 be and is hereby remitted to the 1st Respondent for re-hearing and determination, within thirty days of the date of this judgment.

IV. An order of Prohibition be and is hereby issued prohibiting and restraining the 2nd Respondent from awarding Tender No. KNL/HQ/TOOB/2020-21 for Supply, delivery, installation, testing, and Commissioning of an automatic book scanner for

KNLS virtual Library Digitization LAB, and prohibiting and restraining the 2nd Respondent and the Interested Party from entering into a contract over and /or concerning Tender No. KNL/HQ/TOOS/2020-21 for Supply, delivery, installation, testing, and Commissioning of an automatic book scanner for KNLS virtual Library Digitization LAB, pending the rehearing and determination of the *ex parte* Applicant's Request for Review in PPARB Case Number 43 of 2021 by the 1st Respondent.

V. Each party shall bear its own costs of the Notice of Motion dated 5th May 2021.

56. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2021

J. NGAAH

JUDGE