



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 135 OF 2018

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI,
MANDAMUS AND PROHIBITION.**

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF ARICLES 23(f) AND 47(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF SECTIONS: 8 AND 9 OF THE LAW REFORM ACT CAP 26

AND

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

AND

**IN THE MATTER OF: A DECISION BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD TO ANNUL
TENDER AWARDED TO THE EX-PARTE APPLICANT TO SUPPLY AND DELIVER PRE-STRESSED METALLIC SLEEVES.**

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....1ST RESPONDENT

KENYA PIPELINE LIMITED COMPANY.....1ST INTERESTED PARTY

ECOSPEED GENERAL SUPPLIES LIMITED.....2ND INTERESTED PARTY

EXPARTE:

KEMOTRADE INVESTMENT LIMITED

JUDGMENT

The Application

1. The ex-parte Applicant herein, Kemotrade Investment Limited (hereinafter “the Applicant”), and the 2nd Interested Party herein, Ecospeed General Supplies Limited, are companies registered under the Companies Act and carrying on business in the Republic of Kenya. They were both bidders in a tender advertised on 10th October 2017 by Kenya Pipeline Company Limited (the 1st Interested Party herein), for the Supply of Pre-stressed metallic sleeve on a two year contract frame work under Tender Number KPC/PU/529-LP/17 (hereinafter “Tender No. KPC/PU/529-LP/17”). After the opening of the tender and its evaluation, the 1st Interested Party declared the Applicant the winner of the tender in a notification letter dated 9th January 2018.

2. The 2nd Interested Party thereupon challenged the decision of the 1st Interested Party to award the tender to the Applicant by way of a Request for Review Application No. 31 of 2018, which was filed on 21st February 2018 with the Public Procurement Administrative Review Board, the Respondent herein. The Respondent is a statutory body created under section 27 of the Public Procurement and Assets Disposal Act of 2015, and mandated to review, hear and determine public tendering and asset disposal disputes.

3. On 14th March 2018, the Respondent delivered its decision on the said Request for Review and made the following Orders:

a) The Request for Review dated 21st February 2018 and filed by the Applicant, M/s Ecospeed General Supplies Ltd on the same date in respect of Tender No. KPC/PU/529-LP/17 for the Supply of Pre-stressed Metallic Sleeves, be and is hereby allowed.

b) The award of the subject tender to the successful bidder, M/s Kemotrade Investments Limited, be and is hereby annulled and set aside as its tender was not responsive, and ought to have been declared as non-responsive.

c) The Procuring Entity is directed to re-evaluate afresh bids that made it to the financial evaluation stage to the exclusion of the successful bidder’s bid which was non-responsive while taking into account the findings of the Board herein and complete the procurement process including the making of an award within fourteen days of the date of this decision.

d) For the reason that the procurement process herein is not complete, each party shall bear its own costs of the Request for Review.

4. The Applicant, being aggrieved with the Respondent’s decision, filed judicial review proceedings herein by way of a Notice of Motion Application dated 27th March 2018, and is seeking the following orders therein:

a) An order of Certiorari to remove into this Court for purposes of the same being quashed the decisions of the Respondent Board contained in the Respondent’s ruling dated 14th March 2018 annulling the tender awarded to the Applicant.

b) An order of Mandamus to compel the Respondent to reinstate the Applicant as the winning bidder of tender no. KPC/PU/529-LP/17 for the supply of Pre-stressed metallic sleeves.

c) An order of Prohibition, prohibiting the 1st Interested Party and 2nd Interested Party from acting upon and / or executing the directions made and or given by the Respondent against the Applicant in the ruling dated 14th March 2018.

d) Costs of this application be provided for.

5. The Application is supported by the grounds on its face ; the application for leave by way of Chamber Summons dated 27th March 2018, a statutory statement dated 27th March 2018, a verifying affidavit sworn on the same date by Kevin Mwaura, a Director of the Applicant, and a supporting affidavit sworn by the same deponent on 4th April 2018. The Applicant explained that it is a registered youth enterprise and therefore allowed to access Government tenders or tenders of public bodies. Further, that the Applicant participated in the open tendering process and was properly declared a winner of Tender number KPC/PU/529-LP/17.

6. It is the Applicant’s case that all entities who participated in the tender process were notified of the award through a letter dated 9th January 2018, which the Applicant’s Director collected and signed for, and that the 2nd Interested Party was also notified and its representative known as Evans Okello, holder of ID number 24573090 collected the notification. However, that despite being so notified, the 2nd Interested Party waited until the 21st February 2018 to request for a review by the Respondent, long after the lapse of the 14 days statutory limit.

7. In addition, that despite the 2nd Interested Party’s request for review being filed out of time, the Respondent went ahead and considered the request for review, and also despite the 1st Interested Party demonstrating that it had notified all parties on the 15th January 2018 and not 7th February 2018. Therefore, that the Respondent lacked jurisdiction to consider the Request for Review, and its determination of the same was unlawful null and void.

8. The Applicant further urged that one Evans Okello alias Charles Obongo officially known as Evans Charles Okello Obongo, who is a representative of the 2nd Interested Party, received notification of the tender award. Reliance was placed on a supporting affidavit in the Request for Review dated 12th March 2018 sworn by a Charles Obongo, confirming that his full name was Evans Charles Okello Obongo alias Evans Okello.

9. Further, that the 1st Interested Party had documentary evidence to confirm that the said Evans Okello received the letter of notification of

award on the 15th January 2018, signed for it and indicated the number of his Kenya National identity card; and that the time for filing the Request for Review before the Respondent thus lapsed on 29th January 2018. However, that the Respondent went ahead to consider and determine the Request for review filed on 21st February 2018, despite there being no evidence that time started running on 7th February 2018, as determined in the Respondent's ruling dated 14th March 2018.

10. Reliance was in this respect placed on section 167 of the Public Procurement and Asset Disposal Act of 2015, which provides that any party dissatisfied with the decision of the procuring entity may appeal to the Respondent within fourteen days of notification of award.

11. The Applicant further averred that it submitted a 3M sample which it presented to the 1st Interested Party's tender opening committee in compliance with the tender requirements, and deposited it with the 1st Interested Party as it was directed to do by the Chairman of the tender opening committee. However, that the Respondent failed and neglected to consider the evidence placed before it, and considered extraneous matters which were not placed before it, thus usurping the legal mandate of the 1st Interested Party outlined in section 77(7) Public Procurement and Asset Disposal Act.

12. Further, that the representative of the 2nd Interested Party confirmed through affidavits that he attempted to interfere with the tendering process contrary to the law, but the Respondent ignored that evidence. Therefore, that the decision of the Respondent is unlawful, illegal and detrimental to the commercial interests of the Applicant, and ought to be quashed.

The Responses

The Respondent's Response

13. The Respondent opposed the application through a replying affidavit sworn on 27th July 2018 by its Principal Procurement Officer, Philip Okumu. The Respondent confirmed that the 2nd Interested Party filed a request for review before it on 21st February 2018 challenging the award of the Tender No.KPCU/PU/529-LP/17. That after receiving the Request, the Respondent served the 1st Interested Party notifying it of the pending review, and requiring it to make an appearance for the hearing of the review in accordance with regulation 74(1) and (2) of the Public Procurement and Disposal Regulations of 2006.

14. It was the Respondent's case that it heard the parties, considered their pleadings and submissions and delivered its ruling on 14th March 2018 after taking into account the facts that were presented before it. The Respondent sought to demonstrate that its findings were based on facts as follows. Firstly, that the Applicant failed to surrender the mandatory requirements of the tender by 10.00 am on the 10th November 2018 as highlighted by the 2nd Interested Party, which according to the tender documents would automatically disqualify the Applicant.

15. Secondly, that for purposes of computing time in order to determine whether a request for Review has been filed within or out of time, the computation commences from the next day after discovery of the alleged breach or from the date a party is notified of the outcome of the tender process; and that the first day for the purposes of computing time was 8th February 2018 and counting the period of fourteen days from the said date, the Respondent found that the said period lapsed on 22nd February 2018. That the 2nd Interested Party therefore filed the application within the statutory period of 14 days as required by law, and the objection taken by the procuring entity on the ground that the Respondent lacked jurisdiction to hear and determine the application was disallowed.

16. Third, that at the conclusion of the preliminary evaluation of the tenders the procuring entity was of the view that three bidders had met all the mandatory preliminary requirements required to be met and had all attained a technical score of 70, and invited them for negotiation. Further, that the technical tie between the Applicant and the 2nd Interested Party both of whom attained the same score at the technical evaluation stage was broken by the fact that the Applicant did not submit a 3M sample of the metal sleeve as was mandatorily required as per the tender documents.

17. Therefore, that the decision delivered on the 14th March 2018 allowed the request for review, and the procuring entity was directed to re-evaluate afresh the bids that made it to the financial evaluation stage to the exclusion of the successful bidder's bid, which was non responsive. The Respondent contended that it considered all documents of evidentiary value that was placed before it, and that its decision was within its mandate under in the Public Procurement and Disposal Act 2015.

18. Lastly, that there is no evidence demonstrated by the Applicant that the Respondent was unreasonable in arriving at its decision or that it was guilty of unreasonable exercise of power, irrationality, illegality or procedural impropriety. Further, that the decision of the Respondent is grounded in law.

The 1st Interested Party's Response

19. The 1st Interested Party's response was in a replying affidavit sworn on the 26th April 2017 by Vincent Cheruiyot, its General Manager-Supply Chain. The 1st Interested Party confirmed that it placed an advertisement of an invitation to tender for the supply of pre-pressed metallic sleeves under a two year frame work contract on the 10th October 2017. That all bidders were required to satisfy the conditions set out at section 1 of the tender document, namely, provision of a certificate of incorporation of their company; of a manufacturers authorisation form duly filled; of a tender security of Ksh 50,000/= valid for 180 days, of a valid KRA tax compliance certificate for local tenderers; of a signed declaration form; of one sample of 3m sleeve and mill certificate; and to paginate and initial each page of the bid document.

20. Further, that it was a term of the tender document that the documents submitted by the interested candidates were to be enclosed in plain sealed envelopes marked with the tender reference number, and deposited in the tender box. Further, that the bids were to be opened in the

presence of the candidates representatives who chose to attend at 10:00 a.m on 10th November 2017, at the 1st Interested Party's Boardroom.

21. The 1st Interested Party posited that on 10th November 2017, the chairman of its Tender opening committee called the meeting to order, introduced the agenda and noted that five bidders had tendered their documents. The five bidders were Kemotrade Investments; Aiglecom Virtual; Phoenix Avifil; Ecospeed General Suppliers Ltd and Newslink Suppliers Ltd. That before the tenders were opened, the Applicant's representative, one Kevin Mwaura, notified the tender opening committee that its sample was in the Applicant's motor vehicle at the 1st Interested Party's parking within its compound, and sought directions from the chairman of the tender opening committee.

22. It is the 1st Interested Party's case that at this point, the tender opening committee of the 1st Interested Party noted it had not given specifications regarding the manner in which the sample metallic sleeve was to be submitted, as being bulky it could not be carried to the tender opening venue, and directed the Applicant to ensure that its sample was taken to the stores for receipt and acknowledgement.

23. Further, that the other bidders had first taken their samples to its store before the tender opening time of 10:00 a.m, where they were given an acknowledgement slip which they presented alongside the tender documents. In addition, that the 1st Interested Party treated the matter as a non-conformity or irregularity in the tender which did not constitute a material deviation, as the sample was within the 1st Interested Party's premises.

24. Therefore, that as no objection was made by any of the other bidders, the 1st Interested Party proceeded to open the tenders submitted and proceeded to undertake the technical and financial evaluation of the bids. That the tender committee recommended that the tender be awarded to all the three qualifying bidders starting with the lowest evaluated price. Subsequently a professional opinion on the evaluation was done on the tender evaluation committee's recommendation, which was thereafter approved by the 1st Interested Party's accounting officer on 22nd December 2017. The letters of notification of the outcome were thereupon signed on 9th January 2018 and sent to all bidders through email, followed by telephone calls asking the bidders to collect original letters from the 1st Interested Party.

25. The 1st Interested Party averred that a member of its staff, namely Richard Kaplelach, called one Mr Evans Okello, a representative of the 2nd Interested Party, who came and collected the notification of award letter on 15th January 2018. The said letter notified the 2nd Interested Party that the tender had been awarded to the Applicant, and that even though the 2nd Interested Party was not the lowest evaluated bidder, they would be included in the panel of suppliers for the pre- and mandated to review, hear and determine public tendering and asset disposal disputes. That the said Mr Okello acknowledged his copy by indicating his name, identity card number date and signature.

26. The 1st Interested Party stated that it was subsequently served with the request for review filed on 21st February 2018 by the 2nd Interested Party, seeking the nullification of the award of the tender as set out in the 1st Interested Party's notification letter dated 9th January 2018, and that it filed a response thereto and further raised a preliminary objection on the jurisdiction of the Respondent. Further, that through a decision rendered on 14th March 2018 the Respondent disallowed the 1st Interested Party's objection on jurisdiction, on the grounds that the notification of award was issued on 7th February 2018 and therefore the request was filed within time.

27. That the Respondent proceeded to allow the 2nd Interested Party's request for review, and annulled the award of the subject tender to the successful bidder on the ground that the Applicant's bid was non-responsive for failure to submit a sample at tender opening when all other bidders had submitted the same. In addition, that the Respondent directed the 1st Interested Party to re-evaluate afresh bids that made it to the financial stage, to the exclusion of the Applicant.

28. The 1st Interested Party is of the view that the Respondent acted *ultra vires* and in excess of its jurisdiction, for the reason that it entertained the request for review more than fourteen days after 15th January 2017, which was the date of notification of the award to the 2nd Interested Party, and that the request for review contesting the decision made by the 1st Interested Party on 10th November 2017 ought to have been lodged by 24th November 2017.

29. Further, that the Respondent failed to take into account relevant considerations being evidence tabled by the 1st Interested Party by way of letter dated 9th January 2018 which indicated it was collected by Evans Okello on 15th January 2018, and who indicated his name, his identity card number, the date and signature. Furthermore, that the 2nd Interested Party had not tabled any evidence that the letter was collected on 7th February 2018 as alleged, besides making a mere averment in an affidavit.

30. Other factors the Respondent is alleged to have failed to take into account were that due to the size and weight of the sample, and in absence of directions/specifications in the tender documents regarding the manner in which the sample was to be delivered to the 1st Interested Party for tender opening, none of the tenderers submitted the sample at the tender opening. That it also failed to take into account that the directions given to the Applicant to take its sample to the store from its vehicle before tender opening was the manner determined by the 1st Interested Party for receiving a tender which could not fit in the tender box, as prescribed under Section 77(7) of the Public Procurement and Asset Disposal Act, 2015.

31. The 1st Interested Party further averred that the Respondent's decision that all bidders except the Applicant were able to present their samples at the tender opening, and that the same received an acknowledged by the tender opening committee was not supported by the information and evidence before the Respondent, which was that all the bidders had presented their samples to the 1st Interested Party's store where they were given acknowledgment slips which they presented at tender opening.

32. The Respondent's decision in nullifying the tender was alleged by the 1st Interested Party to be unreasonable and unfair because it was in respect of a framework contract, and all the bidders including the 2nd Interested Party would be included in the 1st Interested Party's panel of suppliers for the two years following the award. Further, that it was unreasonable for the Respondent to expect the Applicant to come to

tender opening at the 2nd floor of the building where the tender opening was to be done, with a sample of the sleeve measuring 3 metres long and 250 kilograms.

33. Lastly, that the Respondent's decision to nullify award of the tender as non-responsive and direct for fresh re-evaluation of the Bids to the exclusion of the Applicant is unreasonable, as none of the bidders presented the samples at tender opening.

The 2nd Interested Party's Response

34. The application was opposed by the 2nd Interested Party through an affidavit sworn on 20th April 2018 by Charles Obongo, its Sales Manager. He confirmed that they submitted a bid in response to the 1st Interested Party's invitation to tender on 10th November 2017 at 10:00 a.m, and attended the tender opening on the same date. That at the tender opening, he noted that the Applicant had not submitted a sample of 3m of the sleeve and mill certificate as part of the mandatory requirements before the tender opening, and therefore had not been issued with a signed delivery note before the tender opening as required.

35. The deponent averred that he raised the issue with the chairman of the 1st Interested Party's tender opening committee, who duly noted the failure and also with the Respondent's Store manager, one Mr Kinyua. Therefore, that the sample of 3m of the sleeve and mill certificate and the delivery note by the Applicant were supplied after the tender opening process had commenced and bids opened, contrary to the law and the provisions of the bid documents.

36. According to the deponent, on 7th February 2018 he received a call from a Richard Kaplach, a Procurement Officer of the 1st Interested Party, who notified him about a letter concerning the tender, and the deponent went to the 1st Interested Party's offices and was served with a rejection letter dated 9th January 2018. That, the said letter stated that the tender had been awarded to the Applicant.

37. The deponent refuted the assertion that the 2nd Interested Party was notified of the 1st Interested Party's decision on 15th January 2018. He contended that the 1st Interested Party failed to place cogent and compelling evidence before the Respondent to prove service of its decision on the 2nd Interested Party as by law required. He stated in this respect that the 1st Interested Party was required to effect service of its decision by the various ways by law but it failed to do so, as it did not email its decision, or send it by registered post or by way of registered delivery to the 2nd Interested Party.

38. Furthermore, that the burden of proving service lay with the 1st Interested Party and does not shift to the 2nd Interested Party. That in view of the contradiction between his deposition that he was only notified of the decision dated 9th January 2018, and the forgery produced by the 1st Interested Party alleging service on 15th January 2018, and as the Applicant failed to show conclusive proof of delivery of the notification letter to the 2nd Interested Party, the Respondent properly resolved that the 2nd Interested Party was only notified of the 1st Interested Party's decision on 7th February 2018.

39. The 2nd Interested Party alluded that under the tender document the tenderers were required to give a quote on the price per pair of metallic sleeve to be supplied, while the letter of award quoted the price per piece of USD 2,643 in accepting the tender by the Applicant, which was therefore not the lowest bid evaluated. Therefore, that the tender was awarded to the Applicant despite its bid being non-responsive.

40. Further, that the Applicant failed to submit a sample of the 3m metal sleeve and a mill certificate before the tender opening as was the requirement, and sought to introduce the sample after the commencement of the tender opening, which was admitted by a Mr. Joseph Obok, the Planning Officer for the 1st Interested Party in his Replying Affidavit to the Request for Review dated 3rd March 2018.

41. The 2nd Interested Party in conclusion contended that that the Respondent arrived at its decision after considering all the facts and issues before it, and that it made a proper and lawful decision that cannot be vitiated for procedural impropriety, want of jurisdiction or unreasonableness.

The Determination

42. The Application was canvassed by way of written submissions which were highlighted during a hearing held on 2nd August 2018. Wangira, Okoba and Company Advocates filed submissions dated 11th May 2018 on behalf of the Applicant, which were highlighted in Court by Mr. Wangira. The Respondent's submissions were dated 2nd August 2018 and were filed by Mr. K. Odhiambo, Litigation Counsel at the Attorney General's Chambers, who highlighted the same at the hearing. Iseme Kamau & Maema Advocates filed submissions dated 11th May 2018 for the 1st Interested Party, which its counsel, Mr. Nyaberi, referred to during the hearing. Mr. Masese for the 2nd Interested Party on his part based his highlights on written submissions dated 14th June 2018, that were filed by Kosgey & Masese Advocates.

43. I have considered the pleadings, submissions and arguments made by the parties and find that the issues arising for determination are as follows:

- a) Whether the Respondent acted outside its jurisdiction to consider the Request for Review by the 2nd Interested Party.
- b) Whether the Respondent failed to take into account relevant considerations in making its decision on 14th March 2018.
- c) Whether the Respondent's decision of 14th March 2018 was unreasonable.

d) Whether the Applicant merits the prayers sought .

44. The issue of the Respondent's jurisdiction will of necessity be dealt with first, as the findings in this regard are likely to affect the determination of the other issues. The Applicant in its submissions on the issue reiterated its arguments that the 2nd Interested Party stated that it noted that the Applicant had not met the mandatory requirements at the stage of the tender opening process on the 10th November 2017. Therefore, it ought to have sought an administrative review within fourteen days of the occurrence of the alleged breach at that stage of the procurement, under section 167(1) of the Public Procurement and Asset Disposal Act. That the review ought to have been filed at most on the 24th November 2017.

45. Further, that the 1st Interested Party advised all the bidders on the outcome of the tender via a letter dated 9th January 2018 and the 2nd Interested Party collected its letter of notification of the award on the 15th January 2018. In addition, that from the evidence provided to the Respondent, all agents of the bidders who collected the letters were required to sign, date and indicate their identification details, and that the 2nd Interested Party's agent and/ or representative called Evans Okello collected the letter on the 15th January 2018 and indicated his Kenyan Identity Card number as 24573090 and signed for it. Further, that the same person is identified as Okello Obongo in the visitors' manifest supplied in evidence by the 1st Interested Party dated 10th November 2017.

46. The Applicant pointed to the supporting affidavit in the Request for Review sworn by one Charles Obong'o who denied that he did not collect the letter on the 15th January 2018, but was rather called by an employee of the 1st Interested Party on the 7th February 2018 and he was given a letter. However, that in the same proceedings, the said Charles Obongo swore a further affidavit on the 12th March 2018 and confirmed that he was the same person called Evans Okello and that his full name was Charles Evans Okello Obongo, and he attached a copy of his Kenyan Identity card number 24573090, which has the same number as that indicated on the letter retained by the 1st Interested Party as a confirmation of the notification having been served on the 2nd Interested Party on 15th January 2018.

47. The Applicant in its submissions contended that the Respondent attempted to circumvent the law and its powers by introducing issues alien to law with regard to service. That the Respondent opined that the 1st Interested Party should have availed a signed delivery book, a recorded postage or evidence of the letter having been emailed to the 2nd Interested Party, and that the said 2nd Interested Party was therefore not informed on 15th January 2018 that its tender was unsuccessful. It was submitted that it was unreasonable for the Respondent to allege that a certificate of postage would have amounted to proper service as opposed to personal service.

48. It was the Applicant's submission that the Respondent assumed jurisdiction yet it did not get and neither did it call for any evidence from the 2nd Interested Party on the allegation that its representative received the letter on the 7th February 2018, and to the contrary, the 1st Interested Party had provided clear documentary evidence of the letter which was collected by Evans Okello alias Charles Obongo. Reliance was placed on the case of **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** that jurisdiction is everything to a court.

49. Further reliance was placed on the opinion of the Supreme Court in **In The Matter Of Advisory Opinions of the Supreme Court Under Article 163(3) Of The Constitution, Constitutional Application No 2 of 2011** that jurisdiction flows from the law, and that a court cannot arrogate itself jurisdiction through the craft of interpretation, where the wording of the legislation is clear. Lastly, the Applicant urged this court to associate itself with the holding in the case of **Republic vs Public Procurement Administrative Review Board & 2 Others Ex-Parte Numerical Machining Complex Limited, (2016) e KLR** that where the law exhaustively provides for the jurisdiction or authority, the body or authority must operate within those limits and ought not expand its jurisdiction through administrative craft or innovation.

50. The 1st Interested Party echoed the submissions made by the Applicant, and submitted that section 167(1) of the Public Procurement and Asset Disposal Act provides that an aggrieved party in a procurement process may seek administrative review within fourteen days of notification of the award or date of the occurrence of the alleged breach. That taking into account that the tender opening was on 10th November 2017, any party who was dissatisfied with the 1st Interested Party's failure to disqualify the Applicant on account of non-submission of the sample at the tender opening ought to have filed a request for review by 24th November 2017. However, that the request for review was lodged before the Respondent on 21st February 2018, approximately two months out of time. Therefore that the Respondent acted *ultra-vires* by entertaining an incompetent Request for Review.

51. It is the 1st Interested Party's contention that section 176 (1) of the Public Procurement and Asset Disposal Act is framed to give two options on the time for filing a request for review. That in the event of a breach during the procurement process, the request ought to be filed within fourteen days from the date of breach. That the second option of lodging the request fourteen days from the date of the notification of the award applies where the breach is manifest in the final decision set out in the notification letter. Therefore, that the 2nd Interested Party ought to have filed its request for review by 24th November 2017 as the process had not been concluded, and the Respondent had no jurisdiction to entertain a request filed out of time.

52. The 1st Interested Party relied on the case of **Republic vs Public Procurement Administrative Review Board and 2 Others., (2015) eKLR** for the proposition that jurisdiction of the Board is only available where an application has been filed within fourteen days.

53. In the alternative, the 1st Interested Party also submitted that it issued its notification of award by way of its letter dated 9th January 2018 both by email to the indicated email address in the bid documents and by hand delivery. It reiterated the submissions made by the Applicant that the 2nd Interested Party's agent, Evans Okello collected the letter on 15th January 2018. Further, that the only available and uncontroverted evidence is that the notification letter was collected by the 2nd Interested Party's representative on 15th January 2018, and that by filing the review on 21st February 2018 the said Interested Party was grossly out of time. The case of **Republic vs Public Procurement Administrative Review Board & 2 Others Ex Parte Apex Security Services (2015) eKLR** was cited for this proposition.

54. The Respondent on its part submitted that it acted within its jurisdiction and had powers to hear the 2nd Interested Party's Request for Review and that the governing and applicable section in this matter is section 167 of the Public Procurement and Asset Disposal Act, which provides for filing of administrative review within 14 days. The Respondent relied on the decision of **Vestergard Frandsen (Sa) vs The Procurement And Supply Management Consortium Ministry of Health App No 140/2007** for the proposition that the Respondent has consistently held that the time for the appeal window began to run upon communication of award, or communication of award or communication of failure to be awarded.

55. Therefore that the Respondent pronounced that it had jurisdiction to deal with the Request for Review by the 2nd Interested Party, and proceeded to hear the matter in an open forum. Reliance was also placed on the decision of the **Owners of The Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited (1989) KLR 1** and **Republic vs. Public Procurement Administrative Review Board & 2 Others (2015) eKLR** for the holding that the jurisdiction of the Respondent is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process, or from the date of the occurrence of the alleged breach where the tender process has not been concluded.

56. The 2nd Interested Party submissions on the issue of jurisdiction were that the issue was raised before the Respondent and dismissed by virtue of section 167(1) of the Public Procurement and Asset Disposal Act. The 2nd Interested Party also relied on the cases of **Owners Of The Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd, (1989) KLR 1**, and **Owners and Masters Of The Motor Vessel "Joey" vs Owners And Master Of The Motor Tugs "Barbara" And "Steve B" (2008) 1 EA 367** for the proposition that jurisdiction is everything without the Court has no power to make one more step and must be determined at the threshold stage.

57. It was the 2nd Interested Party's submission that the Respondent had jurisdiction to decide on the matter and did so comprehensively, and that the main basis of the Applicant questioning the Respondent's jurisdiction is that the 2nd Interested Party picked the regret letter on the 9th January 2018 which was based on a lie.

58. That the existence of the letter was not brought to the attention of the 2nd Interested Party on that date, but on the 7th February 2018, and that the 1st Interested Party failed to produce evidence of service by pre-recorded delivery, or by registered post or even by way of email which was available to it. Therefore, in the absence of service as by law provided, the Respondent correctly accepted the affidavit evidence by one Charles Okello that he was served with the letter on 7th February 2018.

59. Reliance was placed on the holding in the case of **Republic vs Public Procurement Administrative Review Board & Others Apex Security Services, (2015) eKLR** for the holding that jurisdiction of the Respondent is only available where an application for review has been filed within 14 days from the date of delivery of results of the tender process. Also relied upon was the decision in **Maalin Trading Co. Ltd vs County Government of Wajir PPARB No 22 of 2018**, where it was held that it's not the date of the notification letter that counts, but the date that the letter is brought to attention of the intended recipient.

60. The 2nd Interested Party thus submitted that it was notified of the outcomes of the tender on 7th February 2018, and that the request for review was filed on the 21st of February 2018 within the statutory time limit provided for under section 167(1) of the Public Procurement and Asset Disposal Act. In addition, that the Applicant did not adduce any admissible evidence that the 2nd Interested Party received the notification letter on 9th January 2018, and not on 7th February 2018 which remains the date of notification.

61. After due consideration of the legal arguments made, this Court notes that it is not disputed that the applicable law on the issue of the Respondent's jurisdiction is section 167(1) of the Public Procurement and Asset Disposal Act (hereinafter "the Act") which states as follows:-

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

62. There are two limbs to the issue of the Respondent's jurisdiction that are raised by the arguments made in this application. The first is as regards when time started to run within the meaning of section 167(1) of the Act with respect to the breach alleged by the 2nd Interested Party in its Request for Review. The second, is whether the 2nd Interested Party's Request was filed in time for the Respondent to be seized of jurisdiction to hear the same.

63. The Respondent's findings on the two limbs was as follows in its decision dated 14th March 2018:

"Under the cited Section 167(1) of the Act, the Applicant is required to seek administrative review within fourteen days of notification of award. The board has perused the letter of notification and notes that the same was dated 9th January 2018.

The Board has considered the Procuring Entity's submission that the Applicant collected the letter from the Procuring Entity's premises on 15th January, 2018. It has further considered the Procuring Entity's submissions that the Applicant was expressly aware of the notification of the outcome of its tender on 15th January, 2018, as allegedly evidenced by the signature of the Applicant's representative who allegedly picked the letter and that the Request for Review filed on 21st February, 2018 was filed outside the mandatory fourteen days for the filing of Requests for Review

The question that arises is one, which date between 9th January 2018, 15th January, 2018 and 7th February, 2018 was the

date that the Applicant was notified that its tender was unsuccessful? Even though the letter of regret was dated 9th January 2018, it is the Board's view that 9th January, 2018 was not the date of notification because the existence of the letter was not brought to the attention of the Applicant on that date.

The Procuring Entity contended that the Applicant collected the letter of regret from its premises of 15th January 2018. The board has looked at the letter of notification to the Applicant attached to the Replying Affidavit sworn by Richard Kaplelach, the Procurement Officer of the Procuring Entity and notes that the same has hand written markings indicating that the letter was collected by one Evans Okello on 15th January, 2018. The Applicant disputed that Evans Okello collected the letter on its behalf on the 15th January, 2018. The board wishes to observe that the said letter which was attached to Kaplelach's affidavit and the markings made thereon are the photocopy. The markings on the letter cannot therefore be authenticated by the Board. The board further notes that the Procuring Entity did not provide a signed delivery book, a recorded postage or evidence of the letter having been emailed to the applicant. It is not enough for the Procuring Entity to allege that a representative of the Applicant collected the letter on 15th January, 2018 since proof of that mode of delivery is inconclusive and open to contestation as happened in this case. In the circumstances, the Board is of the considered opinion that the Applicant was not informed on 15th January, 2018 that its tender was unsuccessful.

In the absence of clear proof of service of the letter of notification, it is in the Board's view, an untenable proposition for the Procuring Entity to argue that the Request for Review files by the Applicant on 21st February, 2018 was filed outside the statutory period on 14 days. The Board in the recent case *Maalin Trading Co. Ltd vs County Government of Wajir (PPARB No. 22 of 2018)* held as follows:-

"The Board is of the considered view that when it comes to notification, it is not the date on the letter of notification that counts, rather what counts is the date that letter is brought to the attention of the intended recipient."

The Board therefore finds that the Applicant was notified of the outcome of its tender on 7th February, 2018 and the countdown of 14 days started running from the next day namely on 7th February, 2018 and lapsed on 22nd February, 2018. It is the further finding of the Board that the Applicant having filed this request for Review on 21st February, 2018, the same was filed within statutory time provided by law. The Board therefore holds that the Applicant complied with the provisions of Section 167 (1) of the Act in terms of the time for filing the Request for Review. Accordingly, this ground and, by extension, the Preliminary Objection fails and is disallowed."

64. This Court notes with regard to the findings by the Respondent that there are two applicable instances when time will start to run that are provided by an ordinary reading of section 167 (1) of the Act, namely the date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process. Therefore, contrary to the Respondent's finding, there is another point in time when time can start to run other than the date of notification of the award.

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

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

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

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

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

The conclusion in paragraph 31 that time only starts to run once the unsuccessful tenderer can "come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings" reflects a number of decisions that the Court of Justice must have taken with respect to the test of discoverability. The most obvious question that arises for consideration, given that the unsuccessful tenderer has such a small window of time in which to start proceedings and given that the factual basis of a claim may be complex, is what happens if the information which the unsuccessful tenderer has is incomplete? It seems to me that in effect the Court of Justice resolves the problem of gaps in knowledge by treating the existence of an informed view as sufficient to bridge this gap. Once that is reached, there is no further threshold test in terms of prospects of success or indeed any other reason to escape the consequence of knowledge, such as lack of resources or failure to realise the true position in law, that can be taken into account. From this analysis it must follow that it is irrelevant that the unsuccessful tenderer's evidence is incomplete. The unsuccessful tenderer has the requisite knowledge once he has sufficient information to enable him to reach an informed

view as to the matters stated in paragraph 31 of the judgment of the Court of Justice. Finally, the formulation provided by the Court of Justice, involving an informed view as to the appropriateness of bringing proceedings, may well mean that knowledge of some trivial breach not justifying the start of proceedings would not be enough...”

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as “Annexure CO4” to the 2nd Interested Party’s replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd Interested Party’s representative, one Charles Obon’go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issued with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party’s tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore *ultra vires* and null and void.

68. The second breach noted by the 2nd Interested Party in its Request for Review was in paragraphs 6 to 8 thereof, namely that contrary to the requirements of the tender document which invited bidders to give a quote for price per pair of the metallic sleeves to be supplied, the Respondent in its letter of award accepted the quote from the Applicant being the price quoted on a single piece. The letter of award was dated 9th January 2018, but it is disputed by the parties as to when the same was notified to the 2nd Interested Party. Section 87 of the Act provides as follows as regards the notification of awards:

“(1) 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.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.”

69. The duty of the procuring entity under this section is two-fold as regards notification, first that the notification of the award must be in writing, and second, that such notification of award shall be made simultaneously with a notification of regret in writing to all unsuccessful tenders such as the 2nd Interested Party. With respect to notification of regrets there is also a duty of disclosure imposed by section 87(3) of the reasons for the rejection of their tender. This Court (Aburili J.) in **Lordship Africa Limited v Public Procurement Administrative Review Board & 2 Others [2018] eKLR** noted in this regard that notification of regret to the unsuccessful tenderer and the giving reasons for the regret is not optional for the procuring entity and is a mandatory requirement under Section 87(3) of the Act as complemented by section 126(4) of the Act.

70. In addition in the case of **Republic v Public Procurement Administrative Review Board & 2 Others ex parte Team Engineering Spa [2014] eKLR**, Odunga J. observed as follows:

“This submission in my view seems not to have recognized the applicant’s core complaint being that it never received the notification. As was held in Republic vs. Public Procurement and Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR, the burden of proof on the issue of notification lies on the Procuring Entity. The applicant having denied notification, it was upon the Procuring Entity to prove on the standard of balance of probability that the applicant was duly notified of the decision of the Procuring Entity. To contend that the applicant ought to have adduced evidence from its computer that it did not receive the notification would not only amount to shifting the onus of proof but to compel the applicant to prove a negative. I appreciate that under Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya, “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” I also appreciate the legal maxim that *omnia praesumuntur legitime facta donec probetur in contrarium* (all things are presumed to have been legitimately done, until the contrary is proved). However, as was held by Seaton, JSC in the Uganda Case of J K Patel vs. Spear Motors Ltd.”

71. I have perused the 1st Interested Party’s averments in this regard. At paragraphs 20 and 21 of its replying affidavit, the deponent, Vincent Cheruyiot, stated that the letters of notification were sent by email followed by telephone calls. No copy of any email sent to the 2nd Interested Party in this regard was attached. However, the person alleged to have made the telephone call to the 2nd Interested Party’s representative on 15th January 2018, one Richard Kapelech, filed an affidavit to attest to this fact during the hearing of the Request for Review which was annexed to the Replying Affidavit in its “Annexure KPC 8”.

72. The Respondent considered the said affidavit by Richard Kapelech in its decision, and found that the letter of award and reasons for rejection of the 2nd Interested Party’s tender dated 9th January 2018 that was addressed to the 2nd Interested Party and that was attached by the said deponent showing that it had been collected by the representative of the 2nd Respondent on 15th January 2018, could not be authenticated as it was a photocopy. Further, that the same was not supported by a delivery book, postage or an email or any other proof of

service. The said letter was also annexed as “Annexure KPC-6” to the 1st Interested Party’s replying affidavit.

73. The burden of proof upon the 1st Interested Party in this regard was on a balance of probabilities, which with due respect to the Respondent, I find that the 1st Interested Party discharged. There was no evidence before the Respondent for the finding it made that the copy of the letter annexed by Richard Kapelech could not be relied upon. In addition, there was evidence that was placed before the Respondent as regards the identity of the 2nd Interested Party’s representative who was notified of the award; there were contradictory responses by the said representative on his identity; and the 2nd Interested Party did not adduce any further evidence to disprove the 1st Interested Party’s evidence of notification.

74. There was therefore no reasonable basis for the Respondent’s finding that the notification of the award and reasons for rejection of its tender was made to the 2nd Respondent on 7th February 2018, in light of the evidence presented by the 1st Interested Party that the same was done on 15th January 2018.

75. To this extent therefore, the Respondent also did not have jurisdiction to consider the second alleged breach in the 2nd Interested Party’s Request for Review, as the same was filed on 21st February 2018, beyond the statutory limit of 14 days after 15th January 2018, when this Court finds the 2nd Interested Party’s representative was notified of the award and reasons for the rejection of its tender.

76. All considerations and findings made in the Respondent’s decision dated 14th March 2018 as regards the alleged anomalies alleged by the 2nd Interested Party in its Request for Review were therefore irrelevant, unlawful and null and void.

77. The above findings render the issues as regards the irrelevance and unreasonableness of the Respondent’s decision moot, as the Court will then have to consider the merits of the Respondent’s decision of 14th March 2018, which it has found to be null and void. There is thus only one outstanding issue, which is whether the Applicant is entitled to the relief sought.

78. The Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards judicial review orders:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

79. The Applicant has sought orders of certiorari, mandamus and prohibition. I find that as the Respondent has been found to have acted without jurisdiction and *ultra vires* section 167(1) of the Act, the Applicant is entitled to the order sought of certiorari to quash the impugned decision by the Respondent made on 14th March 2018.

80. The effect of the order of certiorari once granted will be to restore the status to the position it was before the decision of 14th March 2018, and that the award of the 1st Interested Party to the Applicant will therefore still stand. The orders sought of mandamus and prohibition are therefore to this extent superfluous and will not serve any useful purpose. In addition, this Court cannot direct the Respondent to undertake its duties in any particular manner as sought in the terms of the prayers for mandamus by the Applicant. Lastly, the actions of the 1st and 2nd Interested Parties that can be prohibited are those that are in contravention of the law, which has not been established by the Applicant. In any event, the Respondent’s decision of 14th March 2018 having been found to be null and void, is not enforceable.

81. In the premises this Court finds that the Applicant’s Notice of Motion dated 27th March 2018 is merited to the extent of the following

orders:

I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the decision and orders of the Respondent contained in the Respondent's ruling dated 14th March 2018 annulling the tender awarded to the Applicant.

II. The Respondent and 2nd Interested Party shall meet the Applicant's costs of the Notice of Motion dated 27th March 2018.

82. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2018

P. NYAMWEYA

JUDGE