



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 190 OF 2016**

**IN THE MATTER OF LAW REFORM ACT & ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT**

**AND**

**IN THE MATTER OF AN APPLICATION BY UNIVERSITY OF ELDORET SEEKING LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI.**

**AND**

**IN THE MATTER OF TENDER Q/UOE/15-16/ACADEMICS/088 FOR PRINTING OF EXAMINATION BOOKLETS**

**AND**

**IN THE MATTER OF A DECISION AND ORDER DATED 7<sup>TH</sup> APRIL, 2016 MADE BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD ....1<sup>ST</sup> RESPONDENT**

**PALONA ENTERPRISES & GENERAL SUPPLIES LIMITED.....2<sup>ND</sup> RESPONDENT**

**EAST COAST PRINTERS LIMITED.....INTERESTED PARTY**

**AND**

**THE UNIVERSITY OF ELDORET.....EXPARTE APPLICANT**

## JUDGMENT

1. By a notice of motion dated 5<sup>th</sup> May 2016 and filed in court on 6<sup>th</sup> May 2016, the ex parte applicant the University of Eldoret seeks from this court Judicial Review orders pursuant to the leave granted on 24<sup>th</sup> April 2016 by Honourable Korir J. The orders sought are that:

a. This Honourable court be pleased to grant an order of **certiorari** to remove into this Honourable Court and quash the entire decision of the Public Procurement Administrative Review Board, the 1<sup>st</sup> respondent herein, delivered on 7<sup>th</sup> April, 2016, annulling the quotation number Q/UOE/15-16/ACADEMICS/088 for printing of examinations booklets awarded to East Coast Printers, the interested party, and awarding it to Palona Enterprises & General Supplies Limited, the 2<sup>nd</sup> respondent.

b. Costs of this application be provided for; and

c. Any other relief that this Honourable Court may deem just and fit to grant.

2. The application is predicated on the grounds on the face of the application; supporting affidavit; statutory statement; verifying affidavit and annexures thereto.

3. The ex parte applicant is a public University established by Charter granted in 2013 in accordance with the Universities Act, 2012 and its case is as deposed by professor Pius Kipkemboi the then Vice Chancellor, that the University sent out invitations for prequalifications of suppliers and service providers through an advertisement in the Standard Newspaper dated 4<sup>th</sup> April 2014 which invited the interested a competent firms to submit their applications for consideration for supply and delivery of goods and services for the period 2014/2015 and 2015/2016 financial years as shown by the newspaper advertisement annexed.

4. That the 2<sup>nd</sup> respondent made an application under category B for UOE/PRE-Q/30/2014-16 for provision of general printing, lamination and binding services.

5. That the prequalifications for the financial year 2014-2016 was opened on 14<sup>th</sup> April, 2014 at 11.00 a.m. at the Annex Hall in which the 2<sup>nd</sup> respondent among 13 others had applied in the category for provision of general printing, lamination and binding services, as shown by minutes of the tender opening committee for that day.

6. That on 28<sup>th</sup> August 2014 a 10<sup>th</sup> special tender committee meeting met and recommended all the 14 bidders for prequalification in the category of provision of general printing, lamination and binding services, including the 2<sup>nd</sup> respondent, who were unanimously prequalified as shown by the annexed minutes.

7. That the procuring entity floated quotation number Q/UOE/15-16/Academics/088 for printing of examination booklets which was done by seeking for quotations from 6 of the prequalified suppliers who had been prequalified in the sought for quotations under prequalification No. UOE/PRE-Q/30/2014/2016 and which quotations were to reach the procuring entity by 3<sup>rd</sup> November 2015.

8. The 2<sup>nd</sup> respondent was among the six qualified suppliers who were invited to submit quotations under quotation No. Q/UOE/15-16/Academics/088 for printing of examination booklets.

9. The quotation from the bidders were opened by the procurement committee on 9<sup>th</sup> November at 12.000 noon in the presence of representatives from most of the bidders as shown by copy of quotation register exhibited.

10. That the 2<sup>nd</sup> respondent and other bidders submitted their bids including samples with financial quotations of:

1. Flogin EA Ltd shs 16.00
2. Talent Graphics shs 16.50
3. Palona Enterprises shs 14.40
4. East Coast Printers shs 16.00
5. The Print Experts shs 16.70
6. Dawin Printing & Stationers shs 16.80

As shown by copies of quotations.

11. Thereafter, the technical evaluation was done by examining the quality of the paper, and the colour, upon which 3 of the bidders progressed having been awarded marks above the minimum set of 30 marks namely:

1. Talent Graphics
2. Palona Enterprises ;and
3. East Coast Printers.

12. That the tender processing committee then physically visited the facilities of the bidders to evaluate their capacity to handle the job at hand before financial evaluation, which visit was conducted on 14<sup>th</sup> December 2015 to the 3 remaining bidders' respective business places.

13. That upon evaluation, the applicant/ 2<sup>nd</sup> respondent earned the least marks of 20 due to the fact that it outsourced machinery and so it was eliminated leaving the final bidders as Talent Graphic and East Coast Printers.

14. That the procuring entity then moved to financial evaluation whereupon East Coast Printers emerged the lowest evaluated bidder of shs 16.00 as compared to Talent Graphic of shs 16.50 hence East Coast Printers was awarded the tender as shown by minutes of 17<sup>th</sup> December 2015 and tender committee meeting of 8<sup>th</sup> February 2016.

15. That the 2<sup>nd</sup> respondent was aggrieved by the decision of the tender committee and lodged a request for review before Public Procurement Administrative Review Board on 17<sup>th</sup> March 2016.

16. That the hearing was conducted on 5<sup>th</sup> April 2016 and the decision of the review board rendered on 7<sup>th</sup> April 2016 annulling the award of quotation No. UOE/PRE/Q/30/2014-16 for printing of examination booklets to Ms East Coast Printers Ltd and instead, the board substituted the applicant's decision and awarded the tender to the 2<sup>nd</sup> respondents and directed the applicant to issue a letter of notification of award to the 2<sup>nd</sup> respondent on or before 15<sup>th</sup> April 2016.

17. the exparte applicant laments that for the foregoing reasons, the Review Board acted beyond its powers in awarding the tender to the 2<sup>nd</sup> respondent and went outside its jurisdiction by not following the proper procurement procedures as required by law.

18. Further, it is averred that the 2<sup>nd</sup> respondent having failed at the technical evaluation stage could not

move to the financial evaluation stage despite having quoted the lowest amount.

19. The applicant complains that the 1<sup>st</sup> respondent Review Board acted outside its jurisdiction in awarding the tender to the 2<sup>nd</sup> respondent despite finding that the tender documents were defective. That the 1<sup>st</sup> respondent acted irregularly and was unfair when it introduced a new issue of visiting the bidders premises which was not pleaded by the 2<sup>nd</sup> respondent for review or before the Review Board for determination and which issue was hinged upon in nullifying the tender award made by the applicant.

20. Further, that the tender validity having lapsed the 1<sup>st</sup> respondent Review Board could not purport to have the power to award the quotation to the 2<sup>nd</sup> respondent as the same would be contra statute. The exparte applicant also challenged the penalty of shs 250,000 costs against it.

21. On the whole, the applicant challenged the 1<sup>st</sup> respondent's decision on the grounds of ultra vires, illegality, irrelevant consideration, unreasonableness/irrationality, bias and breach of the rules of natural justice and procedural impropriety and prayed that this court quashes the decision of the Public Procurement Administrative Review Board.

22. The application was opposed by the 2<sup>nd</sup> respondent Palona Enterprises & General Supplies Ltd through a replying affidavit sworn by Patricia Sawe, a director of the 2<sup>nd</sup> respondent on 1<sup>st</sup> July 2016.

23. In her depositions, the deponent contends that the notice of motion is fatally defective as it wrongly cites the exparte applicant as the applicant instead of the Republic and the exparte applicant under the title and that even though the exparte applicant has sought to quash the decision of the 1<sup>st</sup> respondent it has failed to annex the decision it seeks to quash.

24. The deponent gives the history of the matter just as was given by the exparte applicant and states that after the tenders were opened on 9<sup>th</sup> November 2015 in the presence of the tenderers representatives, 4 months lapsed without any response until 29<sup>th</sup> February 2016 when the 2<sup>nd</sup> respondent wrote to the applicant inquiring on what transpired and that it was after failing to get any response that it lodged an application for review on 17<sup>th</sup> March 2016 with the 1<sup>st</sup> respondent and a decision made on 7<sup>th</sup> April 2016, (as annexed) nullifying the applicant's award to East Coast Printers Ltd.

25. It was contended that Section 173 of the Public Procurement and Asset Disposal Act, 2015 gives power to the 1<sup>st</sup> respondent to annul and substitute the decision of the procuring entity with its own decision.

26. That the 1<sup>st</sup> respondent after perusing the documents submitted to it by the parties held that there was no requirement for due diligence after the technical evaluation (as shown by page 12 and 13 of the decision).

27. That by the time the procuring entity purported to conduct the due diligence the technical evaluation had already been carried out and the 2<sup>nd</sup> interested party had emerged with the most responsive bid moreso when the tender document did not require that the procuring entity would conduct a due diligence after the technical evaluation and in the sense the exparte applicant was using irrelevant considerations.

28. That the 2<sup>nd</sup> respondents bid was found to be responsive at all the preliminary, technical and financial evaluation stages hence the 1<sup>st</sup> respondent awarded the tender to the 2<sup>nd</sup> respondent after considering the provisions of Section 89(4) of the Act which is clear that the lowest bidder is awarded the tender after it has responded to the other requirements under the tender documents.

29. It was contended that the 1<sup>st</sup> respondent is empowered under Section 28 of the PPADA Act to review the tendering process and thereafter under Section 173 thereof to award the tender whose validity had not lapsed and that the delay in communicating the results of the tendering process was deliberate to deny the 2<sup>nd</sup> respondent an opportunity to challenge the Review Board's decision.

30. It was further contended that during the review, the *exparte* applicant admitted that it did not communicate its decision of the purported winner or the other bidders and that the applicant having failed to obey orders of the 1<sup>st</sup> respondent, which is in violation of section 175(6) of the Act, it does not deserve to be heard by this court.

31. The 2<sup>nd</sup> respondent denied that the 1<sup>st</sup> respondent took into consideration any irrelevant matters in making its decision and that therefore this application seeks the court to determine the merits of the decision of the 1<sup>st</sup> respondent as the issues presented are not within the province of Judicial Review.

32. According to the 2<sup>nd</sup> respondent, after the decision by the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent learnt that in fact the *exparte* applicant had clandestinely already awarded the tender to a third party Flogin East Africa Ltd even though at the hearing the *exparte* applicant informed the 1<sup>st</sup> respondent that East Coast Printers had won the tender without communicating to the winner thereof as shown by annexure PS5 and PS6 copies of Local Purchase Order No. P.O. 0812 dated 31<sup>st</sup> March 2016 and invoice No. 1367 dated 18<sup>th</sup> May 2016 by the said 3<sup>rd</sup> party.

33. That therefore the *exparte* applicant is guilty of material non disclosure and seeks to sanitize its action through the court and hence its actions are tainted with *malafides* therefore the motion should be dismissed.

34. The 1<sup>st</sup> respondent Public Procurement Administrative Review Board also filed a replying affidavit sworn by Henock K. Kirungu, the 1<sup>st</sup> respondent's Secretary on 21<sup>st</sup> June 2016 opposing the *exparte* applicant's application for Judicial Review orders.

35. The 1<sup>st</sup> respondent contends that on 17<sup>th</sup> March 2016 it received the 2<sup>nd</sup> respondent's request for review challenging the award of tender No. UOE/PRE-Q/28/2015-2016 for prequalification for provision of printing services. That the review was heard on 5<sup>th</sup> April 2016 and after considering all the material placed before it, the Board delivered its decision on 7<sup>th</sup> April 2016, awarding the tender to the 2<sup>nd</sup> respondent pursuant to Section 173 of the Public Procurement and Asset Disposal Act, 2015.

36. That in making its decision, the 1<sup>st</sup> respondent noted that the 2<sup>nd</sup> respondent had been disqualified by the applicant owing to a due diligence that was carried out after technical evaluation, which was not a criteria for the evaluation of the tenders/quotation contained in the tender documents.

37. Further, that the applicant even when called upon to point out the source of the criteria for carrying out due diligence after technical evaluation had been concluded, counsel for the procuring entity could not point out to the Board the source of the said criteria.

38. It was further claimed by the review Board that the 1<sup>st</sup> respondent considered the entire tender process and not just the financial aspect of it before arriving at its decision.

39. That in any event, there is no insinuation in the 1<sup>st</sup> respondent's decision that the tender documents were defective and neither is the alleged defect disclosed or identified by the *exparte* applicant.

40. That the *exparte* applicant could not establish any criteria in the tender documents where the tender processing committee was mandated to carry out what the applicant called due diligence after

technical evaluation.

41. That in any event, due diligence ought to have been carried out at the prequalification stage and not after the technical evaluation stage had been done.

42. That the applicant has not demonstrated any grounds to warrant the grant of Judicial Review remedies sought and that the applicant is challenging the merits of the decision of the 1<sup>st</sup> respondent although disguised as a Judicial Review application which ought to challenge the procedure of arriving at a decision. The 1<sup>st</sup> respondent urged the court to dismiss the *exparte* applicant's application with costs to the respondents.

43. The *exparte* applicant sought and obtained leave of court to file a further affidavit which further affidavit was filed on 6<sup>th</sup> September 2016 and was sworn by Professor Pius Kipkemboi on 6<sup>th</sup> September, 2016 annexing the decision of the 1<sup>st</sup> respondent Review Board.

44. All the parties' advocates agreed and filed written submissions and authorities to fortress their respective positions and which submissions were highlighted orally on 7<sup>th</sup> September 2016.

45. In his brief submissions that mirrored the written submissions dated 5<sup>th</sup> May 2016, the *exparte* applicant's counsel Mr Wanjala submitted that the respondent's decision was *ultra vires*, illegal, irrational and laced with procedural impropriety and that the decision took into account irrelevant matters.

46. That the Review Board raised a further ground which was not pleaded and which was a criteria called "due diligence." It was submitted that parties were not notified to raise such an issue or criteria.

47. Further, it was submitted that it was erroneous for the Review Board to hold that "due diligence" was part of the criteria yet that ought to have been part of the technical evaluation.

48. According to Mr Wanjala, the Review Board had no jurisdiction to award the tender. That the Board could only have investigated and quashed an award and instructed for fresh tendering but not to award the tender hence, its decision was illegal. Several decisions were relied on including **JGH Marine T/A Western Marine Services Ltd (NPC North East Refining & Chemical Engineering Company Ltd/Pride Enterprises v Public Procurement Administrative Review Board & 2 Others [2015] e KLR** to buttress this point.

49. On the submission that the Review Board had no jurisdiction to award a tender to an unsuccessful bidder based on a criteria not in the tender documents reliance was placed on the **JGH Marine** case; and **Republic vs Public Procurement Administrative Review Board & 2 Others Exparte Akamai Creative Ltd & Republic vs Public Procurement Administrative Review Board & 3 Others Exparte Olive Telecommunications PVT Ltd.**

50. On the submissions that the decision of the Review Board was illegal, it was submitted that Regulation 59 made under the repealed PPADA restricts procurement on quotation to a minimum of shs 1 million but that in this case the 2<sup>nd</sup> respondent quoted shs 14 making the sum to shs 7 million which renders the award illegal.

51. The applicant further submitted that the award was made with procedural impropriety hence *ultra vires* in that the award was made to a bidder who did not achieve the highest combined technical and financial scores. Reliance was placed on **Attorney General V Ryan [1980] AC 718 at 730.**

52. It was further submitted that the decision of the Board was not proportionally made, was made in bad faith abused the power and took into account irrelevant considerations and acted contrary to legitimate expectations of the applicant. That the 1<sup>st</sup> respondent held the incorrect assumption that

the visiting of the premises of the bidders was not part of the technical evaluation and that this was a new and foreign criteria introduced into the quotation process. That this was erroneous and contrary to the procurement practice.

53. In addition, it was submitted that the 1<sup>st</sup> respondent failed to proportionately test when it made a finding of nullity due to the evaluation process yet proceeded to make an award of the quotation to the 2<sup>nd</sup> respondent by basing its decision on the said irregular process and criteria.

54. Further, that the tender made to the 2<sup>nd</sup> respondent was made outside the tender validity period contrary to Section 67(1) of the Public Procurement and Disposal Act (repealed) hence the same was illegal null and void.

55. The applicants' application, counsel prayed for the orders sought in the Notice of Motion.

56. In opposition to the applicant's application, the Miss Maina counsel for the 1<sup>st</sup> respondent Review Board relied on the replying affidavit of Henock Kirungu and written submissions filed on 23<sup>rd</sup> June 2016.

57. On the issue of whether the Review Board had jurisdiction to award the tender, it was submitted that such jurisdiction was derived from Section 173(c) of the PPADA, 2015, which empowers the Review Board to substitute the decision of the Review Board for the decision for the Procurement Entity(PE). It was further submitted that nowhere in the decision did the Review Board find that the tender documents were defective. That the words allegedly read into the tender documents have not been shown.

58. It was also submitted that there was no notification of any bidder of the outcome of the tenders hence a party who had not been notified could not be enjoined.

59. On irrelevant considerations, it was submitted that nowhere was the decision based on prequalifications reserved for the youth, women and PLWD's, contrary to the advertisement.

60. It was further submitted that the 1st respondent made its decision based on the procedure for issuing tenders with the quotation method.

61. Further, that the issue of the limit was never raised in the pleadings. It was also submitted that the alleged criteria of "**due diligence**:" arose out of the tender documents hence it was an issue within the applicant's knowledge, and that the applicant did not request for time to respond to the issue of due diligence.

62. Miss Maina submitted that the application was not merited and sought for its dismissal with costs to the 1<sup>st</sup> respondent. She relied on several decisions to wit: **Republic vs Kenya Power and Lighting Company Ltd & Another [2013] e KLR** to fortify her submissions that it is not enough for an applicant in Judicial Review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for Judicial Review remedies to be granted.

63. On whether the 1<sup>st</sup> respondent acted unreasonably and irrationally while making the impugned decision, Miss Maina submitted that the decision of the 1<sup>st</sup> respondent did not pronounce on any of the issues enumerated under the ground of unreasonableness and irrationality. Therefore, it was submitted that the allegation is false on the part of the applicant.

64. On the issue of costs, it was submitted that the 1<sup>st</sup> respondent had power to award it under Section 173(d) of the Act.

65. On the test of unreasonableness, the case of **Council of Civil Service Unions V Minister for**

**the Civil Service [1984] 3 ALL ER 935** was cited, citing **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223** that irrationality applied to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and that whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

66. Further reliance was placed on **Rahab Wanjiru Njuguna Vs Inspector General of Police & Another [2013]** on the test of unreasonableness.

67. On the issue of whether the 1<sup>st</sup> respondent was in breach of the rules of natural justice, it was submitted that as the 1<sup>st</sup> respondent never notified any of the bidders in the subject tender the outcome of their tenders, there was no notification and so the 1<sup>st</sup> respondent could not enjoin a party who had not been notified as being a successful bidder as espoused in Section 170 of the Act on who should be the parties to the review. That page 9 of the decision dated 7<sup>th</sup> April 2016 was clear that the Review Board observed that there was no copies of letters of notification provided to the Board by the procuring entity in relation to the procurement and went further to find at page 10 that the request for review was premature and that the procuring entity did not explain why it never notified the applicant and other bidders of the outcome of their tenders, in accordance with the law.

68. On whether the 1<sup>st</sup> respondent considered irrelevant considerations when making its decision, it was submitted that the 1<sup>st</sup> respondent never based its decision on the fact that the 2<sup>nd</sup> respondent made its application for review with a view that the prequalifications was reserved for youth, women and persons with disability contrary to the advertisement and that again this is another deliberate falsehood on the part of the applicant because the decision speaks for itself.

69. It was further submitted that the 1<sup>st</sup> respondent made its decision based on the provisions of Section 89(4) of the repealed Act which provides that the successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotation.

70. On whether there was procedural impropriety on the part of the 1<sup>st</sup> respondent in making its decision, it was submitted that the 1<sup>st</sup> respondent's decision was based on arguments made before it and pleadings as filed by respective parties and the tender documents submitted before it; and that it never introduced any new issue of visiting the bidders premises as that is an issue that arose from the tender documents presented by the applicant hence the complaint that it was not allocated time or opportunity to sufficiently respond to that issue does not lie as it never requested for that opportunity.

71. On whether these proceedings are properly instituted before the court, it was submitted that the proceedings herein are wrongly instituted in court as they are not brought in the name of the Republic but in the name of the person aggrieved by the decision, contrary to the judicial decisions in **Farmers Bus Services & Others Vs Transport Licencing Appeal Tribunal [1959] EA 779** and **Rahab Wanjiru Njuguna v Inspector General & Another[2013]e KLR**.

72. It was submitted in conclusion that the application is unmerited and hence the court should dismiss it with costs to the 1<sup>st</sup> respondent. Reliance was placed on **Kenya Pipeline Company Ltd V Hyosung Ebara Company Ltd & 2 Others [2012] e KLR** where the Court of Appeal held that the judicial review could not lie because the application was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact.

73. Further, that so long as the proceedings of the Review Board were regular and the Board had jurisdiction to adjudicate upon the matters raised in the request for review, the Board was as much entitled to decide those matters wrongly as it was to decide them rightly.

74. The 2<sup>nd</sup> respondent **PALONA ENTERPRISES & GENERAL SUPPLIES LIMITED** filed written submissions on 20<sup>th</sup> July 2016 and its counsel Mr Kiarie made brief highlights while fully adopting the submissions by Miss Maina for the 1<sup>st</sup> respondent and relying on its replying affidavit sworn by Patricia Sawe while maintaining that there was no pleading of whether the tender was in excess of what is allowed.

75. Further, that the 1<sup>st</sup> respondent's decision never found that the tender was defective but that it was clearly stated that the tender was being allowed in favour of the lowest bidder which the interested party had not been.

76. That the applicant should have applied for more time to make responses on the issue of due diligence. Reliance was placed to the case of **R. v PPARB & 3 others EXPARTE Olive Telecommunications,PVT Limited [2014]eKLR**, among other cases. Mr Kiarie urged the court to dismiss the application with costs because the Review Board legally awarded the tender to the lowest bidder.

77. In a rejoinder, Mr Wanjala counsel for the exparte applicant submitted that the question of the limit is an issue of law hence it should have come out. Further, that Regulation 59(1) is clear on the thresholds on the quotation method under the First Schedule and that issues of law can be raised at any time in the proceedings. Further, that Section 173 of the Act does not allow the Review Board to substitute a decision and if it does, then the same is bad in law and unconstitutional and inapplicable. Further, that Article 47 of the Constitution on the right to fair administrative action is interfered with. Further, that the decision was ultra vires because there was no criteria for preliminary investigations in the tender documents.

78. In addition, it was submitted that the right to a fair hearing is not pegged on the notification of the award hence the Board should have ensured that all parties affected are issued with notices.

## **DETERMINATION**

79. I have carefully considered the exparte applicant's case and the responses by the respondents and their respective advocates' submissions and authorities relied on. Several questions flow from the said submissions but the main issue is whether the applicant is entitled to the Judicial Review orders sought.

80. In answering the above sole issue, the court will endeavour to resolve several ancillary questions.

81. The short story to these proceedings is that the applicant **THE UNIVERSITY OF ELDORET** is the procuring entity(PE) and was the respondent in request for review No. 19/2016 of 17<sup>th</sup> March 2016 wherein **Palona Enterprises & General Supplies Ltd** was the applicant challenging the Procuring entity's decision relating to tender No.OUE/PRE-Q/30/2015-2016 for prequalification for provision of printing services.

82. The applicant in the request for review proceedings had been disqualified at the technical evaluation stage after the site visit (due diligence) revealed that it did not own the machines for the work tendered for but that it out sourced and so at the technical evaluation stage, it scored 20.35 marks and it was found to be non responsive despite having quoted the least sum of shs 14.40 as opposed to the interested party herein who quoted shs 16.000 ; while others quoted between shs 16.50 -16.70.

83. Only two firms, the interested party herein **East Cost Printers** and **Talent Graphic** who quoted shs 16.00 and shs 16.50 respectively were found to be responsive after due diligence evaluation of the bidders and because the interested party was the lowest, the committee awarded it the tender. It is that award that prompted the 2<sup>nd</sup> respondent to challenge the decision of the tender committee before the Review Board seeking principally, that the Board annuls the whole

decision of the tender committee of the Procuring Entity; it awards the tender to the 2<sup>nd</sup> respondent costs and any other relief.

84. Among the grounds for review were that the public entity did not notify the 2<sup>nd</sup> respondent of the outcome of its tender/quotation and or providing it with reasons why its tender had not been successful as required by Section 67 of the Act, 2005 and Regulation 66 of the Regulations, 2006. It was contended that failure to notify Palona Enterprises of the outcome of the bids was prejudicial to it and intended to deny it the right to challenge the decision of the procuring entity.

85. The Procuring Entity's response was that the review was premature because none of the tenderers had been notified of the outcome of their tenders.

86. The Review Board found that the evaluation process was completed 4 months prior to filing of the request for review yet no letters of notification had been issued to the successful and unsuccessful bidders. Accordingly, the Review Board found that the Procuring entity had contravened Section 67 of the Act, 2005 and Regulation 66 of the 2006 Regulations made under the Act.

87. This court must therefore determine the question of whether the decision of the Review Board was in order on the Procuring Entity's failure to notify the tenderers of the outcome of the bids.

88. The applicant Procuring Entity does not deny this fact of failing to notify tenderers 4 months after the process was completed and neither does it give any reasons for failure to notify the tenderers of the outcome of the tender process.

89. Notification of tenderers of the outcome of the tender process is a statutory requirement as espoused in Section 67 of the Act as complemented by Regulation 66 of the 2006 Regulations.

90. In **Republic V Chief Constable of North Wales Exparte Evans [1982] UK HL 10** it was held that Judicial Review is available to prevent excessive exercise of power by administrative bodies or officials, to ensure that an individual is given fair treatment by administrative authorities to keep administrative excesses in check, and to provide remedy to those aggrieved as a result of excessive exercise of power by administrative bodies. It is therefore upon the judge to identify the malady and issue the necessary cure.

91. The remedy of Judicial Review is nonetheless limited to illegality, irrationality/unreasonableness and procedural impropriety or breach of rules of natural justice ( see **Pastoli V Kabale District Local Government Council & Others [2008] 2 EA 300**).

92. In my humble view, the Review Board had jurisdiction to entertain the request for review and make a determination on non notification of the outcome of the tender process. Notification of the tenderer under the aforesated provisions is intended to enable a tenderer to among other things, the reasons and to decide depending on the reasons given, whether to challenge the Procuring Entity's decision or not. The Procuring Entity did not have any discretion to notify or not to notify the tenderers of the outcome of the tender process.

93. Accordingly, I find that the Review Board did not act outside its jurisdiction in finding as it did that every bidder is by law entitled to know the eventual outcome of such a process.

94. The Review Board was also confronted with grounds 6,7,8,9,10 that the Procuring Entity breached the law when it failed to declare the applicant's tender as the lowest evaluated tender at a price of shs 14.40 for 500,000 pieces of the examination booklets @ shs 7,200,000 in total and instead evaluated the tender wrongly and awarded to the 2<sup>nd</sup> respondent's competitor's whose evaluated price was shs 16.50 for 500,000 pieces of exams booklets @ 8,250,000, resulting in the loss of shs 1,050,000 of the tax payer's money.

95. However, the Procuring Entity was categorical that evaluation of tenders was a process which

was not restricted to the financial evaluation alone but to the technical evaluation as well and that therefore the 2<sup>nd</sup> respondent having failed to be responsive to the technical evaluation, its quotation being the lowest in financial terms was immaterial.

96. The Review Board after examining the tender documents found that the Procuring Entity (Tender Processing Committee) was not mandated to carry out due diligences after technical evaluation which was not a criteria for the evaluation of tenders/quotations hence the Procuring Entity was in breach of Section 66 (2) of the Act which expressly prohibits a procuring entity from evaluating tenders using procedures and criteria other than the procedures and criteria set out in the tender document.

97. In allowing that ground for review, the Review Board proceeded to annul the award of the material tender to the interested party herein and substituted the Procuring Entity's decision and awarded the said tender to the 2<sup>nd</sup> respondent and directed the Procuring Entity to issue a letter of notification of award to the applicant (2<sup>nd</sup> respondent on or before 15<sup>th</sup> April 2016.

98. According to the Procuring Entity (applicant) herein, the Review Board had no power to award a tender to the 2<sup>nd</sup> respondent and that by doing so, it acted in excess and without jurisdiction.

99. Article 227 of the Constitution is clear that when a state organ or any public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive, and cost-effective. In **Republic vs Public Procurement Administrative Review Board Exparte Selex Sistemi Integrati [2008] KLR 728** Nyamu J stated inter alia; on the purpose of public procurement law:

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

100. The question that I must answer is whether the “**due diligence**” criteria under the technical evaluation was an additional criteria which was not provided for in the tender documents.

101. At page 2 and 3 of 6 of the evaluation committee's report, it is clear that the 2<sup>nd</sup> respondent was cleared to proceed for technical evaluation together with the interested party and Talent Graphic. However, before the technical evaluation report could be prepared, the committee agreed that due diligence criteria be undertaken for machinery, clientele and duration of business.

102. All the three evaluated tenderers were responsive on clientele and duration in business but the 2<sup>nd</sup> respondent was non responsive on the machinery aspect that it outsourced unlike its two competitors who owned the machinery hence it earned 5 marks out of 20 for company owned and 10 for leased with agreement.

103. For the court to find that there was an **additional criteria** created by the Procuring Entity which criteria was not part of the tender documents supplied to the tenderers, it must have a look at the said tender documents, examine them and establish whether, indeed, the so called **additional criteria** of due diligence was not part of the tender documents and that it was a criteria that was introduced at the technical evaluation stage thereby prejudicing the 2<sup>nd</sup> respondent.

104. In this case, I have examined the annexures to the verifying and supporting affidavits and I have not come across any tender documents. What is annexed to the affidavits and heavily submitted on are minutes of the tender committee and the evaluation committee.

105. In the said minutes, there is nothing to show that in carrying out due diligence by visiting the premises of the last three responsive tenderers, the Procuring Entity was doing so by introducing an additional criteria thereby breaching Section 66 of the Act (repealed).

106. Public Procurement process, according to Article 227 of the Constitution, and the objects and purposes of the Public Procurement and Asset Disposal Legislation, is not just an issue of value for money, but that the whole process must inspire confidence and there must be transparency and accountability, not just on the part of the Procuring Entity but also on the part of the bidders.

107. Therefore, by the evaluation committee agreeing to physically visit the facilities of the 3 companies to ascertain or evaluate their capability to handle the job at hand before financial evaluation, in my humble view, was an appropriate way of ensuring that tenderers do not just quote the lowest values and get tenders which they cannot handle or perform.

108. In my humble view, there must be in every tender document, an implied criteria for due diligence without which there can never be an efficient, transparent and or accountable public procurement process. Tenderers would be quoting the lowest figures and once awarded the tenders, then they would be unable to perform or implement public projects, thereby swindling the tax payer of the much hard earned tax and rendering the whole process a waste of valuable time and financial resources.

109. I would, therefore, without hesitation find that the due diligence complained of is not an additional criteria but is an implied criteria in every tender document, and that the Procuring Entity is under a public duty to carry out due diligence and satisfy itself that the responsive bidders at the technical evaluation stage are capable of implementing the projects before considering the financial aspect for the bidders.

110. In other words, all bidders in all public contracts should expect that they would be evaluated on their capability to implement the projects, notwithstanding their low value bids.

111. It is for that reason that Section 83 of the 2015 Act stipulates that an evaluation Committee may, after the tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderers who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with the Act. The conduct of due diligence under Subsection (1) of section 83 of the Act may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

112. In the end, I find that the due diligence conducted by the Procuring Entity before recommending the award of the tender to the lowest evaluated tenderer who had passed the technical evaluation stage, being the interested party, was not an irregular undertaking and neither was due diligence an additional criteria that was introduced by the evaluation committee, but a legal requirement.

113. Having said that, the next question is whether the 1<sup>st</sup> respondent Review Board had the power to nullify the award of the tender committee and to award the tender to the interested party who, despite failing in the due diligence test, had the lowest financial quotation.

114. According to the applicant, the Review Board had no power to annul the award and to make the award itself. That it should have referred back the matter to the evaluation committee.

115. On the other hand, the respondents strongly argued that the 1<sup>st</sup> respondent Review Board had the power to award the tender to the interested party pursuant to Section 173 of the Public Procurement and Asset Disposal Act.

116. First and foremost, it must be noted that the Public Procurement and Asset Disposal Act that was in force at the time of the tendering process subject of these proceedings was the 2006 Act, as the

prequalification notices were issued on 4<sup>th</sup> April 2014 and tender openings, done on 14<sup>th</sup> April 2014. The evaluation of the tenders by the tender processing committee was done on 25<sup>th</sup> November 2015 which was still in the old Act of 2005. The whole process was completed on 25<sup>th</sup> January 2016 when the minutes were signed.

117. However, the Procuring Entity did not notify the tenderers of the outcome of the tender process and this is what prompted the 2<sup>nd</sup> respondent to lodge a request for review in March 2016. This is after being “*reliably informed*” that the decision of the tender committee was made on or about 11<sup>th</sup> March 2016 as there was no formal notification of the outcome of the process, necessitating counsel for the 2<sup>nd</sup> respondent to write a letter to the Procuring Entity on 29<sup>th</sup> February 2016 to the applicant(Procuring Entity) herein demanding for an explanation.

118. No doubt, the procurement proceedings before the Review Board were commenced in March 2016 and the decision of the Review Board was rendered on 7<sup>th</sup> April 2016. The 2015 Act came into force on 7<sup>th</sup> January 2016. It therefore follows that the applicable law is the 2015 law and not the 2006 law. I am fortified by Schedule 3 of the transitional provision under Section 1 of the said Schedule to the new Act which stipulates: “***procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before commencement date of this Act.***”

119. Reverting back to the question of whether the Review Board had jurisdiction to award the tender to the 2<sup>nd</sup> respondent, the applicable law is Section 173 of the 2015 Act which provides that:

***“Upon completing the Review, the Review Board may do any one of the following:***

- a) Annul anything the accounting officer of a procuring entity has done in the procurement of disposal proceedings in their entirety;***
- b) Give directions to the accounting officer of a Procuring Entity with respect to anything to be done or redone in the procurement or disposal proceedings;***
- c) Substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;***
- d) Order the payment of costs as between parties to the review in accordance with the scale as prescribed and***
- e) Order termination of the procurement process and commencement of a new procurement process.***

120. In this case, the Review Board maintains that it had jurisdiction to annul the tender awarded to the interested party and to substitute its decision with the decision of the accounting officer of the Procuring Entity as stipulated in Section 173 of the Act above cited.

121. In **Republic vs Public Procurement Administrative Review Board & 2 Others Ex parte Numerical Machining Complex Ltd**, the court observed that the provisions of the then Section 98(c) of the 2006 Act, similar to Section 173(c) of the 2015 Act cannot be read in isolation to the other provisions of the Act and that the power to substitute the decision of the Procuring Entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the Procuring Entity was lawfully permitted to undertake both substantively and procedurally.

122. In this case, the Review Board annulled the tender committee’s decision of awarding the tender to the interested party and proceeded to award the tender to the 2<sup>nd</sup> respondent because the

2<sup>nd</sup> respondent had the lowest financial quotation and moreso, that the procuring entity used an additional criteria of due diligence in eliminating the 2<sup>nd</sup> respondent at the technical evaluation stage.

123. In **Republic vs Public Procurement Administrative Review Board & 2 Others Exparte Numerical Machining Complex Ltd** at paragraph 136, the learned Odunga J quoted as follows:

*“The effect of compelling the applicant to award the tender to the interested party was to compel the applicant to ignore the aforesaid provisions. The 1st respondent, in my view, had no power to compel the applicant to act unlawfully. By so doing it clearly exceeded its jurisdiction. It could only issue such directions and make decisions that the applicant itself was lawfully permitted to issue or make. Therefore, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decision of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of judicial, quasi judicial or administrative nature, is subject to the review of the courts in certain grounds. The tribunal or boards must act in good faith, extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law.*

*In my view, it is unlawful for the board to adopt a procedure by which the provisions of the tender documents are by passed in the award of the tender. Where the board awards the tender in disregard of the provisions of the tender document the court would not hesitate to quash such a decision since Section 66 of the repealed tender shall be the tender with the lowest evaluated price.*

*The board cannot in such circumstances justify its actions by reference to Section 98 of the repealed Act since it ought not in effect substitute itself for the procuring entity in matters where the entity has addressed itself on.”*

124. In the above cited decision, the Board directed the Procuring Entity to award the tender to one of the bidders.

125. However, in the present case, the Board awarded the tender to the 2<sup>nd</sup> respondent in its final order No. (b) Which states;

*“(b) The Board hereby substitutes the Procuring Entity’s decision and awards the said tender to the applicant M/S Palona Enterprises and General Supplies Limited and directs the Procuring Entity to issue a letter of notification of award to the applicant on or before 15<sup>th</sup> April 2016.”*

126. From the minutes of the Tender Preparation Committee TPC - evaluation meeting held on 25<sup>th</sup> November 2015 that deliberated on the subject tender, the evaluation committee recommended the interested party East Coast Printers, to be awarded the tender for the supply of the 16 page examination booklet quotation No. Q/UOE/15-16/ACADEMICS/088 at their quoted price of Kenya Shillings sixteen(16) per booklet, that being the lowest evaluated price of the bid.”

127. The tender committee did subsequently on 18<sup>th</sup> February 2016 approve the recommendations and awarded the tender to the interested party East Coast Printers Ltd.

128. The evaluation committee is mandated under the Act to carry out evaluation of tenders, prepare and sign and recommend to the tender committee to make the award. The evaluation report (see Section

83 (3) of the Act and submit to the tender committee the evaluation report with recommendations. Recommendations of the evaluation committee must be acted upon before a tender is awarded.

129. In the instant case, it is clear that the tender was awarded following the recommendations by the evaluation committee. It therefore follows that the Review Board in awarding the tender to the 2<sup>nd</sup> respondent converted itself into the Procuring Entity's Tender Committee and proceeded to award the tender to the tenderer that the Board believed was the most qualified tenderer.

130. In **Jelt Marine A/S Western Marine Services Ltd ( NPC North East Refining & Chemical Engineering Company Ltd /Pride Enterprises vs Public Procurement Administrative Review Board & 2 Others [2015] e KLR** the court was emphatic that inter alia:

*“.....when the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances. It is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the tender documents.”*

131. Similarly in **Republic vs Public Procurement Administrative Review Board & 2 Others exparte Olive Telecommunications PVT Limited [2014] e KLR**, the court appreciated that:

*“whereas we appreciate that the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the Procuring Entity totally useless. In providing its own definition of what an OEM is, the Board in essence altered the bid documents which can only be done as provided by the Act and by the Procuring Entity.”*

132. In this case, whereas the provisions of Section 173 of the 2015 Act give the Review Board wide powers of review, those powers have been abused by the Review Board wherein it converts itself into the tender committee to award a tender which the tender committee would have awarded.

133. Therefore, whereas I agree that the Procuring Entity could only have awarded the tender to the lowest evaluated price tenderer as that would be cost effective to the tax payer, however, the Review Board had no power to award the tender and albeit it could annul the tender, it could only direct the tender or evaluation committee to act as appropriate.

134. Furthermore the evaluation committee is not just expected to consider the financial value of the bids while ignoring all other aspects of the tender process and requirements under the law. The consideration of the lowest tenderer as a form of cost effectiveness as stated by Odunga J in **Republic vs Public Procurement Administrative Review Board & 2 Others exparte Coast Water Services Board and Another [2016] e KLR**,

*“does not infer that the procuring entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore, apart from the lowest tender, the Procuring Entity is under an obligation to consider all other aspects of the tender as provided for in the tender documents and where a bid does not comply with the conditions stipulated therein it would be unlawful for the Procuring Entity to award a tender simply on the basis that the tender is the lowest. It ought to be emphasized that Section 66(4) of the repealed Act talks of “the lowest evaluated price, as opposed to merely the lowest price. The issue for price must therefore follow an evaluation in accordance with the tender document.”*

135. The learned judge in the above case was fortified by the decision in **Public Procurement Administrative Review Board vs Kenya Revenue Authority Miscellaneous 540/2008[2008] e KLR** where the court held:

***“ To my mind, failure by the respondents to have regard to mandatory provisions of the Act concerning procurement procedures violated the purpose of the Act which is clearly stated in Section 2. I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives....Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency accountability and public confidence.***

***There cannot be greater prejudice to the applicant than failure by the decision maker to comply with provisions of the law. Failure to adhere to the applicable law gives rise to a presumption of bias and prejudice contrary to the argument put forward by the respondents counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness.”***

136. And in Republic vs Public Procurement Administrative Review Board & 2 Others exparte Akamai Creative Limited, the court held that:

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

137. Therefore, this court does not hesitate to find that the Review Board exceeded its powers and did not have the power to award to 2<sup>nd</sup> respondent party the tender and neither did it have the power to award the tender as that power is vested in the Tender Committee following recommendations by the evaluation committee, and it matters not that the Review Board was of the view that the interested party had quoted the lowest value, since the technical evaluation had to be taken into account as well.

138. There is also the question raised by the interested party that the Procuring Entity had already procured the items subject of the tender process, as shown by the affidavit of Patricia Sawe filed on 4<sup>th</sup> July 2016 annexing copies of Local Purchase Orders, an invoice by Flogin East Africa Ltd who was one of the tenderers and who was not awarded the tender as per minute 226/2/2016 for printing of examination booklets.

139. The court notes that the tender was specific to the 2015/2016 academic year and the minutes at page 11 show that the Procuring Entity required 135,000 booklets for the academic year which is long gone. In other words, there is clear evidence that the Procuring Entity clandestinely awarded the tender to Flogin East Africa at 15.00 per booklet totaling to shs 15,000,000 as per the LPO dated 31<sup>st</sup> March 2016 and as invoiced on 18<sup>th</sup> May 2016 even before the determination of the request for review on 7<sup>th</sup> April 2016.

140. In my humble view, although the process has been completed and therefore there is nothing to be reversed if at all, the action by the Procuring Entity applicant herein in instituting these Judicial Review proceedings without disclosing its illegal actions of entering into a contract with a third party even before the request for review had been considered goes along way to show that the Exparte applicant herein is the lord of impunity in public procurement matters and it goes without saying that the exparte applicant ( Procuring Entity) has come to court with unclean hands just to sanitize its illegal and clandestine dealings with one of the tenderers.

141. Accordingly, I find that the applicant (Procuring Entity) is not deserving of the exercise of discretion by this court, and I need no authority to so hold.

142. Although the respondents sought to have the application dismissed because the applicant is not the republic, in my view that is a procedural technicality on form which is curable under Article 159 of the Constitution. Nonetheless, I find that application for Judicial Review herein cannot succeed in favour of

the Procuring Entity exparte applicant.

143. And in view of the illegalities committed by both the Procuring Entity applicant and the Review Board as analyzed herein above and in view of the fact that the 2<sup>nd</sup> respondent too ought to have known that the law does not permit the Review Board to award it a tender, which tender was even made outside the stipulated period, it cannot claim that it lost any legitimate expectation as legitimate must be well grounded in law not founded on illegalities as seen in these proceedings.

144. Accordingly, I shall proceed and I hereby call into this honourable court for purposes of quashing and I hereby quash the proceedings and decision of the Review Board made on 7<sup>th</sup> April 2016 and in the same vein, having found that the exparte applicant's actions of failing to notify the tenderers of the outcome of the tender process was illegal, and that its clandestine procurement of the goods subject of the tender to a third party was illegal, I hereby declare the actions of the exparte applicant illegal.

145. However, as there is nothing to revert to in view of the lapse of time and the performance of the contract which was illegal with the third party, it would be superfluous to order for repeat of any process or for performance of any act by the parties.

146. As none of the parties have exclusively won this case, I order that each party do bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 6th day of March 2017.

**R. E. ABURILI**

**JUDGE**

**In the presence of:**

Kiarie Mungai for the 2<sup>nd</sup> respondent & h/b for Miss Maina for the 1<sup>st</sup> respondent

N/A for exparte applicant

N/A for interested party

CA: George