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# COMPLAINTS REVIEW MECHANISMS AND REMEDIES UNDER THE ETHIOPIAN FEDERAL PUBLIC PROCUREMENT SYSTEM: A CRITICAL REVIEW OF THE STATE OF LAW & SELECTED PRACTICES

**Atakilti Haileselassie Gebremichael**

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**ABSTRACT**

The Ethiopian Public Procurement & Property Administration Proclamation No. 649/2009 is the primary legislation regulating public procurement procedures, complaint review mechanisms, remedies, administration and disposal of public property. It is supplemented with a Procurement Directive aiming at operationalizing the principles and rules embodied in it. This Public Procurement system has largely modelled itself from the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services which features a complaints review mechanism with compulsory hierarchical complaint review mechanisms. The procuring public bodies assume mandatory first instance review jurisdiction on complaints lodged against their own decisions. The complaints review board and the courts are respectively the higher levels of review bodies. It has been 12 years since this law has been put in action and this work aspires to examine and analyse the state of law and practice on suppliers' complaints, review mechanisms and remedies by drawing relevant insights from the 1994 & 2011 UNCITRAL Model Laws. It is focused on the analysis of the rights of suppliers to file complaints, the complaint review bodies and their scope of competence, the powers of the courts and the award of remedies. It has been established that the Ethiopian public procurement complaints review system is constrained by obstacles that the law opted to include prohibitive clauses on the amenability of major procurement decisions which practically impairs the effectiveness of the review system leaving procuring public bodies with discretion. The prohibitions on the reviewability of procurement decisions limit the availability of review to be at the later stage of the procurement procedure and result in far fewer remedies. Moreover, the review board's features of independence and requirements of professionalism are fundamentally compromised. Review jurisdiction by the courts has been very uncertain until the cassation interpretation by the Federal Supreme Court in the *Jedaw* case made a settling judgment.

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# COMPLAINTS REVIEW MECHANISMS AND REMEDIES UNDER THE ETHIOPIAN FEDERAL PUBLIC PROCUREMENT SYSTEM: A CRITICAL REVIEW OF THE STATE OF LAW & SELECTED PRACTICES

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## 1 Introduction

The Ethiopian Federal Public Procurement & Property Administration Proclamation No. 649/2009 is by and large influenced by the UNCITRAL Model Law on Procurement of Goods, Construction and Services ("1994 UNCITRAL Model Law") except for some changes on the substance.[1] The structure is almost the same and is true for the rules as regards review of complaints and remedies. The Ethiopian Public Procurement system is designed as a single legislative framework which regulates the procurement procedures, complaints, review mechanism, remedies, public property administration and disposal.

The public procurement enforcement mechanisms can be seen as a vitally key instrument to the effective compliance of the public procurement rules leading to the award of public procurement contracts. The 1994 Model Law Guide to Enactment underlines that an important safeguard of proper adherence to the procurement rules is that contractors and suppliers have the right to seek review of actions or omissions by procuring entities in violation of those rules.[2] The 2011 UNCITRAL Model on Public

[1] UNCITRAL (United Nations Commission on International Trade Law) Model Law on Procurement of Goods, Construction and Services (1994). It is the author's assertion that the UNCITRAL Model Law greatly influenced the Public Procurement Proclamation which can be evidenced from the discussions down in the sections.

[2] The Guide to Enactment of the UNCITRAL Model Law on Public Procurement of Goods, Construction and Services 1994: para 30.

Procurement has more to emphasize that an effective procurement system is featured by the existence of monitoring and enforcement mechanisms to ensure that rules of the system are obeyed by the procuring public bodies and participant stakeholders.[3] Such important tenets of the procurement system should include challenge procedures, in which suppliers and contractors are entitled to the right to oppose decisions and actions of the procuring public bodies in violation of the procurement principles and rules. Ensuring review or challenge of the decisions of procuring public bodies deters future illegal actions.[4]

It could well be inferred that an effective enforcement is even more indispensable to a developing country, like Ethiopia, where substantial sums of public money are invested in the procurement of goods, construction and services; where the judicial review mechanisms of administrative decisions and accountability are loose. The Public Procurement and Property Administration Proclamation—No.649/2009 ("the Proclamation") provides for accountability of decisions made and measures taken by procuring public bodies comprising of its underpinning policy guidelines.[5] This stipulation can be taken as essentially embodying a principle for right of complaints; review and remedy system on public procurement decisions. This article, therefore, explores the enforcement framework rules: the complaints, review and remedies system in Ethiopia at the Federal jurisdiction. It mainly focuses on the examination and analysis of the structures and powers of the complaints review bodies and available remedies. As it goes along the sections, it draws parallels with the 2011 UNCITRAL Model Laws ("UNCITRAL Model Laws") for the enlightenment of concept and/or issues of high importance which the Ethiopian system may fail to address satisfactorily and show its status vis-à-vis its natural model. The author is well aware of an article published on a similar topic.[6] The current article does not restate what this author has asserted and concluded. It fundamentally differs in that the topic is critically dealt with in greater depth and broader level of analysis with some critical points of differences in the previous author's submissions in respect of the state of law and the practice.

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[3] The Guide to Enactment of the 2011 UNCITRAL Model Law: 228.
[4] 288.
[5] Art 5(4) of the Public Procurement and Property Administration Proclamation No. 649/2009.
[6] See Bahta 2012:188. The title of the article is: "Complaints, Review and Remedies under the Federal Government Procurement Law in Ethiopia".

This article makes comparative insights to the new 2011 UNICITRAL Model Law of which the previous author had not done similar comparative discussion. Moreover, this article has included analysis of selected decisions of the complaints board and Federal Supreme Court Cassation judgments which are not the features of the previous article. Therefore, this article opens up a new debate and contributes value to the very scarce Ethiopian Public Procurement literature.

Ethiopia is a federal system and the Regional States have enacted their own respective Public Procurement and Property Administration laws.[7] Therefore, the laws and cases discussed in this contribution pertain only to the federal jurisdiction.

## 2 Complaints Review Mechanisms: Three Tier Complaints Review System

The Ethiopian Public Procurement System establishes a mandatory three tier hierarchical review system. The Proclamation and the Federal Public Procurement Directive ("the Procurement Directive")[8] provide that a candidate or bidder shall be entitled to submit a complaint to the head of the public body, which is bestowed with obligatory first instance review jurisdiction.[9] Subsequently, the bidder may submit a complaint to the Federal Complaints Review and Decision Setting Board[10] upon receiving a written response for the complaints from the head of the procuring public body ("the PPB"). Finally, an unsatisfied complainant is, in principle, entitled to appeal to the ordinary courts on the decisions of the Complaints Review Board. This review system resembles to the 1994 UNCITRAL Model Law complaints review structure.[11] As discussed below, it can be revealed that the 2011 UNCITRAL Model Law has made

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[7] The Constitution of the Federal Democratic Republic of Ethiopia ("the Ethiopian Constitution"), Proclamation No. 1/1995, Federal Negarit Gazzeta First Year No. 1, 21 August 1995, Addis Ababa. See Art 50 of the Ethiopian Constitution on the state structure; and the devolution of legislative, executive and judicial powers upon the federal state and regional state governments.

[8] A directive in the Ethiopian hierarchy of laws is a subordinate piece of legislation issued by a minister to implement a Proclamation, which is an act of a Parliament, or a regulation which shall be issued by the council of Ministers. Hence, the Public Procurement Directive has been issued by the Ministry of Finance and Economic Development (June 2010) to implement the Proclamation by virtue of the powers vested on the ministry under Art 78(2) of the Proclamation.

[9] In-depth discussions and evidences are provided in the sections below.

[10] The official nomenclature of the review body is "Federal Public Procurement & Asset Disposal Complaints Review Board" which is referred to as the Complaints Review Board throughout this article.

[11] Note Arts 53-57 of the 1994 UNCITRAL Model Law.

the review bodies optional. Before proceeding to an in-depth analysis of the review bodies and the procedures thereof, it is noteworthy to highlight the matters that are capable of review, non-reviewable; *locus standi* and limitation of time.

### *2.1 Locus standi*

It is worth elaborating on the parties which are entitled to a *locus standi* to seek review of a decision taken by PPBs in their public procurement endeavors. Article 73 of the Proclamation provides for a general basis of the right, which a candidate who might have been affected by a PPB's decision may complain to the hierarchical complaint review bodies. It could be seen that the entities that seem to enjoy standing before the review bodies are generally referred to as a candidate and bidder. It appears important to clearly define the parties throughout the procurement proceedings as it matters for standing qualification. There are three terms: a supplier, candidate, and a bidder, referred to in the Proclamation, albeit confusing.[12] The Procurement Directive, Article 43, provides a seemingly different standard of *locus standi*. It stipulates that:

> "A candidate or a bidder aggrieved or is likely to be aggrieved on account of a public body inviting a bid not complying with the provisions of the Proclamation or this Directive in conducting a bid may present a complaint to the head of the public body or the secretariat to have the bid proceeding reviewed or investigated."

In this regard, what the terms "aggrieved" or "likely to be aggrieved" constitute is a legitimate question that deserves a qualification. Should a party with a standing right be required to prove that it could have been the likely winner of the bid or that it has actually sustained damage as a result of the alleged illegal decision? Does a proof of the existence of violations of the law suffice to grant *locus standi* without requiring a bidder to prove that it would have been the likely winner? There could not be a question as to the legitimacy of standing if a bidder is actually aggrieved. The question that calls for careful consideration is the scenario when a bidder is likely to be aggrieved in the course of the procurement proceeding. Since the violation of the law manifests in itself inevitably putting the rights of a bidder at risk, while at the same time preferentially

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[12] Arts 2(9), (10) and (11) of the Proclamation. The terms "supplier", "candidate" and "bidder" respectively connate with different meanings.

benefiting others. It must in itself suffice to grant standing provided that a bidder could potentially be in the bidding process had the PPB not decided illegally since restrictive requirements of standing compromise the effectiveness of the review system. The 2011 UNCITRAL Model Law under Article 64(1), provides that a supplier or contractor who alleges to have suffered or may suffer a loss is entitled to challenge decisions of a PPB. Suppliers and contractors who intend to participate in the procurement proceeding may challenge the terms of solicitation, pre-qualification or pre-selection or of decisions or actions taken by the PPB in pre-qualification or pre-selection proceedings by submission of applications to the PPB or the independent review body prior to the deadline for presenting bids.[13] It is submitted that *locus standi* could be better defined in explicit, comprehensive and an unrestrictive approach in which a proof of financial loss should not be a requirement to establish it.

Another issue of interest may also be raised with respect to who can stand on behalf of a rightful complainant: only the party itself or a professional (or industrial) association of which it is a member? The right to a *locus standi* basically stems from the Ethiopian Constitution,[14] the supreme law of the land. Article 37(2)(a) of the Ethiopian Constitution provides that "any association representing the collective or individual interests of its members has the right to bring a justiciable matter to, and to obtain a decision or judgment by a court of law or any other competent body with judicial power." It is crystal clear that whether associations can represent their members is a matter of constitutional principle. The exercise of the right would undoubtedly help the aggrieved bidder keeping it anonymous so as to protect it from being illegally blacklisted by PPBs. It may appear; however, practically difficult to prove an alleged injury sustained by a bidder thereby claiming redress for damages without being disclosed publicly. This approach could inspire Ethiopian domestic bidders in their respective sectors that they establish strong associations that could give them collective leverage to pursue for their constitutionally guaranteed right to a standing on behalf of their members.

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[13] Art 67[2(a)] of the 2011 UNCITRAL Model Law.
[14] Art 37 of the Ethiopian Constitution.

### *2.2 Reviewable and Non-reviewable Matters*

Article 73(1) of the Proclamation generally establishes suppliers' rights that a candidate shall be entitled to submit a complaint to the head of PPB or the Complaints Review Board against an act or omission of the public body with regard to a public procurement decision where it believes that such an act or omission violates the Proclamation or the Procurement Directive. The following two sub articles of the Proclamation and additional provisions in the Procurement Directive; however, restrict the rights of a bidder to challenge a decision of a PPB on certain important matters. These restrictions as provided in Article 73(2) and (3) are:

i. "The selection of procurement method pursuant to this proclamation;"[15]

ii. "The rejection of bids, proposals or quotations pursuant to Art. 30 of this Proclamation;"[16]

iii. "Complaints against an act or omission of a public body pertaining to a proceeding to an award may not be brought before the head of that public body or the Board after the contract has been signed with the successful bidder."[17]

The last exemption is qualified by one of the two conditions that:

> "(a) where the contract has been signed without a complaint being filed with the public body concerned within the time limit prescribed in the directive; or (b) where the public body responds to the complaints lodged and a contract is signed because of the expiration of the time limit for the signing of contract after the award without the bidder pursuing its complaint further."[18]

The Procurement Directive contains two more matters which cannot be subject to review by any of the review bodies. Article 44(b) provides that "the selection of bidders

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[15] Note Art 73(2)(a) of the Proclamation—NO. 649/2009-*cum*-Art 44(a) of the Procurement Directive.
[16] See Art 73(2)(b) of the Proclamation and Art 44(d) of the Procurement Directive respectively. Note also Art 30 of the Proclamation provides for the grounds on which a public body may reject bids where it is also stipulated that the procuring entity shall incur no liability towards candidates for damage as a result of termination of the bid proceeding.
[17] Art 73(3) of the Proclamation No. 649/2009.
[18] Art 73[(4) (a and b)] of the Proclamation read with Art 44 (e and f) of the Procurement Directive.

for procurement to be made by means of restricted or request for quotation or on the evaluation criteria set forth in the bidding document beforehand" [19] may not be subject to review. This exemption essentially restricts review on selection of bidders with respect to restricted bidding and request for quotation procurement procedures.[20] Bid evaluation criteria which should be published in the bid document are crucial elements of transparency and fairness of the procurement procedure. Imposing restrictions on the right to challenge regarding the transparency and fairness of bid evaluation criteria profoundly compromises the effectiveness of the fundamental public procurement principles and integrity of the procurement procedure. This encourages the likelihood of a procurement procedure having anti-competitive and unfair evaluation criteria to pass through the award stage without any opportunity to challenge it. Article 44(c) further provides that a complaint by a candidate with respect to the preference given to domestic providers pursuant to Article 25 of the Proclamation and Article 16.20.1 of this Directive may not be brought and reviewed. The list in the Proclamation under Article 72 in respect of which matters subject to review is expressly exhaustive and no further power on this matter is delegated to the Minister to add for more exemptions. Thus, the Directive's extra exemptions on the reviewability of decisions of PPBs in public procurement proceedings are an *ultra-virus* act. It is worth noting that all the exemptions are categorically applicable irrespective of their derogatory consequences on the fundamental principles of the public procurement law. Consequently, these can adversely hamper early rectification of irregularities and violations of the procurement rules committed by a PPB.

There has been a practice by PPBs that they incorporate a clause that they reserve a discretionary right to partially or fully cancel or reject bids, proposals or quotations without any condition. This discretionary clause may serve as preemptive tactic to bypass challenge by aggrieved suppliers. This trend appears to be manipulative of the

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[19] Request for Quotation is one of the tender procedures provided for in the Proclamation (Arts 55 and 56) by which public bodies may procure works or services or purchase readily available goods as long as the value of the contract does not exceed the maximum threshold provided for in the Procurement Directive (Art 24.2). See Art 56 of the Proclamation and Art 24 of the Procurement Directive for the specific procedures allowed. Request for quotation is also one of the proposed tender procedures by the UNCITRAL Model Law. Compare this with Art 21.

[20] See Arts 49 and 50 of the Proclamation read with Art 23 of the Procurement Directive on the conduct of restricted bidding procedure; and Arts 55 and 56 of the Proclamation read with Art 24 of the Procurement Directive on the conduct of request by quotation procurement procedure.

provision in the proclamation instructing PPBs to include a reservation clause in the bid document which declares that the public body concerned may reject all bids at any time *prior to the notification of award*.[21] This issue of discretionary freedom of cancelling or rejecting bids has been brought as defense mechanism by PPBs before the complaint Review Board and the courts in Ethiopia. In the *Kibrom Desta GC v Adigarat University* Case, the PPB's consistent defense argument had been that its decision of fully cancelling the bid after notification of the award cannot be subject to challenge and shall not be required to prove that its grounds for cancellation of the award decision are appropriate or true; and the bid document included a reservation clause to fully cancel the bid at any time.[22] *Adigrat University* brought this defense to the Complaints Review Board and the board upheld its decision on the ground that the PPB can cancel a bid if it thinks that an error was committed in the course of the bid proceeding compromising the outcome of the bid without being required to prove the appropriateness of the ground.[23] *Kibrom Desta* appealed to the Federal High Court opposing the board's decision that it contradicted the cancellation grounds exhaustively listed under Article 30(1) of the Proclamation; and such grounds should be proved to have happened and practically influenced the outcome of the bid. The appellate court reversed the Board's decision that the cancellation of the bid was not made pursuant to the grounds provided in Article 30(1)(a) which requires a proof of error in the procurement proceeding which could affect the outcome of the bid.[24] This was reversed by the Federal Supreme Court appellate division confirming the defense arguments of the PPB that it shall not be bound to prove the appropriateness of its cancellation grounds except to mention in its decision one from the list under Article 30(1) of the Proclamation.[25] This case finally reached the Supreme Court's cassation bench on appeal lodged by *Kibrom Desta*. The cassation appeal had particularly

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[21] Art 37(j) of the Proclamation. Emphasis in italics is inserted by the author.
[22] Federal Supreme Court cassation division case No. 193392 involving *Kibrom Desta* GC *v Adigrat* University Dated 04 August 2021. This cassation judgment is a follow up appeal from the Federal Complaints Review and Decision Setting Board decision file No. መግ/ኦ-22/16/1489, dated 18/03/2010 Ethiopian Calendar (18 November 2017), Federal High Court File No. 205736 dated 11/05/2011 (Ethiopian Calendar system), and Federal Supreme Court Appellate division judgment File No. 175066. The decision to cancel the bid was given after six months from the date of notification of award. The cassation judgment is not yet published. See the 8 page judgment of the Cassation division for further details about the background of the case.
[23] *Kibrom Desta v Adigrat University* case, the decision of the Complaint Review Board: 6-7.
[24] Federal High Court judgment File No. 205736: para 9.
[25] Federal Supreme Court judgment File No. 175066: para 13.

sought interpretation of the procurement law whether a PPB is bound to prove the appropriateness of its grounds for cancellation of bids based on Article 30[1(a)] and correction of the Supreme Court's judgment. The cassation court apparently twisted the issue into whether notification of award amounts to conclusion of a procurement contract leading to different line of interpretation.[26] This line of framing was neither based on a claim by the bidder nor a central issue entertained at the complaint Review Board and the lower courts leading to their respective judgments. The court cites Article 3167 of the Civil Code which provides that a designation of a successful tenderer by a procuring body shall not have the effect of concluding a contract; and Article 3168 stipulating that public bodies may in their discretion approve or refuse to approve the results of a procurement proceeding. It correlated the stipulation in these provisions to Article 37(j) of the Proclamation mentioned above. The cassation court concluded that the PPB had unlimited freedom of discretion to cancel the bid before the conclusion of the contract in accordance to the provisions of the Proclamation; and Articles 3167-3168 of the Civil Code.[27] The judgment upheld the appellate court's position that a PPB shall not be bound to prove the appropriateness of the grounds for its bid cancellation action so far as it notifies one of the reasons listed under Article 30(1) of the Proclamation. However, Article 37 contradicts the Civil Code provisions. First, that the stipulation in the procurement law permits cancellation of bids is *prior to the notification of award* and factually the decision to cancel the bid was made six months after notification of the award. Second, the stipulations in the Civil Code provisions do not govern the grounds of cancellation of bids.[28] Third, stipulations in the new and relatively modern proclamation override any contradictory provisions of the old Civil Code provisions as indication of express repeal of the old laws. Bahta

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[26] See *Kibrom Desta v Adigrat University* case, Federal Supreme Court Cassation judgment: para 12.
[27] See para 16.
[28] Art 30(1) of the Proclamation provides for the exhaustive list of grounds for the rejection of bids, proposals and quotations. Bids, proposals or quotations can be rejected before the conclusion of the contract where: (a) there is proof of error in the procurement proceeding which could affect the outcome of the bid; (b) it is ascertained that the procurement has no use in enabling the public body to obtain a better technical or economic advantage as a result of a change of work plan or another alternative representing a better option to meet the requirement of the public body; (c) bidders fail to meet the minimum criteria set forth in the bid document; (d) the minimum price offered in the bid does not match with the market price circulated by the Agency and the public body expected that it can get a better price advantage by re-advertising the bid; (e) the price offered by the successful bidder exceeds the budgetary allocation made for the procurement and the public body cannot make up for the deficiency from any other source; and (f) it is proved that the bidding is not sufficiently competitive as a result of connivance among candidates.

rightly submitted that "notwithstanding the clear repeal of the provisions in the administrative law, the courts are still willing to apply whenever its application is called by for by the parties"[29] and that is practically true of this case. Fourth, the appropriate provisions to be considered for the sought interpretation would have been Articles 30 and 37(j) of the procurement proclamation of which both stipulate about the grounds for rejection of bids and the condition for the application of reservation clause to reject bids; and takes accountability of PPBs into context. It is submitted that this cassation judgment has set a dangerous precedent handing a blank cheque to the PPBs at the cost of accountability for unforeseeable future time.

The restrictions provided in the Ethiopian public procurement law are directly modeled after the Article 52(2) of the 1994 UNCITRAL Model Law.[30] Such restrictions on the rights of bidders seeking review of decisions of PPBs are deemed to be justified as necessary to strike balance between the need to preserve the rights of suppliers or contractors, on the one hand, and the integrity of the procurement process and the need to limit the disruption of the procurement process, on the other.[31] The 1994 UNCITRAL Model Law's position with respect to exemptions of reviewable decisions of PPBs is highly criticized by commentators which stand as valid and strong views. For example, James J's commentary on the 1994 UNCITRAL Model Law on Procurement is worth quoting here. He submitted that:

> "The Model Law provides that the selection by a procurement official of the method of procurement is not subject to protest, i.e. is immune from private remedies. Following the rules with respect to choice of the method of procurement is one of the most important aspects of government procurement. It would obviously be inappropriate and anti-competitive for a procurement official to simply use sole source procurement because he knows of only one manufacturer of an item and has made no further investigation to determine whether there are other available suppliers. [I]f the applicable procurement law provided for public notice and an opportunity for qualified suppliers to compete, then other

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[29] Bahta 2017:24.

[30] Art 52(2) stipulates that review may not be sought in respect of the following decisions: (a) the selection of method of procurement; (b) the choice of selection procedures; (c) decision to reject all tenders, proposals, offers or quotations; (d) the limitation of procurement proceedings on the basis of nationality; or (e) an omission to refer to certain information in the contract documentation, the laws and regulations, etc, applicable to the procurement (which the Model Law suggests to be included in the documentation referred to in Art 27(t) and Art 38(s).

[31] The 2011 UNCITRAL Model Law Guide to Enactment: para 33.

> manufactures of the item would have standing to protest the incorrect selection of the sole source method of procurement and thereby enforce the provisions of the law. In my view the Working Group made an incorrect decision when it made the question of source selection immune from protest. The Model Law, as it currently stands, provides that source selection is one of the items which are not subject to protest. This is a provision that I would advise any government adopting the Model Law to change."[32]

It is unfortunate that the Ethiopian Public Procurement system has modeled the 1994 UNCITRAL Model Law without due consideration of issues of high importance such as the foregoing strong scholarly critics on the pitfalls of the Model Law and national considerations. Such limitations on the right of bidders may only serve to shield the PPBs from accountability for their unlawful decisions. This compromises the fundamental principles of non-discrimination, equal treatment and fairness of tenders, and value for money which could otherwise be ensured through competitive bidding. Ultimately, it impairs the effectiveness and fairness of enforcement of the public procurement system in general. One of the major changes the 2011 UNCITRAL Model Law has made is removing all the restrictions on the reviewability of actions or decisions of PPBs. Accordingly, a challenge can be made at a stage when a PBB takes actions regarding the solicitation methods, terms of pre-qualification or decisions in the course of pre-qualification or selection proceedings prior to the deadline for presenting bids.[33] And complaints on decisions taken during the procurement proceedings shall be filed within the standstill period or prior to the entry into force of the procurement contract.[34] In the context of the Ethiopian system, the time when a supplier or contractor may invoke the right to challenge practically appears to run from the point when a candidate is communicated the results of the award decision. Article 46 of the Proclamation provides for the conditions of the notification of award and signing of the contract. With respect to the communication of the bid results to the bidders which stipulates that:

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[32] Extract from Myers 1994:253 cited in Arrowsmith, Linarelli & Wallance 2000:771.
[33] See Art 66[2(a)] of the 2011 Model Law. The Guide to Enactment of the Model Law provides that there should not be actions or decisions of PPBs in a procurement procedure that are exempted from a review mechanism. A reading of the policy reveals that enacting states should guarantee that there are no acts or decisions in a procurement procedure which are exempt from the review mechanism which they establish. Read Arts 64-69 of the Model Law and the Guides to Enactment for the details.
[34] Art 66 of the 2011 UNCITRAL Model Law.

> "Prior to the expiry of the period of bid validity, the public body shall notify the successful bidder that its bid has been accepted. The notification of award shall specify the time within which the contract must be signed. The unsuccessful bidders shall also be informed as to who the successful bidder is and why they have lost the bid."

It is unequivocally stipulated that the unsuccessful bidders are entitled to be notified of the bid result including the identity of the declared successful bidder and the reasons why they have lost the bid. It should be strictly made mandatory that notification of the unsuccessful bidders should be simultaneous to that of the successful bidders. This helps any aggrieved bidder to examine the grounds of decisions of the PPB and prepare its complaint from the very start of the time limit.

### *2.3 The Standstill Period*

The PPBs must wait before concluding the contract until the *standstill* period lapses. It is expressly provided that the contract shall not be signed by the PPB prior to the receipt of the notice by the unsuccessful bidder and before the period specified in the directive.[35] It is a double requirement that the unsuccessful bidder must first be served with a notice of the award result and the expiry of the *standstill* period which is seven working days after disclosing the result of the bid evaluation or after responding to a complaint[36] before the PPB can sign the contract with the winner. Thus, a bidder who is unsatisfied with the decisions of the PPB may within five days of when he became aware of or should have been aware of the reasons giving rise to the grievance complain to the head of the PPB.[37] The broad phrasings of "when he became aware of or should have been aware of the reasons" may be a source of ambiguity in relation to the point in time at which the period of prescription starts to run as has been argued above. It may be appropriately interpreted to refer to the date of notification of the act or the date on which it is apparent that the aggrieved bidder became fully aware of the decisions made by the PPB. It appears that the time limit to apply for a challenge against a decision of a PPB is barely five working days. The 1994 UNCITRAL Model Law provides that the time limit to apply for review to the procuring entity shall be 20

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[35] Art 46(3) of Proclamation 649/2009.
[36] Art 45.1(a) of the Procurement Directive.
[37] Art 45.1(b).

days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of that supplier or contractor should have become aware of those circumstances.[38] The 2011 UNCITRAL Model Law, however, does not specify the number of days which the enacting states should stipulate in their respective legislations.[39] The means of communication to be used by the PPBs in communicating with the bidders is not specified. It is important, especially, if the date when the period of prescription is due to start would be taken from the day when a PPB has sent the notice. Furthermore, whether the seven days standstill period should be absolute may be an issue of contention. It appears absolute from the fact that a candidate cannot complain once the contract was concluded after the expiry of the seven days period despite any existence of irregularities and violations of the procurement rules.

It is submitted that the time limit in the Ethiopian Public Procurement system appears to be too short to give aggrieved bidders enough time to prepare and defend their rights given that Ethiopia's means of communication is one of the poorest. It is a fourth of the time recommended in the 1994 UNCITRAL Mode Law which has largely influenced the content of the proclamation. Thus, it generally undermines the effectiveness of the review system and specifically the right of the bidders seeking for a remedy. It may not even be practicable in the context of big and complex bids to identify the grounds for the challenge in five days as the PPBs could deliberately conceal facts so that the grounds for filing a legal action to review were only known after the lapse of the time limit. Thus, the five days period appears well suited to serve that purpose. The author acknowledges that there should be a balance of interests between the rights of the bidders for recourse to legal remedies against decisions of the PPBs and public interest on the prompt implementation of the procurement project concerned. Therefore, the short period of time to initiate complaints might have been intended to force a negligent complainant to apply for review promptly. However, it should not be implemented as a counterproductive measure which amounts to preventing aggrieved bidders from filing a complaint. In this regard, it appears from the case that the lapse of five days without lodging a complaint is too short a time and too

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[38] Art 53(2) of the 1994 UNCITRAL Model Law.
[39] Art 65(2) of the 2011 UNCITRAL Model Law.

punitive with the effect of barring a bidder as being negligent. There must be room for flexibility of which the Complaints Review Board exercises discretion to consider challenge applications after the expiry of the *stand still* period on significant public interest considerations like revelations of fraudulent irregularities or instances of corruption.[40]

The time for the commencement of review of complaints in respect of decisions or actions of PPBs seems to be available only after the notification of the bid evaluation results as the wide range of decisions are exempted from review; and the difficulty of understanding the terms “acts or omissions” will make it practically difficult to seek review before the award stage. That undermines the rights of bidders seeking review and remedial decisions awarded by the review bodies would not be effective. The state of law appears to narrow the opportunities for rectification of irregularities at the earliest stage of the procurement proceeding. It is submitted that the review of complaint should not be made subject to the fact that the public procurement procedure in question has formally reached a particular stage, but that it shall be allowed any time following the official notification of the bid procedure.

### *2.4 The Procuring Public Body: Mandatory Self-review Corrective Procedure*

Article 73(1) of the Proclamation establishes that candidates or bidders shall be entitled to apply for review to the head of the PPB or to the complaint Review Board in opposition of an act or omission of a public body in regard to a public procurement proceeding. A literal reading of this Article gives an impression that the head of a PPB appears as optional forum in the review procedure. The subsequent Articles of the Proclamation, notably Article 74 and 75 nonetheless, show evidence to the contrary. Article 74(1) provides that a complaint against an act or omission by PPB*s* shall in the first instance, be submitted to the head of the PPB. Article 74(3) further provides that, unless the complaint is resolved by mutual agreement, the head of the PPB shall suspend the procurement and shall, within 10 days after submission of the complaint, issue written decisions, stating the reasons, and, if the complaint is upheld, including the corrective measures to be taken. It can be seen that amicable settlement of a

[40] The 2011 UNCITRAL Model Law Guide to Enactment: 318-319.

dispute between a PPB and a complainant bidder is encouraged. It is a clear requirement that an unhappy bidder shall have to apply for a review by the head of the PPB within five working days from the day it knew or should have known the circumstances giving rise to the complaint.[41] If a bidder fails to complain within the five days *standstill* period, it would be presumed to have opted out of its legal rights. Consequently, the bidder would be precluded from taking recourse to further legal remedies such as seeking review by the complaint Review Board or filing a challenge in a court.

Article 53(1) of the 1994 UNCITRAL Model Law stipulates that unless the procurement contract has already entered into force, a complaint shall, in the first instance, be submitted in writing to the head of the PPB or to the head of the authority that approved that decision. A supplier or bidder shall, within 20 days of when it became aware of the circumstances giving rise to the complaint or when that supplier or bidder should have become aware of those circumstances, submit his complaint to the procuring entity.[42] A failure to take recourse at the first instance may not totally preclude a supplier or bidder from pursuing the complaint to the next levels of review bodies[43]; nevertheless, it might have a limiting effect on the remedies to be sought. The 2011 UNCITRAL Model Law provides for three optional review bodies. Article 64(2) reads that "Challenge proceeding may be made by way of an application for reconsideration to the procuring entity under Article 66, an application for review to the independent body under Article 67, or an application or appeal to the court or courts." The 2011 Model Law is very clear that bidders or suppliers may only apply to the PPB if they see a possibility that the PPB could acknowledge the irregularity of complying with the law and reconsider its decision. If that option appears not to be workable to the complainants, they are free to apply to the independent review body (the Complaints Review Board in the Ethiopian case) or a competent court designated by the public procurement law. It is commendable that the kind of alternative review system introduced by the 2011 Model Law creates forum of convenience and makes potential delaying tactics by the PPBs fruitless. It contributes to the review system to be effective

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[41] See also Art 74(2) of the Proclamation read with Art 45.1(b) of the Procurement Directive.
[42] Art 53(2) of the 1994 UNCITRAL Model Law.
[43] Note Art 54.

and expeditious as procurements are essentially time sensitive. Moreover the Guide to the Enactment of the 2011 Model law stresses that:

> "Significantly, this system is an option for suppliers or contractors, and not a mandatory first step in the challenge process. The system has been included so as to facilitate a swift, simple and relatively low-cost procedure, which can avoid unnecessarily burdening of other forums with applications and appeals that might have been resolved by the parties at an earlier, less disruptive stage, and with lower costs."[44]

The distinctive feature of review by the PPB is that no third party neutral body is involved in dealing with the dispute. The assumed advantages for the requirement of a first instance review by the PPB concerned may be to give it an opportunity to swiftly take corrective measures in collaboration with the bidder in a non-confrontational approach.[45] It may have a particular significance to the bidder that if a dispute can be settled in such speedy and friendly environment; the bidder may have an opportunity to compete for the award of the contract and can still keep a sense of confidence in the procurement process.[46] Moreover, it will be significant for both parties to save further cost of litigation or any related costs and more importantly allows the procuring entity to promptly implement time sensitive public contracts. It cannot, however, be guaranteed that this will always be a workable approach giving rise to those positive outcomes. When it is made a compulsory review forum the disadvantages may greatly outweigh the advantages. The advantages would be inconceivable, especially, in circumstances where a wide range of decisions made by PPBs at the early stages of an award procedure are exempted from a review process. This creates a big obstacle for early remedies. As elaborated earlier, the peculiar feature of a public body as a first instance review forum of complaints lodged against its own decision is characterized by its obvious lack of independence and impartiality since it acts as a judge and a party with vested interest on the outcome of the complaint. It is, thus, not surprising that PPBs may be unwilling to correct their willful mistakes even if they are known to be unlawful. This happens both to keep prestige or authority and because of the procurement officers' corrupt practices.[47] Added to the many restrictions on the

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[44] The 2011 Model Law Guide to Enactment: 230, para 11.
[45] Xinglin 2009:207.
[46] 207.
[47] 208.

reviewable actions, making the PPB a compulsory first instance review body, will no doubt be any different than undermining effective and speedy dispensation of the remedies that could have been availed of at the earliest possible time. While the Ethiopian review system continues under the shadows of the 1994 Model Law, the 2011 UNCITRAL Model Law has moved towards adopting a flexible approach by making review by PPBs optional.

### *2.5 Review by the Complaints Review Board*

The preceding sections have dealt with issues of *locus standi*, time limits, restriction on the reviewability of decisions and the review procedures by the head of a PPB. This section is, thus, devoted to the review of complaints by the "Complaints Review Board" established in the Proclamation. A "Board" in accordance with Article 2(20) of the Procurement Proclamation is "[a]n entity established under this proclamation to review and decide on complaints from candidates with regards to the conduct of procurements and disposal of property of the Federal Government." Articles 70, 71, and 72 of this Proclamation provide for establishment of the Complaints Review Board, Board members and terms of office and powers and duties of the Board respectively. Each of these shall be examined as follows.

#### *2.5.1 Appointment, Qualifications and Composition of the Board Members*

The Proclamation provides that "[a] body (hereinafter referred to as the 'Board') is hereby established which reviews and decides on complaints lodged in regard to public procurement (…)."[48] The Board is established with review and decision making powers on complaints lodged against PPBs in relation to public procurement decisions subject to the exemptions dealt with earlier. Article 71(1) of the Procurement Proclamation provides that the Board shall be drawn from persons representing the private business sector, the relevant public bodies and public enterprises. It is strongly worded that the Minister[49] shall appoint the members of the Board.[50] Let us put this into the perspective of the actual composition of the complaint Review Board as

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[48] Art 70(1) of Proclamation NO.649/2009.
[49] The Minister, according to Art 2(15) of the Proclamation, is the Minister of the Ministry of Finance and Economic Development. The Ministry is the highest public body for planning, implementing and regulating all financial and economic, including procurement, activities of the government.
[50] Art 71(3) of Proclamation NO.649/2009.

provided for in the Procurement Directive. Article 36(a) of the Procurement Directive provides that the Minister shall appoint five persons to serve as members in the board for review and resolution of complaints lodged by bidders in public procurement decisions. Accordingly, the members shall be drawn from the Ministry of Finance (chairperson), the Chamber of Commerce, public bodies, Public Enterprises, and Public Procurement Agency. There will be one more member to be drawn from the Agency, who shall serve as secretary and expert adviser to the board with none voting power. Furthermore, the Agency shall serve as the secretariat of the Board.[51] Given this list of institutions constituting the Board, it is critically important to examine their affiliations and look at whether the mere presence of a single seat in the Board from the private sector among the interdependent public institutions give the Review Board a feature of independent and impartial review body.

As one could discern from the Proclamation and the Directive, the Agency plays multiple roles in the public procurement sector of the country. It plays such roles as monitoring and supervisory entity, being accountable to the Ministry of Finance, on implementation of public procurement policies and regulations. It is uniquely designated as administrative tribunal with review and decision making powers on complaints lodged by PPBs against bidders or suppliers. It is responsible, among other things, for administering and maintaining suppliers list which consequently exercises authority on decision making for suppliers' qualification, exercises authority to suspend or debar suppliers from participation in public procurement.[52] Furthermore, the Agency is empowered to exercises with discretion to allow public bodies to launch a public procurement procedure by evading the fundamental principles governing public procurement procedures. Moreover, the Agency, mandated with such multiple functions, exercises substantial and influential roles in the Board. The roles include; member with voting right, a secretariat to the Board, and with one more of its personnel serving as a secretary and expert advisor to the Board. All these roles essentially privilege the agency to have a leverage to substantially influence decisions of the Board. In a nutshell, there is strong interdependence among the Ministry of Finance

[51] Art 71(2).
[52] See Arts 15 and 16 of the Proclamation for the list of the functions and powers of the Agency. A firm or an individual shall not be allowed to bid unless it has been registered in the suppliers list of the Agency.

including its subordinate Agency, PPBs and Public Enterprises. This triggers a question on the standing of the Complaints Review Board for its features of independence and impartiality. The mere fact that one member is drawn from the Chamber of Commerce does not at all change the standing of the Board. Moreover, it does not appear to be clear from the law that the decisions of the Complaints Review Board possess a judicial character and generated challenges in practice.[53]

The Proclamation provides no clue as to the qualification criteria for the selection and appointment of members of the Complaints Review Board. Should independence and impartiality be taken into account is also not indicated. But the Procurement Directive has, in general terms, made a reference to eligibility for membership to the Review Board to be based on "knowledge and experience in public procurement, good manner and ethical standing."[54] This is not qualified with specific qualification criteria. Neither professional qualification nor a level experience in the legal profession is required as eligibility criteria to the Review Board membership as if review of procurement complaints is solely a technical matter devoid of legal complexities. The Guide to Enactment of the 2011 Model Law recommends that the importance of individuals with specialist expertise within any independent forum that will hear challenges should be emphasized in national public procurement legislation, given the demanding decisions required and extensive procedures to take place in dispensation of the review

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[53] The lack of clarity on the judicial character of the Complaints Review Board has misled many complainants for filing first instance court actions at the Federal First Instance and High Courts against the Board's decisions; and the Board and other public bodies have been joined in the litigation as a party with the procuring public bodies. The text of the law is not clear whether the decision of the Board is final and binding having an equivalent effect with a court of first instance jurisdiction. For example, in the cases of *Adem Mohammad Awol Building and Water Works Construction v Federal Public Procurement and Property Administration Agency, Public Procurement Complaints Review Board and the Ministry of Finance & Economic Development* (Federal High Court File No. 179767 date 28/09/2009 Ethiopian Calendar system); and *Kibrom Desta General Contractor v Adigrat University and the Public Procurement Complaints Review Board* (Federal High Court File No. 205736 date 11/05/2011 Ethiopian Calendar system), could clearly demonstrate the state of confusion. In both of these cases, the Review Board was brought as a party on the basis of its decisions for lack of clarity in the law itself. See the discussions further on the Court's holding.

[54] See Art 36(d) of the Procurement Directive. Practically, the chairperson of the Board is always a state Minister of the Ministry of Finance. Other members include the Director General or Deputy Director General of the Public Procurement and Property Administration Agency, a state minister from other Ministries, a representative from the Ethiopian Road Authority and only one member from the Ethiopian Chamber of Commerce. Hence, it can be discerned that the majority of the Board members are appointed not by virtue of their professional qualification, relevance, and competence in public procurement, but by virtue of the high level government positions they have assumed. Moreover, the independence and impartiality criteria cannot be met.

process.[55] Moreover, the Ethiopian public procurement review system fails to mention gender composition in the Review Board. It is submitted that failure to provide for the special expertise, independence and impartiality is the major pit falls on the standing of the Review Board which we hope to be rectified in future legislative reforms of the public procurement law sector.

### *2.5.2 Jurisdiction: Scope of Review and Decision Making Powers of the Board*

The focus of the preceding section has been on the features of the "Complaints Review Board" with regard to its institutional features, composition, and qualifications of its members among other issues. This section turns on discussing the competence of the Review Board particularly on review and decision making powers.

The Review Board exercises a competence to review and take binding decisions on complaints lodged on the basis of Article 74(4) of the Proclamation. That is, upon submission of a complaint by a candidate/bidder within five working days following from the date on which the decision has been or should have been communicated to the candidate or bidder by the PPB. It is reiterated that a complaint that has not been submitted to the head of the PPB concerned cannot be entertained by the review board which consequently parallels it to a first instance appellate tribunal like in the ordinary courts.[56] The Review Board, upon a receipt of a complaint, shall promptly serve a notice of the complaint to the PPB which, *ipso facto*, automatically suspends further action by the PPB until the Board sets its final and binding decision on the complaint.[57] Hence, an order to suspend the procurement proceeding is the first interim measure on which the Board must exercise competence.

A bidder who submits a complaint to the secretariat of the Board [essentially, the Agency] is required to attach to its complaint a copy of the complaint submitted to the head of a PPB and a copy of the decision taken by the head of that PPB on the complaint if such decision was already given. The Review Board is required, before taking any decision regarding a complaint, to "notify relevant bodies" of the complaint and shall consider arguments and information obtained from them and the public

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[55] The 2011 UNCITRAL Model Law Guide to Enactment: 300.
[56] Compare with Art 47(a) of the Procurement Directive.
[57] Art 75(1) of Proclamation NO.649/2009.

body.[58] The reference to "relevant bodies" and why they should be notified is not clear. Is it referring to other bidders including the one declared as a winner? Or who else is referred to? If the reference is intended to be addressed to all participating bidders and even other affected public bodies, it would have been appropriate to establish it as their right to get communicated with the complaint and be able to apply for joinder of action if the proceeding could affect their interest. Notification of all identified participants in the procurement of an application submission to an independent review body is clearly made mandatory in the 2011 UNCITRAL Model Law.[59] The Review Board, in order to reach a decision, is bound to review the complaint against documents which are related to the bid in protest.[60] Moreover, the Review Board shall issue its decisions in writing within 15 working days of receiving the complaint, stating the reasons for its decision and remedies granted, if any.[61] However, the Article 47(f) of the Procurement Directive provides that decisions shall be given within 15 working days of the receipt of the public body's statement of response.[62] Nonetheless, while the latter may appear practicable and logical; it is legally ineffective as a minister cannot alter a text of law enacted by a Parliament, the highest legislative body.

The 15 day timeline period when the Review Board should render its final decision on the complaints, generates doubts on the quality, practicability and reliability of the Review Board's decisions. It appears too short to deliver a well-reasoned and evidenced decision following due examinations of voluminous bid documents and expert testimony hearing, as the case may demand. It would not be difficult to imagine that complex mega projects are accompanied by a large volume of documents of complex technical and financial bid specifications and subsequent bid evaluation reports made by the PPB. How then would the 15 day period be reasonably enough to render a decision on disputes of such complex nature unless the Review Board disregards the basic requirements of due process? Evidence from the Review Board's previous decisions strongly support the argument that the Review Board took a longer

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[58] Art 75(3).
[59] Art 67[5(b)] of the 2011 UNCITRAL Model Law.
[60] Art 47(e) of the Procurement Directive.
[61] Art 75(4) of Proclamation No. 649/2009.
[62] Compare with Art 75(4).

period of time than the one prescribed in the law even in less complex bids.[63] The answer will be simple that it is unrealistic; even the Review Board can still meet the time limit without due regard to the quality and reliability of its decision. Thus, decisions of such nature are bound to be superficial and virtually prejudicial to the interests of the parties to expeditiously end the dispute. Consequently, it extends the period of suspension by further appeal actions to the ordinary courts. The Review Board does not offer hearing procedure which is the default constitutional right accorded to the parties in judicial and quasi-judicial proceedings.[64] Moreover, the power of the Review Board to award remedies is limited only to order rectification of the procurement procedure and annulment (set-aside) of unlawful procurement decisions.[65] Coupled with the exemptions on the reviewability of many procurement procedures, the effectiveness of these remedies will be too limited. Remedies are dealt with under section 3.

### *2.6 Review of Complaints by the Public Procurement and Property Administration Agency*

Earlier, it has been discussed that the Agency exercises review and decision making powers on complaints submitted to it by public bodies against a bidder. Thus a PPB can complain to it when it believes that an unlawful act or an act prejudicial to its legitimate interest has been committed. It is provided that a concerned public body "without prejudice to the measures it is entitled to take against such person in accordance with the bidding documents or the contract, notify the matter in writing to the Agency."[66] It appears clear that PPBs are entitled to recourse to unilateral measures on the basis of the bidding documents or the contract in addition to their

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[63] Two cases are worth mentioning. One is in relation to the procurement of works and the second in the procurement of goods. In the Public Procurement Complaints Review Board decision file No. መግኤ/ኦ-22/16/1489, dated 18/03/2010 (November 18, 2010 Ethiopian Calendar), *Kibrom Desta* GC *v Adigrat University* (the procurement of *Mitsae Werqi* Campus infrastructure construction) was rendered after 95 days of the receipt of the complaint which is 80 days later than the 15 days cut off period. In the Public Procurement Complaints Review Board decision file No. መግኤ/ኦ-12/16/1078, dated 15/06/2011 (15 February 2011 Ethiopian Calendar), *DokTok v Aksum University* (the procurement of standby generator) was rendered 155 days after the receipt of the complaint which is 140 days longer than the 15 days cut off period. [The official language of the decisions is Amharic and the dates are in Ethiopian Calendar system.]

[64] Art 37 of the Ethiopian Constitution establishes the right to seek justice and be heard by a court of law or a body vested with judicial power, which includes quasi-judicial bodies.

[65] Art 75(2) of Proclamation NO.649/2009.

[66] Art 76(1).

right to complain to the Agency. A mere belief of the existence of an unlawful act or prejudicial act to a PPB's legitimate interests suffices to justify the *locus standi* at the Agency.

The basis of a complaint could be on the pre-award or post-award alleged conduct of a bidder which a PPB believes amounts to an unlawful act or an act prejudicial to its legitimate interests.[67] This is broadly interpreted in the Procurement Directive to include acts/omissions:

> "violation of provisions of the law governing the procurement in which it is involved, refusing to sign a contract with the public body, committing a fraud or providing falsified document, committing an act of connivance or corruption or a damage is sustained by the PPB on account of failure by a bidder/supplier to perform its obligations under a contract."[68]

These matters are not covered by the Proclamation and there exists no delegated authority to the Minster to make such interpretations. Bodies with judicial authority could only interpret a law. The Minister in that respect can exercise a delegated authority only to determine the procedures which the Agency shall follow in reviewing and deciding complaints submitted to it.[69] A Minister cannot interpret an Act of Parliament as that is constitutionally the power of the courts.[70] The Agency may give one of the following decisions[71] which are further elaborated under the Procurement Directive.[72]

a) Suspend for a definite or indefinite period the candidate/supplier which it finds to be at fault from participation in any public procurement;

b) Give a written warning; or

c) Dismiss the complaint.

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[67] Art 76(1).
[68] Art 48.1 of the Procurement Directive.
[69] Art 76(6) of Proclamation NO.649/2009.
[70] Art 79 of the Ethiopian Constitution provides for judicial powers. Art 79(1) generally provides that judicial powers, both at Federal and state levels, are vested in the courts. Thus, interpretation of laws is the sole authority of the courts not any official of the executive.
[71] Art 79(5).
[72] Compare with Art 48.5 of the Procurement Directive.

Authorization of the Agency as complaints review forum is profoundly illogical and inconsistent with the purpose of its establishment. There is no policy rationale for why such matters are made subject to review by a body of non-quasi-judicial nature. In the first place, it is more convincing and appropriate to put such matters under review by the Review Board or alternatively by the regular courts for disputes arising from the contract. Secondly, no time limit to file such a complaint is provided for. Third, there is no specific prescription of the actions entailing suspension from participating in government procurements for a "definite or indefinite" period. There are questions like how indefinite is indefinite? What grave crimes could one imagine entailing suspension for good? Obviously, there is no clear answer from the law. Fourth, there is a potential risk that the bidder/supplier against whom a complaint is lodged may not be accorded with a proper due procedural rights. As highlighted earlier, the Agency profoundly lacks institutional and professional features to become an arbiter of disputes in the case in point. Bahta argues that this particular review:

> "[H]as been created to counter the candidates/bidders/suppliers tendency to abuse and take unlawful advantage of the inexperienced and/or corrupt staff in procurement proceedings."[73]

I differ from this submission that any of such corrupt practices are grave misconduct of behavior and entail criminal charges, which should be submitted to the regular courts.[74] Hence, there is no evidence that review by the Agency could serve that purpose. This kind of review is not even envisioned by the 1994 UNCITRAL Model Law which influenced the Ethiopian procurement system. I strongly contend that this review process rather poses a potential risk that a PPB may utilize the Agency to affect the interests of bidders by bringing counter complaint or pre-emptive complaints to deter potential complaints against it. Thus, bidders would be deterred from taking recourse to legal actions of which they are entitled to for fear of being "blacklisted" or grave consequences like a systematic discrimination in future bids. As revealed here, a bidder might be charged on multiple accounts. For example, on criminal accounts

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[73] Bahta 2012:9.

[74] Art 77 of the Proclamation proscribes certain actions as procurement offences, and the corresponding fine and term of imprisonment. Art 77(1)-(3) concerns the employees while sub-articles (4) and (5) are applicable to the actions of candidates. See Art 77(1)-(3) of the Proclamation for the details of the offences and the corresponding sentences.

which entail fine and sentence to imprisonment of many years in addition to the unilateral administrative measures which can be taken by a PPB and the Agency. Furthermore, PPBs are entitled to seek compensation for any damage or loss they have sustained on account of an act or omission by bidders in connection with the contract or the law.[75] It is ironic that bidders, who may sustain a similar damage or loss as result of an illegal act or omission by PPB, are not entitled to seek any form of compensation. These are good reasons enough to suspect that this review approach can be utilized as a preemptive deterrence mechanism to discourage bidders; while shielding PPBs from accountability.

It is submitted that the Agency's review powers is fundamentally prejudicial to the rights of bidders to challenge decisions of PPBs and compromises the effectiveness of the review system. All pre-award disputes, which may be complained against a bidder or supplier, could be handled by the complaint Review Board under the same conditions and procedures applicable to other matters subject to its review jurisdiction. Post-award disputes, which likely include defaults of contract performance by a supplier, should be subject to the jurisdiction by the ordinary courts where accused contractors could be entitled to full assurance of due process of the law. Moreover, any entitlement to claim compensation for any alleged injury or loss should not be discriminatory in anyway. While the law generously entitles PPBs to seek compensation for "any damage", bidders or contractors are denied seeking compensation for a similar nature of loss they may sustain as a result of proven illegal act or omission on the part of the PPBs in relation to the award procedure. It can be concluded that this kind of review is constitutionally illegitimate and certainly undermines the effectiveness of an independent review system.

### *2.7 Review by "a Competent Court"*

It must be reasonably expected that a thorough coverage of strict requirement for a review or appeal by a regular court of those decisions to be taken by PPBs, the Complaints Review Board and the Agency would be clearly stipulated in the

[75] Art 48.5.5 of the Procurement Directive.

Proclamation and the implementing Procurement Directive. The fact that the self-correction measure by the head of the public body and the review procedures by the Complaints Review Board lack features of independence, impartiality, institutional and professional judicial standing; strict requirements for judicial review or appeal over such decisions shall be mandatory.

The Proclamation, as the primary source of the legal rules on Public Procurement, should provide for a basis that decisions of the Complaints Review Board and the Agency are subject to a review by a particular level of court with clearly prescribed jurisdiction. Ironically, the Proclamation contains no single provision establishing a ground for a review or appeal by the courts. The Directive, which is subordinate to the Proclamation, only makes an ambiguous stipulation with regard to a review by a court of decisions of the Board, the Agency or a PPB. Article 50 of this Directive provides that "a candidate, bidder or supplier aggrieved by a decision of a public body, the Board, or the Agency, pursuant to Articles 45, 47 and 48 of this Directive, may take the matter to a competent court."[76] Apart from this negligently framed provision, no further qualification is made as to the particular hierarchy of the court and its scope of judicial powers. And yet, the scope of the decisions and the remedies which could be granted by the "competent court" is at all very unclear—should, for example, the court rule on questions of fact and law or question of law alone? Added to the fact that no constitutional or equivalent principle requires judicial appeal on decisions of quasi-judicial tribunals is to be found, the public procurement enforcement system in that regard is manifestly laconic and has been tested in practice as evidenced in the coming paragraphs. It shall not be confused with the new Federal Administrative Procedure Proclamation[77] which provides for administrative procedures governing routine executive decisions of government agencies, and direct judicial review of such decisions.[78] It can well be concluded that the *lacuna* may potentially create unfair

[76] The phrase "may take the matter to a competent court" provided in Art 50 does not conform to the standard legal terminology used to refer to appeal or judicial review. It makes it confusing and even uncertain whether it refers to appeal or judicial review.
[77] Federal Administrative Procedure Proclamation Number 1183/2020.
[78] Section four of the Administrative Procedure Proclamation provides for judicial review of directives issued by administrative bodies and administrative decisions stipulated through Arts 48-57.

review process and may comfort the PPBs to be unchecked or loosely challenged. Bahta's submission on this very issue states that:

> "Article 79(1) of the constitution also guarantees that judicial powers are vested only in the courts, be it at federal or state level. [I]ndeed, there is otherwise no constitutional or statutory guarantee that administrative tribunals, which are mushrooming in Ethiopia, will be independent, impartial and adhere to fundamental standards of procedural fairness. From this, it follows that the Federal High Court exercises judicial review over the Board's or Agency's decision, with the right to appeal to the Federal Supreme Court."[79]

The author subscribes to the only point that many quasi-judicial administrative tribunals have mushroomed by different laws, where they exercise judicial authority[80] with little judicial check undermining the power of the judiciary. However, the submission appears to be misrepresenting the law and facts in practice in that it narrowly reads "only" the courts are vested with judicial powers. Because judicial powers could as well be exercised by other competent bodies mandated with judicial powers as clearly provided in the Ethiopian Constitution.[81] Moreover, Bhata's submission on the fact that the Federal High Court exercises first instance review powers over the decisions of the Review Board or the Agency; and that the Federal Supreme Court exercises appellate powers over similar decisions appears to be erroneous. In the first place, no Article or stipulation in the Ethiopian Constitution provides as to how decisions of those competent bodies referred to in Article 37 and mandated with judicial powers should be reviewed or otherwise appealed by the courts. Secondly, there is no one principle or law which provides for the power of the Federal High Court to exercise judicial review powers over decisions of administrative tribunals in general and the decisions of the Complaints Review Board or the Agency

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[79] Bahta 2012:10.

[80] Decisions rendered by such quasi-judicial tribunals are final and binding and no direct judicial review is applicable except for the appeal right of the aggrieved parties. However, the practice evidences that quasi-judicial tribunals fail to comply with fundamental due process procedures, such as the right to be heard.

[81] Art 37(1) of the Ethiopian Constitution provides that "everyone has the right to bring a justiciable matter to, and obtain a decision or judgment by, a court of law or any other competent body with judicial power"; and Art 79(1) provides that "judicial powers, both at Federal and state levels, are vested in the courts." Therefore, the stipulation under Art 79(1) should be understood in view of Art 37 in which judicial powers are vested in both the courts and other competent bodies to be constituted by legislative instruments of the Parliament. Hence, judicial powers are not absolutely monopolized by the courts, but can be exercised by quasi-judicial bodies constituted with judicial powers by law.

in particular.[82] Thirdly, there is no similar stipulation that the Supreme Court exercises a direct appellate jurisdiction over matters of similar nature, unless there is a specific stipulation by law to that effect.[83] And yet, no evidence or practice has been offered in support of his conclusions. The public procurement law does not show any indication to substantiate the conclusion; while the evidences from other areas of laws support the fact that judicial review of decisions of administrative tribunals is inconsistent as clearly evidenced from the following examples. The Trade Competition and Consumer Protection Proclamation No. 813/2013, for example, established a "Trade Practice and Consumer Protection Authority" vested with administrative and quasi-judicial powers in matters of trade competition and consumers rights.[84] The evidence from this law is that the Federal Supreme Court can only have cassation appeal powers on matters of fundamental error of law.[85] Similarly the Federal Civil Servants Administrative Tribunal's decisions are directly appealable to the Federal Supreme Court only on issue of error of law.[86] Moreover, decisions of the Tax Appeal Commission are appealable to the Federal High Court on question of law only and a cassation appeal to the Supreme Court.[87] These evidences suggest that there is no consistency that

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[82] Art 11 of the Federal Courts Proclamation No. 1234/2021 provides no indication on the first judicial review jurisdiction of the Federal High Court over decisions of quasi-judicial tribunals similar to the Complaints Review Board. Art 13 also provides that the Federal High Court shall have appellate jurisdiction over decisions of the Federal First Instance Court; and cases specified by other laws. This clearly falsifies the submission that the Federal High Court exercises review powers over the Complaints Review Board's decisions. See also Art 9 of the Proclamation on the appellate powers of the Federal Supreme Court.

[83] See Art 80 of the Ethiopian Constitution and Art 9 of the Federal Courts Proclamation on the appellate jurisdiction of the Federal Supreme Court.

[84] See Art 30 read with Art 32 of the Proclamation for the powers and duties of the Authority and its adjudicatory benches. Its powers include, adjudication, imposing administrative and civil sanctions on those who are found violating this law. Moreover, the Authority is mandated with both first instance and appellate adjudicatory powers through its adjudicative tribunals over complaints falling within the ambits of this law. The very same law under Art 33 has established a "Federal Trade Competition and Consumer Protection Appellate Tribunal" to exercise powers to hear and decide on appeals against decisions of the authority and of its adjudicative benches.

[85] On the issue of review by the courts, the law provides that a decision made by the "appellate tribunal" shall be final except that it can be appealed to the Federal Supreme Court only on the issue of mistake or error of law where no issue of fact and evidence could be entertained [see Art 39(2)].

[86] The Federal Civil Servants Proclamation No. 1064/2017, 24th year No. 12, Addis Ababa, 15th December 2017. Art 81(5) provides that the decision of the Administrative tribunal shall be final on question of facts and appeal can be filed only on question of error of law.

[87] The Federal Tax Administration Proclamation (No. 983/ 2016) under Art 86 established a quasi-judicial tribunal called "Tax Appeal Commission" fully charged with first instance powers to adjudicate over disputes between a tax payer and tax authorities on the assessment and determination of the amount of taxes. Art 57 of this proclamation provides for a party dissatisfied with the decision of the tribunal to appeal to the Federal High Court on question of law only. Moreover, Art 58 provides for a cassation appeal to the Supreme Court.

the Federal High Court exercise first instance review powers over decisions of administrative quasi-judicial tribunals in the absence of specific stipulation by a particular law. Seeing from the evidences presented above, decisions of administrative quasi-judicial tribunals are reviewed at an appellate level of jurisdiction with restricted powers of the courts. Some of the decisions of administrative tribunals could be appealed to the High Court and decisions of some other tribunals could only be directly appealed to the Supreme Court on the basis of error of law.

Few decisions of the Complaints Review Board have reached the Federal Courts and the practices clearly evidence the existence of confusions on the issue of jurisdiction. The Federal Supreme Court Cassation bench rendered a binding interpretation as to which level of the courts exercises what judicial powers over decisions of the Complaints Review Board. [88]In the case *Jedaw Consulting Architects v Federal Sport Commission* ("*Jedaw* cassation case"), *Jedaw*, the applicant, directly instituted a claim at the Federal First Instance Court against the respondent, the PPB, opposing its decision on the award of the national stadium construction project design work bid after the Complaints Review Board decided against it. The respondent brought a preliminary objection that matters of complaints on public procurement decisions cannot be instituted to a regular court of first instance. Such complaints should be submitted to the procurement Complaints Review Board which is the legitimate *quasi*-judicial body of first instance jurisdiction to entertain and render a binding decision on complaints regarding procurement decisions in accordance to Article 75(1) of the Proclamation. The applicant argued that neither the Proclamation nor the Procurement Directive has stipulated that the Complaints Review Board's decision is final and binding; therefore, the Complaints Review Board's decision cannot be taken as final and binding with the effect of barring a bidder's right from filing complaint to the first instance court. The applicant further argued that its submission was consistent with

[88] Case- C/F/No. 107805, 04 October 2008 E.C., *Jedaw* Consulting Architects *v* Federal Sport Commission and Federal Ministry of Justice (Federal Supreme Court Cassation Bench Cassation Decisions, Vol. 19, 2008 E.C, 332-336). C/F/No. stands for Cassation File Number and E.C. stands for Ethiopian Calendar system. *Jedaw*, the applicant at the cassation bench, was a bidder while the first respondent was a procuring public body accused of illegally awarding the Procurement of National Stadium Construction Project design work bid to another less qualified candidate. *Jedaw Consulting* was a plaintiff and the first respondent was a defendant, represented by the state prosecutor, at the Federal First Instance Court. Translation from Amharic to English is authors own.

Article 50[89] of the Procurement Directive which stipulates that a party aggrieved by the Board's decision may take the matter to a competent court; thus, the first instance court could have jurisdiction to directly admit the complaint for a *de novo* trial and thus render a final and binding decision. The First Instance Court dismissed the preliminary objection by the respondent and assumed jurisdiction over the case. Its ruling was appealed by the PPB to the Federal High Court and was reversed on the ground that it did not have jurisdiction to entertain and render a decision on matters entertained by the Complaints Review Board. *Jedaw* further filed a cassation appeal to the Federal Supreme Court on the grounds of error of law committed in the High Court's interpretation concerning the jurisdiction of the First Instance Court. Against the foregoing background of the case, the Federal Supreme Court Cassation bench framed three issues for interpretation. These are:

Whether the stipulation in the Procurement Directive, which provides for a party aggrieved by the Review Board's decision to take the matter to a competent court, refers to a court which does have a power to directly entertain such a complaint of its first instance jurisdiction based on the nature of the matter and the amount of the claim? Or refers to a court which shall entertain a complaint or an appeal on the basis of its appellate jurisdiction and render judgment weighing the appropriateness of the Review Board's decision on the disputed matter? And which one is this competent court?[90] The Supreme Court first interpreted conjoining Articles 37 and 79 of the Ethiopian Constitution in the context of the right to be heard and judicial powers of the courts, respectively. The first provision guarantees everyone with the right to bring a justiciable matter to and to obtain a decision or a judgment by a court of law or any other competent body vested with judicial powers. The second establishes that judicial powers are vested in the courts. The court reasoned that the stipulation of Article 37 of the Ethiopian Constitution that judicial powers are vested in the courts should be understood that the courts have a jurisdiction on any justiciable matter if that matter is

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[89] The referred Art 49(1) of the Procurement Directive which has been repeatedly cited throughout the judgment document is wrong. Art 49 is about "*Force Majeure*" which is structured in three sub-articles: 49.1, 49.2 and 49.3 each of which contains paragraphs. The correct provision regarding review by a court is Art 50 titled as "Review of complaint by Court" and the text is put only in one sentence. The mistake might have been a typing error or have been made unintentionally while proceedings were transcribed.

[90] C/F/No. 107805: 334. Author's translation from the official Amharic language.

proved not to be the jurisdiction of other competent organs outside the whim of the regular courts. If a justiciable matter is not the jurisdiction of a competent authority other than the courts, the courts shall have exclusive judicial jurisdiction to entertain and render decision or judgment on such justiciable matter. Therefore, before admitting and entertaining a justiciable dispute, the courts shall have the obligation not only to examine the justiciable nature of the dispute but also to directly examine whether the matter brought to them has to be submitted first to other competent bodies of quasi-judicial nature in their first instance jurisdiction in accordance to Article 37 of the Ethiopian Constitution.[91]

It has been clearly established from the law that procurement complaints must first be submitted to the PPB then to the Complaints Review Board for decision before it can be submitted to the regular courts.[92] The Complaints Review Board falls in the domains of those competent bodies referred to in Article 37 of the Ethiopian Constitution as a quasi-judicial organ to exercise first instance jurisdiction over public procurement complaints. It is clear that the wording in the title of Article 50 of the Procurement Directive "review of complaint by court" was the bone of contention which sought the interpretation by the Supreme Court cassation division. The phrasing "review of complaint" is interpreted to connote a submission of a disagreement based on a previous decision made by the Complaints Review Board. In view of the stipulations in Article 37 of the Ethiopian Constitution read with Article 75(1) of the Proclamation and Article 50 of the Procurement Directive, the connection of "review of complaint" to the regular courts is clearly attributed to the appeal system in which the courts shall be able to entertain and examine the Review Board's decision in accordance with applicable procedural laws by virtue of their appellate jurisdiction not to litigate the parties *de novo.*[93] The Supreme Court Cassation division concluded that, a submission of complaint opposing the decision of the Complaint Review Board can be made to a court of appellate jurisdiction based on the appeal system. Moreover, a submission of a complaint to a court of first instance jurisdiction on the basis of the nature and amount of claim criteria otherwise violates the judicial procedural system.[94]

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[91] C/F/No. 107805: 334.
[92] Art 75(1) of the Public Procurement Proclamation No. 649/2009.
[93] C/F/No. 107805: 335.
[94] C/F/No. 107805: 335.

Therefore, the Federal High Court exercises appellate jurisdiction[95] over decisions of the procurement Complaints Review Board to review its appropriateness on both questions of fact and law. The silence of the Proclamation and the ambiguous stipulation in the Directive has generated uncertainty on the procurement review system. The law has been unclear and manifestly laconic until this cassation interpretation has settled it. The lack of clarity on the hierarchy of judicial review of decisions rendered by administrative tribunals is largely attributed to the judicial system and therefore, the state of law in respect of judicial review of administrative quasi-judicial tribunals' decisions is generally inconsistent. It follows from the foregoing evidences that the competent court with appellate jurisdiction over decisions of the Complaints Review Board is the Federal High Court and the Federal Supreme Court exercise cassation powers on error of law.

Article 57 of the 1994 UNCITRAL Model Law provides that respective countries should designate in their national laws a particular court to exercise review jurisdiction over actions or inactions pursuant to Article 52 and petitions for judicial review of decisions made by independent review bodies. The applicable national law to judicial proceedings shall govern issues of procedure and the remedies that may be granted.[96] Furthermore, the law applicable also governs whether "the court is to examine *de novo* aspect of the procurement proceeding complained of, or is only to examine the legality or propriety of the decision reached in the review proceeding."[97] The 2011 UNCITRAL Model Law introduces an optional review mechanism which it claims ensures effectiveness, expediency and cost-effectiveness.[98] The challenge proceedings may be optionally made by way of an application to the procuring entity for reconsideration of an action or inaction violating the law; or an application to an independent review body to be established; or an application or appeal to a competent court.[99] That a challenge can be directly filed with a court bypassing review by an independent review body, the case shall be first entertained *de novo* at a court of first instance subject to appeal to an appellate hierarchy of a court. The new approach followed by the 2011

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[95] See Art 13(2) of the Federal Courts Proclamation No. 1234/2021.
[96] See UNCITRAL Model Law 1994: Guide to Enactment on Article 57: 101.
[97] See further UNCITRAL Model Law 1994: Guide to Enactment on Article 57: 101.
[98] The UNICITRAL Model Law 2011: Guide to Enactment on challenge procedures: 297.
[99] Arts 64(2) and (3) of the 2011 UNCITRAL Model Law.

Model Law is justified as to give options to different countries adopting such a review system which fits to their peculiar legal system.

## 3 The Award of Remedies

As has been illustrated in the preceding sections the power of the ordinary courts in reviewing decisions of the Review Board and their competence to award remedies has been unclear and uncertain until the *Jedaw* cassation case shaded light. The cassation interpretation made by the highest court in the country has established that the court at appellate jurisdiction can only review the appropriateness of decisions of the Review Board. There is no specific legal stipulation or a precedent that which available remedies could be awarded by the courts. Hence, the discussion on the award of remedies is mainly attributed to the Complaint Review Board competence.

Generally, the remedies which the Review Board can award following a challenge decision are discerned respectively from Article 72(3) and Article 75(2) read with Article 41 of the Proclamation and the Directive. As provided for in Article 72(3), the Review Board may award one of the following decisions, which it deems to be appropriate; with the details to be prescribed in the Directive that:

a) the procurement proceeding in respect of which a complaint was lodged be rectified or terminated;

b) Dismiss the case where in its judgment the complaint is unfounded.

Further, Article 75(2) provides that the Review Board, unless it dismisses the complaint on the basis of Article 72(3)(b), may order one of the following decisions:

a) Prohibit the public body from acting or deciding unlawfully;

b) Order the public body to proceed in a manner conforming to this Proclamation other than a decision to award or conclude a contract;

c) Annul in whole or in part, an unlawful act or decision by the public body.

The remedies could be summarized into three categories: rectification which includes prohibitory remedies, termination of the award procedure and annulment (set-aside) of unlawful decisions. Article of the Directive does not offer any extended details of the

forgoing general terms as contemplated in the Proclamation. It rather obscures the remedies stipulated in the proclamation by restating them with synonyms. It merely emphasizes on simple procedural matters while it provides no reference to the fact that the Review Board may decide that the award procedure under challenge should be rectified or terminated. Moreover, it has changed the important term "annul" used in the Proclamation to "invalidate" which results in consistency of the use of legal terms.[100] As effectiveness is an essential feature of the review system for prompt intervention by the review bodies, suspension of further actions or invalidation of previous decisions of the procurement proceedings and preventing the entry into force of the procurement contract should be available at the earliest possible phase of the procurement procedure.[101]

### *3.1 Rectification of the Procurement Procedure*

The legal source for rectification or termination of the procurement procedure as a remedy, is Article 72(3)(a) of the Proclamation which provides for the Review Board to decide the "rectification or termination" of the contested procurement procedure. Rectification is not defined and the scope of its consequences is not known. In a situation where no established practice is available to guide any formulation of arguments in respect of the scope and the effect of "rectification" on the procurement procedure; it reasonably makes it difficult to accurately foresee the future course of its application. It appears reasonable that the arguments and the consequent conclusions provided in this regard are based on theoretical interpretations and hypothetical illustrations. If it could be assumed that the rationale behind rectification is to provide for an early correction of any alleged defect of the award procedure, correction of the defect should imply that the problem would be contained without a need to disrupt the procurement procedure. Therefore, the procedure will be continued allowing participation of bidders which were excluded as a result of the alleged irregularity or illegal decisions by the PPBs. It is noteworthy of the instances where rectification can be effective and meaningful. This takes one to further inquire the point of time when review is available. If rectification could be construed as removing the defective aspect

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[100] Compare Art 75(2)(c) and Art 41(g) of the Proclamation and the Directive respectively.
[101] The 2011 UNCITRAL Model Law Guide to Enactment: 297.

of the award procedure as early as it has happened, any application for review must be admissible as early as the bid procedure is deemed to have commenced. Most decisions of PPBs, however, which could have been subject to early review demanding rectification, are well exempted from challenge. These are for example: choice of procurement method, evaluation criteria, selection of bidders in respect of restricted tendering, and rejection of bids.[102] If such decisions cannot be put to a challenge, the opportunity for early review is not possible and thus violations of this kind persist in over the procurement procedure and throughout the period of the contract. Therefore, rectification as it stands now would only exist being a paper tiger.

### *3.2 Termination of the Procurement Procedure*

Article 72(3)(a), termination, is the other remedy which the Proclamation provides for as an alternate to rectification. Termination suggests that the defective procurement procedure must be terminated and thus a new procedure shall be recommenced afresh. When termination of the procedure is chosen as the remedy, it indicates that the violation of the law committed by the decision of the PPB is serious and cannot be rectified. This can be illustrated by the fact that a PPB which conducts procurement procedure without publishing bid invitation, as required by the law, can be terminated so that a new bid invitation shall be published where all potential bidders shall have equal opportunity to bid. It could also be a case where an attempt to rectify any defective aspect of the procedure leads to the amendment of a selection of evaluation criteria or any other important terms of the bid documents.

Article 75(2)(a) and (b), which misleadingly appears to have offered a different remedy, is in fact similar to what has been said above, ie: rectification or termination of the award procedure. Both stipulations in Article 75(2)(a) and (b) do not feature any substantive difference except for the exceptions provided for in the latter. It is argued that these two are mutually inclusive and thus could be summarized in the way that: the Review Board may prohibit the PPB from acting contrary to the law and order it to proceed in conformity to the law applicable to its decisions. A critical aspect of these provisions is that the Complaints Review Board is prohibited from ordering PPBs to

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[102] See section 2 above.

award the contract to the bidder thar is found to be the correct winner. This scenario may call for a question of why bidders must be interested in filing complaints against PPBs in respect of their decisions in an award procedure. Litigation is a risky and hostile affair where complainant bidders may risk being blacklisted by PPBs which potentially puts their future business into an uncertain situation. The answer to the main question then becomes that they choose to litigate because they have a high stake in obtaining the contract and they could likely be the rightful winners had the PPB not decided unlawfully. Even though it may follow from the opinion of the Review Board that the contract should have been awarded to the complainant bidder, it cannot order the concerned PPB to that effect. It may set-aside the unlawful decision to award the contract so that a new procedure would be recommenced confirming to the correct rules.

### *3.3 Annulment of unlawful decisions*

The Proclamation provides for annulment (setting-aside) of unlawful decisions made by PPBs. It is stipulated that the Review Board may annul in whole or in part, an unlawful act or decision by the PPB.[103] The scope of setting-aside or annulment is subject to the limited availability of decisions that are amenable to review. It is, once more, reiterated that the many wide range of unqualified discretionary powers conferred upon PPBs; that several decisions taken by them are exempted from review; and other factors are generally manifestations of the weakness of the review system and particularly makes the setting aside remedy practically of no significance. Thus, an application to set-aside unlawfully taken decisions would be limited to only the few reviewable matters and at a later phase of the procurement process, arguably at the stage of the final award decision.

Interim relief takes effect subsequently after a complaint has been lodged for review of a decision that was illegally taken by PPBs. It is not provided *per se* that aggrieved tenders can apply for interim relief; it is rather the power of the Review Board on its own initiative to ensure suspension of further actions by the public body—which the

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[103] See Art 75(2)(c). It must also be noted that Art 41(f) of the Directive replaces the term in the Proclamation, annul, to invalidate which may imply a different definition, thus, a different effect. The Directive's terminology should, however, be ineffective as it is subordinate to the Proclamation.

PPB cannot practically conclude the contract until the Review Board reaches a final decision on the complaint. Interim relief is a key aspect of any supplier remedies regime which has to be implemented with a balance of the trade-offs between preserving an effective remedy in a challenge to a procurement decision thereby promoting integrity, on the one hand, and the need to minimize disruption to the procurement process thereby enhancing efficient procurement, on the other.[104] There is, however, a difficulty of balancing these two trade-offs by many states. Thus, enacting states have to make a choice in adopting one approach on the use of interim relief as a remedy. A broader approach of implementing interim relief is favoring the objective of integrity resulting in an automatic suspension of the procurement process, similar to what Ethiopia and many other African states have already adopted.[105] The 2011 UNCITRAL Model Law clearly adopted this approach and Article 65(1) provides that the procuring entity shall not take any step that would bring into force a procurement contract (…). However, the PPB may at any time request the independent body reviewing the decision to authorize it to enter into the procurement contract, arguing that urgent public interest considerations justify it doing so. The reviewing independent body may authorize the PPB to enter into the procurement contract where it finds it convincing that urgent public interest consideration so justify or it can take such decision on its own initiative.[106] A second approach is a restrictive or narrow implementation of interim relief only where the applicant can make out a *prima facie* case for the review of the decision.[107]

### *3.4 Invalidation of Concluded Contracts and the Award of Compensation*

The Ethiopian public procurement system does not provide for the invalidation or ineffectiveness of concluded procurement contracts by the reviewing Board or by the courts. Quinot opined that the power to invalidate concluded contracts is not expressly granted to the Board, and the Board is expressly prohibited from making decisions in regard to selection of the successful bidder or entering into a contract, hence, not be

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[104] Quinot 2013:323.
[105] 323.
[106] Arts 65(2) and (3) of the 2011 UNCITRAL Model Law.
[107] The 2011 Model Law Guide to Enactment: 321 and 323.

able replacing the PPB's award decisions.[108] There is no doubt that the state of law in Ethiopia does not allow the Review Board or the courts to invalidate concluded contracts. Quinot has rightly observed that mentioning the power of the courts is even overlooked, for example, the primary law on public procurement never mentions the power of the courts. As Quinot pointed out, it is the Procurement Directive which simply states that a bidder may take his complaint to a "competent court" without qualifying which court and what powers the court exercises in such applications are.[109] Bahta holds a contrary position that the courts in Ethiopia exercise review jurisdiction over concluded procurement contracts "which can result in invalidation or voiding of the contract, a new procurement procedure and monetary relief, if applicable."[110] I strongly reject this generalization that there is no state of law or practice supporting this submission. Concluded procurement contracts in Ethiopia remain to be sacred cows of which Ethiopian courts do not exercise powers to invalidate concluded procurement contracts within the frameworks of the public procurement system. However, procurement contracts can be invalidated by the courts based on the conditions of the contract and the Civil Code provisions governing invalidation and cancellation of contracts.[111] Moreover, the Ethiopian public procurement system provides no award of monetary compensation in any form. Many other African states have also adopted a similar approach in that their procurement laws opted not to make provision for monetary compensation.[112] The 2011 UNCITRAL Model Law has changed little on the award of compensation. Article 67(9)(i) narrowly provides that the independent review body or a court may require the payment of compensation for reasonable costs incurred by a bidder. Such compensable costs shall be limited to costs relating to preparation of the submission of bids or relating to the application for challenge or both. The award of compensation under the current Model Law clearly excludes lost profits when the party who won the challenge proceeding does not get the contract.

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[108] Quinot 2013:324. And see the preceding sections for the detailed discussions on the power of the Complaints Review Board and the courts on making the range of remedies. Note also section 2 for detailed discussion on the reviewable matters.
[109] Quinot 2013:325.
[110] Bahta 2012:n 66.
[111] See Arts 1808-1818 of the Civil Code of Ethiopia on invalidation and cancellation of contracts.
[112] Quinot 2013:328-329.

## 4 Conclusion

This article has explored the public procurement complaints review mechanisms and remedies designed in the Ethiopian Public Procurement and Property Administration Proclamation No.649/2009. The complaints review system is discussed and analyzed vis-à-vis selected landmark cases entertained by the Complaints Review Board and the Federal Courts. It has drawn UNCITRAL Model Law comparative perspectives for the latter's influence on the public procurement system. The Ethiopian complaints review mechanism features a compulsory hierarchical review system in which the PPBs exercise mandatory first instance self-review jurisdiction on complaints against their own decisions. It is established that the requirement for this mandatory first instance self-review by the PPBs is bound to compromise a speedy and effective review process. The role of a PPB concerned in a complaint review process should have been better limited to the only requirement that a bidder notifies it that it is seeking for review of alleged infringements of the law where the PPB at that juncture of time may demonstrate genuineness to reconsider and rectify a wrong decision at the earliest possible phase of the procurement procedure. The 2011 UNCITRAL Model Law's optional requirement of application to the PPB for reconsideration of a procurement decision is the most plausible approach to be adopted in future legislative reforms. It is submitted that the Ethiopian public procurement review system as it stands now is constrained by obstacles that the law opted to include prohibitive clauses on the amenability of major procurement decisions which practically affects the effectiveness of the review system.

The procurement complaints review system provides for mandatory Complaints Review Board to exercise review powers on complaints previously lodged to the head of a PPB concerned. It has been established that the systematization of this review body lacks independence, requirements of certain levels of legal profession and features of judicial character. As a result, the Complaints Review Board had been summoned as party to multiple actions filed with the courts on its own decisions. The members of the Complaints Review Board chaired by a state minister of the Ministry of Finance and Economic Development are single handedly appointed from among public bodies without regard to a minimum professional expertise and relevant experiences requirements. The Complaints Review Board does not qualify as fitting to

an institutional and professional character that one expects it to be independent, impartial and competent to at least satisfactorily deliver the review functions bestowed on it. It has been made clear that this review body is different from what is recommended in the 2011 UNCITRAL Model Law as independent review body.

The rationale why the Public Procurement and Property Administration Agency is mandated to exercise review powers on complaints filed by PPBs against bidders is unconstitutional and cannot be attributed to its character. The Agency's adjudicative authority appears entirely inappropriate that such review of complaints could fall within the scope of review powers of the Complaints Review Board. It is concluded that the Agency's review authority evidences itself to be a double standard virtually prejudicial to a review process featured by impartiality, effectiveness, competence and objectivity. Complaints related to any procurement procedures which could be complained by PPBs against bidders should be within the purviews of the Complaints Review Board under the similar qualifications and procedures applicable on other complaints subject to its jurisdiction. Post-award contract disputes should be adjudicable by the ordinary courts where accused contractors or suppliers shall be entitled to the full assurance of a due process of the law.

The state of the law on review by the courts has been essentially laconic. The failure by the Proclamation to provide for review by a court clearly evidences uncertainty in the public procurement complaint review system. Even if the procurement directive provides for aggrieved bidders to appeal for a review by "a competent court" against decisions of the Review Board, it fails to determine the particular hierarchy of that competent court, its competence and the available remedies it can award. Consequently, it has led to confuse the courts, bidders and the PPBs as to which level of the courts have jurisdiction on procurement complaints. Many parties have believed that procurement complaints can be lodged to the Federal First Instance Court on its first instance jurisdiction. The Federal Supreme Court Cassation division interpretation on the *Jedaw* case settled this legal gap. Taking the Complaints Review Board as mandatory first instance review body, the cassation interpretation concluded that the Federal High Court shall exercise appellate judicial jurisdiction on the basis of the judicial appeal procedures of the judicial appeal system. Consequently, the review power of the Federal High Court is limited only on the review of the appropriateness

of the decision rendered by the procurement Complaints Review Board. Therefore, it is established that no court has the competence to otherwise entertain any procurement complaint *de novo*. Review at an appellate level would have been proper had the Complaint Review Board been independent quasi-judicial entity, be required to employ basic due process procedures, conducts hearing of the parties and testimonies, and its members demonstrate adequate qualifications of the legal profession and practice.

The Ethiopian remedies system offers only interim measures and annulment as the only remedies. None of the award of compensation, termination of a concluded contract on unlawful grounds and alternative penalties is in the domain of the remedies recognized. There appears no convincing policy rationale to categorically exonerate PPBs from liability when it could be established that bidders have practically suffered measurable economic losses as a result of unlawful actions and decisions by the PPBs.

It is to be hoped that the practice of the public procurement law for over 12 years since its enactment offers adequate lessons to the regulatory bodies for its prompt reform. The approaches in the 2011 UNCITRAL Model Law, introduced after entry into force of the public procurement law, would also be a dependable guiding model law in reforming the Ethiopian public procurement review and remedies system in a manner of accommodating national peculiarities. Reform endeavors should consider changing the structure of the existing complaints review system: review by the PPBs should be optional, reconstitute the Complaints Review Board as independent quasi-judicial tribunal body and clearly designate a particular court with the appellate or review jurisdiction with powers to award effective remedies. Last but not least is that non-discriminatory, predictable, expeditious, competent and effective complaints review and remedies system is yet to be seen in the future reform endeavors of the public procurement sector in Ethiopia.

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