



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISCELLANEOUS CIVIL APPLICATION NO. 36 OF 2020

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

ENERGY SECTORS CONTRACTORS ASSOCIATION.....1ST INTERESTED PARTY

ZOEC-ZHEPEDC-NGINU.....2ND INTERESTED PARTY

AND

THE KENYA POWER & LIGHTING COMPANY LIMITED.....EX PARTE APPLICANT

JUDGMENT

The Parties

1. The *ex parte* applicant, **The Kenya Power & Lighting Company Limited** is a limited liability company incorporated in Kenya under the laws of Kenya with its registered office at Nairobi.
2. The Respondent, the **Public Procurement Administrative Review Board**, is a central independent procurement appeals review board established under section 27 of the Public Procurement and Asset Disposal Act^[1] (herein after referred to as the Act). Its functions pursuant to section 28 of the act are reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to it by the Act, Regulations or any other written law.
3. The first Interested, **Party Energy Sectors Contractors Association** is an association of contractors in the energy sector.
4. The second Interested Party is **Zoec-Shepedc-Nginu** is an unincorporated Joint venture vehicle comprising of Zhejiang Orient Engineering Co. Limited (*a Chinese company*), Zhejiang Huayan Electric Power and Engineering Design & Consultation Co. Limited (*a Chinese company*) and Nginu Power Engineering (East Africa) Ltd (*a Kenyan company*). It was a Tenderer in the subject Tender.

Factual Matrix

5. The factual background which triggered these proceedings is essentially common ground or uncontroverted. It is admitted that the applicant entered into a Credit Facility Agreement dated 11th December 2015 with *Agence Francaise de Developpement (AFD)* which provided for procurement under the terms provided in the Procurement Guidelines referred to in clause 10.15. Under the agreement, the said guidelines were contractually binding upon the applicant.
6. The applicant maintains that the subject procurement is governed by the Procurement Guidelines for AFD-Financed Contract in Foreign Countries which apply to all procurement financed by AFD. It also states that the guidelines were subject to no objection e-mail and the response thereto has been confidentially provided to the Respondent under section 67(4) of the Act. It states that in accordance with the Bilateral Agreement and the AFD Guidelines, the applicant advertised Number **KP1/6A.1/PT/3/13/A72** for Procurement of Design, Supply, Installation, Commissioning of Transmission Line and Substation on 20th August 2019. The applicant also states that subsequent to the advertisement, there were 3 amendments to the tender dated 7th October 2019, 29th October 2019 and 25th November 2019 respectively.

7. It is admitted that various clarifications were sought under clause 7 of the Bidding Document, the latest of which was sought on 30th August 2019 while the final e-mail requiring a clarification was dated 20th August 2019. It is common ground that the said clarifications were responded to on 24th December 2019 without amending the terms of the Tender. It is also uncontested that the Bid submission date was on 7th January 2020 which date was also the bid opening date. It is also admitted that as at the closing date a total of 31 Bids had been submitted. The point of departure is that the applicant maintains that the alleged breach which triggered the Request for Review occurred on 30th August 2019.

8. The applicant states that the first Interested Party made an application for review one day before the tender closing date which was served upon the Respondent at 11:35 am on 7th January 2020. Further, the applicant states that the tenders had in accordance with the last amendments to the Bidding Document dated 24th November 2019 been opened at 10:30am before the said service. The applicant states that shortly after the tenders were opened, it received a Notification of Appeal dated 6th January 2020 informing it that on 6th January 2020 a Request for Review No. 1 of 2020 had been filed by the first Interested Party.

9. The applicant states that in the said Request for Review, the first Interested Party claimed that the Tender was discriminatory towards Kenyan-owned firms and that it favored foreign contractors. It also claimed that the criteria for cash flow, turnovers, technical requirements and tender security was unrealistic and discriminatory and no Kenyan contractor could attain the same.

Legal foundation of the application

10. The applicant's case is predicated on several provisions of the law among them section 167 of the Act which provides that a candidate may seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach. It states that the alleged breach was in respect of the Bidding Document, the last amendment of which was done on 25th November 2019, hence it was not open to the tribunal to find that the date of breach commenced running from the date on which a response to a clarification was made.

11. The applicant states that Article 227(2) of the Constitution and section 155 of the Act are circumscribed by various provision of the Act among them section 4 (2) (f) & 9(k) which apply to the Government of Kenya and section 157 of the Act which deals with the criteria for applicability of preference and reservation. It states that procurement proceedings are required to be without discrimination except where participation is limited in accordance with the Act and the Regulations. It also states that section 157 (2) permits the Cabinet Secretary to prescribe preferences and or reservations in public procurements and asset disposal which is limited to sub-section (4).

12. The applicant states that under the third schedule to the Act, section 11 thereof, the Regulations provided therein were contemplated to be made within 1 year after the effective date of the Act which was 7th January 2016, but the said Regulations have not been made, hence, the applicable Regulations are the *Public Procurement and Disposal (Preference and Reservations) Regulations, 2011* and the *Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013*.

13. The applicant's states that Regulation 5 of the 2013 Regulations read in conformity with section 39 (8) (a)(ii) of the *Public Procurement and Asset Disposal Act, 2005* which is the equivalent of section 157 (8) of the 2015 Act provided the threshold above which exclusive preference shall not be granted is Kenya Shillings 1 billion. It states that it is undisputed that the Bidding Documents were above Ksh. 1 Billion yet the Respondent decided to apply section 155 of the Act as if the provision in exclusive preference was applicable to the tender. In the circumstances the applicant states that the Respondent made the determination in breach of the statute and Regulations.

14. The applicant contends that it was unreasonable and contrary to the provisions of the Act for the Respondent to arrive at the conclusion that the contract value was over stated without evaluation of the items as provided for under section 60 (3) of the Act and by disregarding the application of the tax legislation to the said provisions. It also states that the Respondent's determination that the cash flow requirements were unattainable by the Kenyan contractors was beyond its power and or scope at the stage of submitting tenders. It also states that it was a term of the tender that: - (a) the Bidder had to examine all instructions, forms, specifications and terms as stipulated under clause 6 (4) of the Bidding Document; and (b) the Bidder had the discretion to seek any clarification in relation to the Bidding Document. Further the applicant states that no information was provided to the Respondent on the alleged over-estimation of the tender price.

15. The applicant also states that the relevant provision in relation to un bundling is made pursuant to the 2013 Regulations, in particular, Regulation 19 (1) as found by the Respondent and that due to the complexity and requirements of the process of unbundling, the provision of contracts and services and the Regulations have been made discretionary and not mandatory on the part of the Procuring Entity. The applicant maintains that no reasonable tribunal would have elevated the discretionary provisions of the Regulations to be mandatory, particularly where a Procuring Entity had emphasized the position that the works were incapable of being unbundled.

16. The applicant also states that it was unlawful, unreasonable and beyond the jurisdiction of the Respondent to direct a Procuring Entity to issue a tender document in breach of the terms of the Act and the Bilateral Agreement with an external entity, when the Act and the Regulations did not require it to do so, and to further provide the timeline within which the process ought to be completed. Lastly, the applicant states that the process leading to the impugned decision was illegal, unlawful, and irrational and marred with procedural improprieties.

The Reliefs sought

17. As a consequence of the foregoing, the *ex parte* applicant prays for the following orders:-

a. An order of *Certiorari* to remove into this court and quash the decision of the Respondent dated 27th January 2020.

b. A Declaration that the Bidding Document as prepared was in conformity with the Act and the Regulations.

c. Cost of the application be provided for.

The Respondent's Replying affidavit

18. Mr. Hennock Kirungu, the Respondent's Secretary swore the Replying Affidavit dated 2nd June 2020 in opposition to the application. He deposed upon receiving the Request for Review on 6th January 2020, he directed the applicant herein to be served in conformity with section 168 of the Act together with all other bidders who participated in the subject tender. He averred that the applicant filed a response in opposition to the Request for Review on 16th January 2020 and submitted the relevant documents as had been requested in the notification letter.

19. He deposed that the Respondent considered both parties' pleadings, oral and written submissions and delivered its decision on 27th January 2020 allowing the Request for Review, it nullified and set aside the Procuring Entity Bidding Document and directed the Procuring Entity to prepare a fresh Bidding Document for the Subject Tender within 30 days from the date of the decision, taking into consideration the Board's findings in the Request for Review. It also directed the Procuring Entity to re-tender within 45 days from the date of the decision and directed each party to bear its own costs.

20. He deposed that in arriving at the said decision, the Respondent was alive to all the issues raised by the parties, the applicable law and it observed the rules of natural justice. He averred that the Respondent acted lawfully exercise its mandate under sections 28 and 173 of the Act.

21. He deposed that the Respondent having considered all parties' cases distilled only two issues, namely; (a) whether the Board had jurisdiction to entertain the Request for Review; and, (b) whether the provisions of the Procuring Entity's Bidding Document contravened Articles 227 (1) and (2) of the Constitution; sections 3 (a), (b), (i) and (j); 60 (1) and (3) (d); 70 (6) (e) (vi) and (k); 155 and 157 read together with the *Public Procurement and Disposal Regulations, 2006*; Regulation 19 and 20 of the *Public Procurement and Disposal (Preference and Reservation) Regulations, 2011*; and the *Public Procurement and Disposal (Preference and Reservation) (Amendment) Regulations, 2013*.

22. He averred that it was the Respondent held that the Request for Review was filed within the statutory period required under section 167 (1) of the Act. He deposed that the Respondent held that the last Addendum which became part of the Procuring Entity's Bidding Document was issued on 24th December 2019, a day excluded in the computation of time pursuant to section 57 (a) of the *Interpretation and General Provisions Act*.^[2] He averred that the first Interested Party had a right to approach the Board within 14 days after 24th December 2019 which period lapsed on 7th January 2020. He averred that the first Interested Party filed its Request for Review on 6th January 2020 within 14 days from the date it learned of the Procuring Entity's alleged breach of duty arising from the Last Addendum/Clarification No. 2 issued on 24th December 2019.

23. He also averred that it was the Respondent's finding that the first Interested Party had *locus standi* to approach the Respondent as it had demonstrated that it obtained the tender documents from the applicant, a public entity, pursuant to an invitation notice by the Procuring Entity, thus it met the definition of a candidate under section 2 of the Act. He also deposed that the Respondent also held that for section 4 (2) (f) of the Act to apply, one of the parties to a procurement undertaken in accordance with the terms of a bilateral or multilateral agreement must be the Government of Kenya.

24. Mr. Kirungu averred that the Respondent interrogated the Credit Facility Agreement and found that the Procuring Entity was identified as the Borrower and *Agence Française de Développement* ("AFD") identified as the Lender and held that the Procuring Entity is not the Government of Kenya. He also deposed that the Respondent addressed its mind to a letter dated 24th June 2015 contained in the Procuring Entity's confidential file submitted to the Board pursuant to section 67 (3) (e) of the Act and found that the National Treasury expressly stated that the concurrence it had given the Procuring Entity to obtain a term loan from AFD did not constitute the Government's guarantee for the said term loan. He averred that in essence the National Treasury distanced itself from the terms of the loan facility being extended from the Procuring Entity and would not therefore guarantee its repayment in case of any default by the Procuring Entity.

25. He deposed that the Respondent outlined the import of section 6 (1) of the Act and the provisions of the Credit Facility Agreement and found that AFD and the Procuring Entity asserted application of the Laws of Kenya in so far as the subject procurement process is concerned and AFD gave the Procuring Entity a "No Objection" at every stage of preparation of the Bidding Document. He deposed that the Respondent observed that the Procuring Entity has an obligation under Articles 10 (2) (c) and 227 (1) of the Constitution to undertake its procurement process in a manner that demonstrates accountability to the public on the use of public funds, hence, ought to have negotiated favourable terms for the loan.

26. He deposed that the Respondent found that the subject procurement failed to meet the threshold of section 4 (2) (f) of the Act because the applicant is not the same entity as the Government of Kenya nor was the Government party to the procurement. Mr. Kirungu deposed that guided by the above findings, the Respondent ruled that it had jurisdiction to entertain the Request for Review. He deposed that upon considering the question whether *the provisions of the Procuring Entity's Bidding Document applicable in the subject tender*, contravened the Constitution and the Act, the Respondent concluded that the Bilateral Agreement explicitly provided that the laws and regulations applicable to the Procuring Entity shall be the Laws of Kenya. He also deposed that the Bidding Document read together with the Last Addendum/Clarification No. 2 dated 24th December 2019 contravene the provisions of Articles 27 and 227 (2) (a) and (b) of the Constitution; Section 3 (a), (b) (i) (j); 86 (2), 89 (f); 155, 157 (8) and (9); read together with Regulation 28 of the 2006 Regulations, and the provisions of the 2011 Regulations and 2013 Amendment Regulations by expressly stating that no margin of preference would be applicable.

27. Mr. Kirungu deposed that the Respondent observed that even though the Procuring Entity indicated an absolute value of tender security required by bidders, that absolute value was within the threshold of 2% required under section 61 (2) (c) of the Act. He averred that upon studying the Tender Opening Certificate dated 7th January 2020, the Respondent noted that bid prices for Lot 1 and Lot 2 proposed by bidders were far below the Procuring Entity's estimated value of the project for Lots 1 and 2, therefore wondered how 15 bidders in Lot 1

and 16 bidders in Lot 2 would propose bid process that are far below the Procuring Entity's estimated value of the project leading the Board to conclude that the Procuring Entity over-estimated the value of the project to be implemented in the subject tender, and that the cash flow requirements in the Bidding Document provided by the Procuring Entity did not take into account the provisions of sections 60 (1) and 89 (d) of the Act.

28. He deposed that the Respondent addressed its mind to the overriding objective of section 3 (i) and (j) of the Act and noted that Regulations 19 (1) of the *Public Procurement and Disposal (Preference and Reservations) Regulations, 2011* as amended by Regulation 6 of the *Public Procurement and Disposal (Preference and Reservations) Amendment Regulations, 2013* require a procuring entity to unbundle works with a view of encouraging participation of citizen and local contractors to promote the local industry but the Procuring Entity failed to take these provisions into account.

29. He deposed that the Respondent found that the applicant contravened Articles 27 and 227 (2) (a) of the Constitution, section 3 (a), (b), (i), (j), 89 (f), 155, 157 (9) of the Act read together with Regulation 28 of the *Public Procurement and Disposal Regulations, 2006*, the 2011 Regulations and the 2013 Amendment Regulations, hence it directed the applicant to prepare a fresh Bidding Document and to seek guidance from the *Public Procurement Regulatory Authority* regarding a tender document that would contain sufficient information to allow fairness, equitability, transparency, accountability, cost-effectiveness and competition in accordance with section 3 of the Act and Article 10 and 227 (1) of the Constitution. He deposed that the decision was reasonable, rational, fair and lawful.

First Interested Party's Replying Affidavit

30. Eng. Stephen Kigera Njoroge, the first Interested Party's chairman swore the Replying Affidavit dated 10th March 2020 in opposition to the application. He deposed that the Respondent took into account all the relevant facts and the law, and that the tender was flawed and it was meant to lock out local citizens and local contractors, hence, it is not surprising that when the tender was closed and opened, no local citizen or firm was in the list of the firms that submitted their tenders.

31. Mr. Njoroge deposed that its clear from the applicant's Statutory Statement and affidavit that the preference and reservation scheme was expressly excluded which was unlawful because express provision of the law cannot be omitted from a tender document. He deposed that the tender requirements were skewed, unfair, unreasonable and meant to shut out local citizens and local contractors from participating or having a fair opportunity to compete in subject tender. He deposed that the constitutional and statutory provisions aim at ensuring fairness, equity and reasonableness as opposed to locking out local citizens and local contractors from participating in procurement process.

32. Mr. Njoroge averred that local citizens and local contractors cannot be protected or be promoted where tender documents are deliberately skewed to lock them out under the excuse that the fund to be applied in a particular procurement are donor funds. He averred that there is nothing in the Credit Facility Agreement to bring it within the provisions of section 4(2) (f) and 6 (1) of the Act. He deposed that the Respondent considered the law, national interest and fairness and it was not biased and that by challenging a decision asking it to retender, the applicant is determined to skew the process in favour of foreigners. He deposed that the impugned decision is legal reasonable, factually correct and based on evidence.

Second Interested Party's Replying Affidavit

33. Mr. Ngigi Njuru, a Director of Nginu Power Engineering (East Africa) Limited a joint venture partner in the second Interested Party swore the Replying Affidavit dated 12th March 2020 in support of the case. He deposed the advertisement stated that the tender would follow the International Competitive Bidding Procedures specified in the *Agence Française Development's Guidelines: Procurement Guidelines for AFD-Financed Contracts in Foreign Countries*, published by the Bank in February 2017 and that it was open to all eligible bidders as defined in the Procurement Guidelines.

34. He averred that as per paragraph 4.1 Section I-Instructions to Bidders and Section II-Bid Data sheet ITB 4.1 at page 6, 7 and 227 of the Bidding Document, bidders had the option of bidding as joint ventures to complement each other and meet the requirement of the Tender with a maximum of 3 partners. He deposed that in order to meet the financial and technical requirements of the Tender, their companies formed Joint Venture vehicle, namely; ZOEC-ZHEPEDC-NGINU and submitted its bid on 7th January 2020.

35. Mr. Njuru averred that the second Interested Party has expended substantial resources in complying with the tender requirements which include preparation of the tender bid, purchasing the Bid bond for the sum of EUR 330,000/=-, substantial travelling expenses, attending pre-bid meetings and site visits as per the mandatory requirements of the Tender and would wish the Tender to proceed for evaluation in accordance with the terms of the Tender. He deposed that the first Interested Party lodged Request for Review PPARB No. 1 of 2020 on 6th January 2020 claiming that the tender was discriminatory to Kenyan Firms and that it favoured foreign contractors and the cash flow, turnovers, tender security and technical requirements that were unrealistic and discriminatory.

36. He averred that the Respondent improperly and illegally assumed jurisdiction by failing to recognize the applicant as an implementing agency of the government under Section 4(2) (f) of the Act and failing to appreciate that the Act was not applicable in the procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government or agency.

37. He deposed that the technical specifications in the bidding document were clear and specific, based on international standards which requirements were necessary to ensure that the eligible and prospective tenderers had capacity to execute the works in accordance with Section 60 of the Act, hence it was not meant to discriminate upon any specific or class of tenderers.

38. Mr. Njuru deposed that to build capacity the local contractors ought to have formed joint ventures either among themselves or with foreign companies to ensure that their tender bids met the tender requirements. He deposed that the Respondent was wrong to order the unbundling of procurement works pursuant to Regulation 19 (1) of the 2013 regulations without taking into account the technical complexities of the project. He deposed that the second Interested Party agrees with the applicant's view that the decision made by the

Respondent was irrational and unreasoned and that if the decision is upheld, the second Interested party stands to suffer substantial financial loss.

Mode of hearing

39. This case was canvassed by way of affidavit evidence and written submissions. The applicant's counsel and the Respondent's counsel adopted their written submissions. However, counsel for the first Interested Party did not file submissions despite this court's directions made on 2nd March 2020 and 4th June 2020. On 22nd July 2020, counsel for the first Interested Party asked for 5 days to file submissions but as at the close of business on the 5th day from the said date, he had not filed. The second interested party supported the applicant's case. Its counsel relied on the applicant's advocate's submissions.

Guiding constitutional and statutory principles

40. The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the State procurement process is Article 277 (1) of the Constitution. The Article provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

41. The national legislation prescribing the framework within which procurement policy must be implemented is the [Public Procurement and Asset Disposal Act](#)[3] (the Act) and *The Public Procurement and Disposal Regulations, 2006* (hereinafter referred to as the Regulations). A decision to award a tender constitutes administrative action so the provisions of Article 47 of the Constitution and the *Fair Administrative Action Act*[4] (herein after referred to as the FAA Act) from which a cause of action for the Judicial Review of administrative action arises, applies to the process.[5]

42. Section 3 of the Act provides that Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—**(a) the national values and principles provided for under Article 10; (b) the equality and freedom from discrimination provided for under Article 27; (c) affirmative action programmes provided for under for under Articles 55 and 56; (d) principles of integrity under the Leadership and Integrity Act, 2012; (d) the principles of public finance under Article 201; (e) the values and principles of public service as provided for under Article 232; (e) principles governing procurement profession, international norms; (f) maximization of value for money; (g) ...and ...**

43. Procurement disputes revolve around the proper interpretation and application of Article 227 of the Constitution; hence, they raise constitutional issues. This is because procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner.

44. Article 227 of the Constitution, the Public Procurement and Asset Disposal Act and the *Public Finance Management Act*[6] provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in the FAA Act. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in the FAA Act.

45. Fairness is inherent in the tender procedure. Its very essence is to ensure that before a State organ purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in Article 227 of the Constitution permeate the procedure for awarding or refusing tenders.[7]

46. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.**

47. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

Determination

48. The first issue for determination is whether the first Interested Party's Request for Review was time barred. The contestation here as I see it revolves around the question when the alleged breach occurred as contemplated by section 167(1) of the Act.

49. The applicant's counsel faulted the Respondent for finding that the applicant filed its Request for Review within 14 days from the date it learned of the procuring entity's alleged breach arising from Clarification No. 2 issued on 24th December 2019. He argued that the said finding was contrary the express provisions of the Bidding Document which, at Clause 8, permitted the applicant to amend the Bidding Document only by issuing amendments, while Clause 7 permitted a Bidder to seek clarification(s). He argued that the clarification dated 24th December 2019 was neither an addendum nor a modification of the Bidding Documents.

50. Counsel submitted that because the tender was not closed as at the date of the application for Review (the tender closing date being 7th January 2020), the operative provision of the Act is section 167(1). He submitted that the Respondent's jurisdiction under the said section is invoked either by notification of award (which is not applicable to this case), or by date of occurrence of the alleged breach. It was his submission that time starts to run the date when the aggrieved party discovers that there is a purported breach. He argued that the first

Interested Party did not become aware of the alleged breach on the date the clarification was provided on 24th December 2019 adding that it was the first Interested Party who raised what it claimed to be a clarification and sought the said clarification on 30th August 2019. He argued that the date of occurrence of the alleged breach is the date the first Interested Party raised the same in writing and cited *Republic v Public Procurement and Administrative Review Board & another; Dochar Construction and Trade Inc Ltd (Interested Party) Ex Parte Xtreme Engineering Services Limited*[8] which cited with approval *Republic v Principal Secretary Ministry of Health and another, ex parte Apex Communication Limited trading as Apex Porter Novell* which held that under section 167 (1) of the Act, a request for review may be filed within fourteen days after the notification of the award, or on the date of occurrence of the alleged breach at any stage of the procurement process or disposal process and that the later can also be explained as to file a request for review within fourteen days from the date the aggrieved tenderer learns of the alleged breach by the Procuring Entity.

51. He also cited *Republic v Public Procurement Administrative Review Board & 2 others*[9] which held that there are two applicable instances when time will start to run for purposes of filing a request for review provided by section 167 (1) of the Act, namely the date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process. Also, he cited *Republic v Public Procurement Administrative Review Board & 2 others*[10] for the holding that the timelines under the Act were specifically set for a purpose and must be complied with, and once it is established that the Review Board acted without jurisdiction then the court must not proceed to consider the remaining grounds for judicial review. (Citing *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*[11] and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*[12])

52. He submitted that the clarification sought by the first Interested Party by its e-mail of 30th August 2019 clearly shows that it had knowledge of what it claimed to be *alleged* violations. He submitted that the applicant's response to the said queries by way of its letter dated 24th December 2019 did not amend the Bidding Document. He argued that the alleged breach occurred on 30th August 2019 as shown by wording of the clarification which was: - "*the conditions (of the Invitation to Bid) seem to discriminate against the people of Kenya.*" He maintained that the date of occurrence of the alleged breach was 30th August 2019 when the first Interested Party drew attention of the applicant to what it claimed to be a breach. He submitted that the first Interested Party failed to file an application for Review within fourteen (14) days from the said date.

53. Mr. Odhiambo, the Respondent's counsel did not address this issue at all.

54. The contestation here is whether the alleged breach occurred on 24th December 2019 when the clarification was made or on 30th August 2019 when the first Interested Party sought the clarification. The applicant's position is that the first Interested Party was already aware of the alleged breach particularly considering that he described the bid conditions as discriminatory in his letter suggesting that it was fully aware of the nature of the breach. A reading of Clause 7.1 of the Bidding Document shows that it provides for Clarification of Bidding Documents in the following words:-

A Bidder requiring any clarification of the Bidding Documents shall contact the Employer in writing at the Employer's address specified in the BDS or raise its enquiries during the pre-bid meeting if provided for in accordance with ITB 7.4. The Employer will respond in writing to any request for clarification, provided that such request is received no later than fourteen (14) days prior to the deadline for submission of bids. The Employer shall forward copies of its response to all Bidders who have acquired the Bidding Documents in accordance with the ITB 6.3, including a description of the inquiry but without identifying its source. If so specified in the BDS, the Employer shall also promptly publish its response at the web page identified in the BDS. Should the clarification result in changes to the essential elements of the Bidding Documents, the Employer shall amend the Bidding Documents following the procedure under ITB 8 and ITB 22.2.

55. The following points can be culled from the above clause. *One*, if any tenderer requires clarification of the tender invitation documents, he/she sends a written request to the Procuring Entity for the latter's consideration and action. *Two*, clarification of tender invitation documents is conducted by the Procuring Entity by sending a letter clarifying the tender invitation documents to all the tenderers who have received tender invitation documents and by promptly placing it at the web page if so required by the Bidding Document. *Three*, should the clarification result in changes to the essential elements of the Bidding Documents, the Procuring Entity is required to amend the Bidding Documents following the procedure set out in the Bidding Documents. *Four*, the Procuring Entity is responsible for responding to requests for clarification of the bidding documents, in time for bidders to take the clarification into account in preparing and submitting their bids. *Five*,

56. The following principles must be borne in mind. *One*, the Bidding Documents should be read and interpreted with reference to the principles contained in Article 227 of the Constitution. *Two*, the court must be alive to the ever-present duty of a Public Procuring Entity to act fairly. *Three*, fairness is to be determined on the circumstances of each case. *Four*, it may in some instances be fair to ask a Procuring Entity to explain an ambiguity in its Bidding Document or to correct an obvious mistake. *Five*, in a complex tender, it may be fair to ask for clarifications or details to ensure the proper evaluation of the tender, provided that doing so does not affect the fairness of the process. *Six*, whatever the case, the tender process must remain transparent, competitive and cost-effective. 57. Regulation 24 (5) of the *Public Procurement and Asset Disposal Regulation, 2006* provides that "*the procuring entity shall promptly respond to all requests for any clarification relating to the pre-qualification document where such requests are received before the deadline for submission.*" The emphasis here is that the request for clarification must be received before the deadline for submission. The request for clarification complied with this Regulation. It was made on 30th August 2019 before the submission date. The clarification was made on 24th December 2019 before the closing date.

58. The other important point discernible from the above Regulation is the use of the word "prompt." Despite the clear language of this Regulation, the reply to the clarification sought on 30th August 2019 was made on 24th December 2019. Clearly, there was an unexplained delay of close to three months contrary to the clear dictates of the above Regulation. However, the unexplained delay has not been raised in this case nor has any prejudice been cited.

59. My reading of the Bidding Document and the above Regulation is that once a clarification is sought, the Procuring Entity has a duty to provide the clarification promptly. The argument that the first Interested Party was aware of the breach is founded on the applicant's use of

the words “*the conditions (of the Invitation to Bid) seem to discriminate against the people of Kenya.*” The use of the word “seem” in the request for clarification is worth noting. At the centre of this argument is the correct meaning of the words “seem” and “clarification.”

60. In searching for the meaning of the said words, it is inevitable that I will consult dictionaries. The practice of appealing to dictionaries simply as memory aids was deemed a function of judicial notice. [13] Words must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court. [14]

61. Dictionaries may also serve an instantiating function, that is, they may be used by the court to confirm that a contested meaning has been employed in either speech or literature, and has thus been recognized as a valid meaning by lexicographers. Of this instantiating function, Professors Hart and Sacks said, “Unabridged dictionaries are historical records (as reliable as the judgment and industry of the editors) of the meanings with which words have in fact been used by writers of good repute. They are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is linguistically permissible.” [15]

62. In using a dictionary to instantiate a contested meaning, a judge searches the dictionary to determine what meanings have attained currency in the language at large and are thus linguistically permissible in a given context. [16]

63. The word “seem” is defined as to appear to be, feel, do, etc; to appear to one's own senses, mind, observation, judgment, etc; to appear to exist; to appear to be true, probable, or evident; to give the outward appearance of being or to pretend to be. [17] Clarification is defined as the action of making a statement or situation less confused and more comprehensible; [18] the act of clarifying; the act or process of making clear or transparent...; [19] to make (an idea, statement, etc.) clear or intelligible; to free from ambiguity. [20] These being the accepted definitions of the two words, the applicant's argument that the applicant was aware of the breach cannot be sustained. A person may seek clarification not because he does not know, but because he entertains doubts which he desires to clear. That being the correct meaning and purpose of clarification, even if the applicant knew as the wording of the request suggests, he was entitled to seek the clarification which is provided for under the law and the Bidding Documents. The doubt created by the use of word “*seem*” confirms the request for clarification.

64. The other important point to note is that the clarification provided did not result in changes to the essential elements of the Bidding Documents, hence, it was not necessary for the Procuring Entity to amend the Bidding Documents following the procedure set out in the Bidding Documents. Had the Bid been amended following the Request, then time would run afresh.

65. As was held in *Republic v Public Procurement Administrative Review Board & 2 Others* [21] the jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. Section 167 (1) of the Act which provides:- “*Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.*” I find and hold that time began to run on 24th December 2019 when the clarification was provided. The effect is that the Request for Review was filed within time. It follows that the Respondent properly exercised its jurisdiction by entertaining the Request for Review. This ground of review fails.

66. The second issue for determination is whether the first Interested Party's Request for Review was filed without the first Interested Party making the statutory deposit as per Section 167(2) of the Act. The Respondent's counsel did not address this ground at all.

67. Section 167 (2) of the Act provides that a request for review shall be accompanied by such refundable deposit as may be prescribed in the Regulations, and such deposit shall not be less than ten per cent of the cost of the contract. Section 180 of the Act provides that the Cabinet Secretary shall make Regulations for the better carrying out of the provisions of the Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of the Act, and such regulations shall not take effect unless approved by Parliament pursuant to the *Statutory Instruments Act*. [22] To my mind, the Regulations contemplated under the said section are yet to be made.

68. Section 24 of the *Interpretation of General Provision Act* [23] provides that where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder. The relevant Regulations are the *Public Procurement and Asset Disposal Regulation, 2006* promulgated under the repealed Act.

69. Regulation 73 (2) (e) provides that the request referred to in paragraph (1) shall- be accompanied by the fees set out in Part II of the Fourth Schedule which shall not be refundable. Regulation 73 (3) provides that every request for review shall be filed with the Secretary of the Review Board upon payment of the requisite fees. A reading of the said provisions and the 2006 Regulations shows that they had no provision for the deposit contemplated under section 167 (2) of the Act. It follows unless and until the Regulations contemplated under section 167(2) of the Act are promulgated, the court has no basis to operationalize section 167(2). This ground of attack collapses.

70. The third issue for determination is in my view the gravamen of the applicant's case. The contestation is whether the procurement process was exempted from the provisions of Preference and Reservations under the Act. The applicant's counsel cited Article 227(1) (2) (a) of the Constitution and section 39 of the *Public procurement and Asset Disposal Act 2005* which permitted the Minister to prescribe preference or reservations on public procurement and preference. He singled out section 39(8) which provided:-

“**39. Participation in procurement**

(1) *Candidates shall participate in procurement proceedings without discrimination except where participation is limited in*

accordance with this Act and the regulations.

(8) In applying the preferences and reservations under this section—

(a) exclusive preference shall be given to citizens of Kenya where—

(i) the funding is 100% from the Government of Kenya or a Kenyan body; and

(ii) the amounts are below the prescribed threshold;

(b) a prescribed margin of preference shall be given—

(i) in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya; or

(ii) works, goods and services where a preference shall be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.”

71. He argued that section 140 which gave the Minister wide powers to make Regulations with regard to better carrying out of the provisions of the Act and in discharge of his functions, the Minister promulgated the *Public Procurement and Disposal (Preference and Reservations) Regulations 2011* (“**the 2011 Regulations**”), amended by the *Public procurement and Disposal (Preference and Reservations) Amendment Regulations 2013* which provide at Regulation 5 as follows:-

“5. The principal Regulations are amended by deleting Regulation 13 and substituting therefor the following new regulation –

13. For the purposes of section 39 (8) (a) (ii) of the Act, the threshold below which exclusive preference shall be given to citizen contractors, shall be the sum of –

a) one billion shillings for procurements in respect of road works, construction materials and other materials used in transmission and conduction of electricity of which the material is made in Kenya;

b) five hundred million shillings for procurements in respect of other works;

c) one hundred million shillings for procurements in respect of goods; and

d) fifty million shillings for procurements in respect of services.”

72. He argued that the provisions of Section 39(8) of the 2005 Act, though revoked by the 2015 Act, are substantially in *pari materia* to section 157 of the 2015 Act. He submitted that even though the 2015 Act at Paragraph 11 provides that the Regulations contemplated under the Act would be made within a period of one (1) year, none have so far been made. He cited section 24 of the *Interpretation and General Provisions Act* (supra) for the proposition that unless a contrary intention appears, the above Regulations remain in force, so far as they are not inconsistent with the repealing Act, until they are revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and are deemed for all purposes to have been made thereunder. He relied on *Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & Another*^[24] which held:-

“190. It is clear that in its decision, the Respondent did not stipulate the margin of preference. It is however contended that no Regulations or Guidelines have been prescribed by the Cabinet Secretary pursuant to Section 157(2) hence the Respondent Board cannot enforce non-existent Regulations. Section 24 of the **Interpretation and General Provisions Act**, Cap 2 Laws of Kenya however provides as hereunder:

Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

191. It would therefore follow that in the absence of the said Regulations the provisions of the *Public Procurement and Disposal (Preference and Reservations) Regulations, 2011*, would have to be resorted to. I therefore do not find that by merely stating that the margin of preference should be applied, the Respondent stipulated a particular margin. In other words, whatever margin of preference to be supplied, the procurement entity had to apply the prevailing law and regulations.”

73. He argued that section 155 of the Act creates an overall intention to give preference to Kenyan entities in public procurements in the following terms:-

“155. **Requirement for preferences and reservation**

1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

2) Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential treatment.

3) Despite the provisions of subsection (1), preference shall be given to –

- a) Manufactures articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or
- b) Firms where Kenyans are shareholders.
- c) The threshold for the provision under Section (3)(b) shall be above fifty-one percent of Kenyan shareholders.”

74. He argued that the Board placed heavy reliance on the above section. He cited section **157(1)** which provides candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with the Act and the regulations and submitted that section **157(2)** prescribes the matters to be considered by the Cabinet Secretary when prescribing preferences and reservations in public procurement and asset disposal. He argued that section **157(8)** of the Act limits the Cabinet Secretary’s powers to provide preference and reservations as follows:-

“(8) In applying preferences and reservations under this section –

a) Exclusive preference shall be given to citizens of Kenya where –

- (i) The funding is 100% from the national government or county government or a Kenyan body;
- (ii) The amounts are below the prescribed threshold; and
- (iii) The prescribed threshold for exclusive preference shall be above 500 million shillings”

75. He submitted that the exclusive preference is not applicable to the procurement herein because the funding was provided by AFD and not by the National or County Government. In addition, he argued that the provisions of the Amended Regulations provide that exclusive preference is not applicable where:-

- a) The project is not being funded wholly by the National government, county government or a Kenyan body; or
- b) The value of the project is below the prescribed threshold.

76. He submitted that a margin of preference could not be given under Section **157(8)(2)** of the Act because the tender did not fall within the criteria described under Section **157(8)(b)(ii)** namely:-

“157(8)(b) A prescribed margin of preference shall be given –

- (i) In the evaluation of tenders to candidates offering goods manufactures, assembled, mined, extracted or grown in Kenya; or
- (ii) Works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.”

77. Counsel observed that in its finding the Respondent held that Clause **33** of Section **I** of the Instruction to Bidders, read together with Clause **33.1** of Section **II** of the Instruction to Bidders and Clause **2** of Section **III**, Evaluation and Qualification Criteria of the Bidding Document read together with the last Addendum/Clarification No. **2** dated **24th** December 2019, contravenes the provisions of Article **27** and **227(2)(a)** and **(b)** of the Constitution, Sections **3(a), (b), (i), (j), 86(2), 89(f), 155, 157(8)** and **157(9)** of the 2015 Act, read together with the *Public Procurement and Asset Disposal Regulations 2006* (“**2006 Regulations**”). He submitted that **Article 27** deals with discrimination and is not applicable in the instant situation because a preference and reservation is discriminatory by its very nature.

78. He faulted the above finding arguing that **Article 227(2)** of the Constitution does not provide for wholesale conferment of preference but left it for Parliament to prescribe a framework within which policies relating to procurement and asset disposal shall be implemented. He submitted that Parliament fulfilled the above requirement by enacting the 2015 Act and argued that Article **227(2)** did not provide for wholesale conferment of preference. He submitted that section **3(a), (b), (i)** and **(j)** of the Act sets out the guiding principles to be implemented in accordance with the provisions of the Act and not in isolation or exclusively or in combination with other convenient provisions of the Act as the Respondent found. Also, he argued that section **86(2)** of the Act does not apply to the stage of submission of tenders, but to evaluation of submitted tenders at a stage yet to be achieved.

79. Counsel submitted that the Board found that section **155** introduces preference and reservations in exclusion to any other provision under that Section despite section **155(1)** which provides :- “Pursuant to Article **227(2)** of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.”

80. He submitted that the Board interpreted the said provision to mean referring exclusively to Section **155** instead of Part **XII**, which is, the

provision referred to in Section 155(1). He submitted that while section 155 makes provision for requirement for preference and reservations, it is Section 157 which grants powers to the Cabinet Secretary to prescribe, save to the extent provided under that section for eligibility and participation in preference and reservation. He argued that the subject tender neither granted a right to exclusive preference nor did it prescribe a margin of preference. It was his view that that window must have been left to ensure that where financiers or donors require a tender to be internationally competitive, there would be a window within the governing legislation to accommodate the same. He submitted that section 157(9) of the Act did not apply.

81. The applicant's counsel also submitted that although the Board relied on the 2006 Regulations, the same had been replaced by the *Public Procurement and Disposal (Preference and Reservation) Regulations 2011*, as amended by Regulation 5 of the 2013 Amended Regulations, fixing the threshold or exclusive preference at one billion. He relied on *Republic v Public Procurement Administrative Review Board & Another*[25] and *Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & Another*. [26] Lastly, counsel argued that the Respondent's finding that the Invitation to Bid issued by the applicant was contrary to the Constitution, the Statutes and the Regulations is without foundation and runs counter to the express provisions of the statute and the regulations. He maintained that the procurement herein was not subject to preference or reservations.

82. Mr. Odhiambo, the Respondent's counsel cited section 4 of the Act which provides for the scope of application of the Act and section 6 (1) which provides for conflicts with international agreements and argued that the issue is whether the mere fact that the particular procurement or procurement to be under taken using the proceeds of a grant or loan where the Government of Kenya is a party can oust the Jurisdiction of the Board to hear and determine the dispute under Section 4 (2) (f) of the Act and the Constitution. He relied on *Republic v Public Administrative Review Board, Machiri Limited, Athi Water Services Board and Weihia International economic & Technical Cooperation Company Ltd* [27] which held that that the mere fact that a project is being financed by funds from a donor cannot deprive the Board or the court the oversight and supervisory jurisdiction to hear and determine the dispute pursuant to the provisions of the section 4(2) (f) of the Act. He relied on *Okiya Omtata Okoiti & 2 Others v The Attorney General and 3 others*[28] for the holding that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with the Act. He submitted that the key consideration is whether the donor funds are to be paid back by the Kenyan public at the end of the day and if the answer is in the affirmative, then the institutions charged with the duty to provide oversight over the use of such funds both under the constitution and other laws are vested with the Jurisdiction to provide such an oversight.

83. On whether the Board acted *ultra vires* by introducing preference criteria which was not expressly provided for in the bid document, Mr. Odhiambo argued that owing to the significance and the public importance attached to the issue of preference and reservations as set out under part XII of the Act running from sections 155 to 157 of the Act, it is apparent that there was a clear legislative intent for promotion of local industry and economic empowerment of Kenyan citizens by enhancing their ability to participate in procurement processes by cushioning them against skewed competition. He submitted that a Procuring Entity is under a legal duty to consider whether a bidder is entitled to preference or not and thereafter must accord the bidder preference notwithstanding any silence in the tender document or any express provisions to the contrary in the tender document. He cited *Republic v The Public Procurement and Administrative Review Board and the Kenya Revenue Authority*[29] for the holding that the margin of preference consideration was a statutory one and although in the Act the provision is couched in discretionary terms due to the use of the word "may," in Regulation 28(2) (a) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement. He relied on *Republic v The Public Procurement and Administrative Board, National Training Authority and Coretech Solutions and Systems Ltd*[30] which held that the issue of preference and reservations is one provided for by the procurement laws. He submitted that section 155 of the Act stipulates that pursuant to Article 227 (2) and despite any other provision of the Act or any other legislation, all procuring entities shall comply with the law on preference and reservations.

84. Mr. Odhiambo reproduced sections 157 (8) and 157 (9) of the Act and submitted that although the tender document did not in mandatory terms require the procuring entity to apply the preference and reservation scheme, based on the law and the decided cases preference ought to have been provided. He argued that the applicant's reasoning on this issue runs contrary to the provisions of the Constitution and the Act and defeats the very purpose for the enactment of the statutory provisions on preference and reservations.

85. Mr. Odhiambo submitted that if any such bilateral agreement purports to take away the right to preference and reservation, then the same would be contrary to the letter and spirit of the law. It was his submission that if the Board or any other public authority was to allow a donor to impose conditions that omit the application of the preference and reservations scheme merely because the donor is the one donating the funds, then local contractors/tenderers will be elbowed out of a significant number of procurement processes in this country a fact that will render part XII of the Act of no economic benefit to local contractors/tenderers and the public. It was his submission that the Board correctly found that the Procuring Entity acted contrary to the law by failing to consider and accord preference to the applicant and any other bidder who was entitled to the application of such scheme in its favour in the procurement. .

86. In resolving this issue, at the risk of repeating guiding principles in cases of this nature, I find it convenient to state that public procurement in Kenya has been afforded a constitutional status. Article 227 of the Constitution establishes the primary and broad secondary procurement objectives. This Article is the cornerstone against which the requirements of public procurement is to be assessed. It provides that:-

(1) *When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.*

(2) *An act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following:-*

a) *categories of preference in the allocation of contracts;*

b) *the protection or advancement of persons, or categories of persons, or groups previously disadvantaged by unfair competition or discrimination.*

c) Sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and

d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

87. While the above Article makes provision for organs of state to implement procurement policies that prefer ‘categories of preference’ in the allocation of contracts and provides for the advancement of persons disadvantaged by unfair competition or discrimination, it is clear that the freedom conferred on organs of state to implement preferential procurement policies is circumscribed by the opening sentence of the same sub-article (2) which provides that an “An act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following:-

88. The clear implication is that organs of state may implement preferential procurement policies provided they do so within a framework prescribed by an Act of Parliament. It is undisputed that the *Public Procurement and Asset Disposal Act* constitutes the legislative scheme envisaged in Article 227 (2). Section 3 of the Act provides that public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

a) the national values and principles provided for under Article 10;

b) the equality and freedom from discrimination provided for under Article 27;

c) affirmative action programmes provided for under Articles 55 and 56;

d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);

e) the principles of public finance under Article 201;

f) the values and principles of public service as provided for under Article 232;

g) principles governing the procurement profession, international norms;

h) maximisation of value for money;

i) promotion of local industry, sustainable development and protection of the environment; and

j) promotion of citizen contractors.

89. The Constitution is the supreme law of the land and all other law is subject to it. Thus, its interpretation cannot depend on the legislation enacted under it but on the language used in Article 227 which applies to a State organ or any other public entity.

90. Section 155 of the Act provides for requirement for preferences and reservations in the following words:-

1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

2) Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

3) Despite the provisions of subsection (1), preference shall be given to— (a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or (b) firms where Kenyans are shareholders.

4) The threshold for the provision under subsection (3) (b) shall be above fifty one percent of Kenyan shareholders.

5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya— (a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and (b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.

91. An examination of the impugned ruling is useful to contextualize my analysis and findings. The Respondent observed that Parliament enacted the above provision in order to give effect to Article 227 (2) (a) & (b) of the Constitution and faulted the applicant for contending that it was not mandatory for it to apply the preference and reservation scheme in the subject procurement. The Respondent singled out clause 33 of Section 1, Instructions to Bidders of the Bidding Document which provide that “unless otherwise specified in the BDS, a margin of preference for domestic bidders shall not apply.” It also cited ITB Clause 33.1 of section 11, Bid Data Sheet of the Bidding Document which provided that “a margin of preference shall not apply.” It referred to clause 2 of section 111, Evaluation and Qualification Criteria of the Bidding Document which provided that *Domestic Preference is not applicable*. Lastly, the Respondent note that the addendum dated 24th December 2019 provided that the bid shall be issued as per the bidding document.

92. The Respondent at page 91 of the decision observed that even though the Procuring Entity's Bidding Document and the clarification dated 24th December 2019 both excluded the application of domestic preference in the subject procurement process, *the AFD Guidelines recognized domestic preference at clause 2.1.4 (a)*. It faulted the applicant for excluding the preferences provided under Part X11 of the Act. It cited Regulation 28 of the 2006 Regulations and section 70 (6) (e) (vi) of the Act which provides *inter alia* that where necessary, the preferences and reservations of the tender are clearly spelt out in the bidding documents. The Respondent relied on *Republic v Public Procurement Administrative Review Board & 2 others ex parte Microhouse Technologies Ltd*[31] for the proposition that the issue of preference and reservations is one provided for by the procurement laws.

93. The Respondent also relied on *Church Road Development Co. Ltd b Barclays Bank of Kenya Limited & 2 others*[32] and *Universal Petrochemical Ltd v Rajastan State Electricity*[33] both of which held that a contract cannot be used to override the provisions of the law. The Respondent held that preference schemes having been provided under the Act, a procuring entity ought not to exclude them by ouster clause in its document. Its finding was that such exclusions cannot override express provisions of the Act and that the ouster clauses in the Procuring Entity's Bidding Document offend the guiding principles in section 3(1) and (j) of the Act and that such ouster clauses cannot be enforced.

94. Section 7 (2) (b) of the FAA Act provides that a court or tribunal has the power to judicially review an administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with. Procurement of goods and services by an organ of state must be carried out in terms of the principles set out in Article 227(1) (2). The proper approach to tender reviews is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground has been established.

95. Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that the tender awarding body may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified by the Act and the right to a fair administrative action. Deviations from the law and laid down procedure will be assessed in terms of those constitutional norms and procedural fairness.

96. Strict compliance with the law and tender procedures by both the procuring Entity and bidders is of central importance in public procurement of goods and services. The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive. In order to ensure a fair outcome in a tender award, the process itself must be fair. If the process is compromised or legal requirements are overlooked the process loses the attributes of fairness prescribed under Article 227(1).

97. The tender invitation, which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these constitutional and statutory provisions. Clause 33 of Section 1 of the Bidding Document expressly provided that "...a margin of preference for domestic bidders shall not apply." This clause went against the clear provisions of Article 227 (1) (2) (a) (b) of the Constitution, the guiding principles in sections 3 and 70 (6) (e) (vi) of the Act and Regulation 28. This ouster clause deprived the entire process the constitutional attribute of fairness and competitiveness. A bid document cannot oust constitutional and statutory provisions.

98. Deviations from the law and a fair process is a symptom of malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Insistence on compliance with the law and process formalities has a threefold purpose: - (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by other influences. The question is essentially one of fairness.

99. The principle of legality dictates that there must be a rational connection between the decision taken and the purpose for which the decision was taken. For a decision to be rational, there must be a rationally objective basis justifying the impugned conduct. In the ordinary meaning of the term, a decision is 'rationally' connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious. A determination of whether a decision is rationally connected to its purpose calls for a factual enquiry blended with a measure of judgment. In terms of section 7 (2)(i) of the FAA Act, an administrative action is reviewable if it is not rationally connected, *inter alia* to the purpose for which it was taken, the purpose of the empowering provision, the information before the functionary who took the decision or the reasons advanced by the functionary who took it. In *Democratic Alliance v President of the Republic of South Africa & others* the Constitutional Court stated as follows:-

'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that was done to achieve that purpose. Not only is the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.'

100. In order to be rational, a decision must be based on accurate findings of fact and a correct application of the law. A wrong or mistaken interpretation of a provision in a statute constitutes an error of law that is reviewable under section 7 of the FAA Act. It is also reviewable under the principle of legality.

101. It is my finding that the Respondent correctly construed the provisions of sections 4 and 6 of the Act in that the loan agreement was clear that it was between the Respondent and the Lender and that the Government was not a party to it, hence, the Respondent cannot seek refuge in the said provisions. I also find that the ouster clause in the Bid document offends the provisions of Article

227 and section 3 of the Act. The Bid document a drawn offends the provision of section 70 (6) (iv) of the act which provides that the procurement function ensures that where necessary, the preferences and reservations of the tender are clearly spelt out in the bidding documents.

102. I also find that the ouster clause offended section 155 of the Act on requirement for preferences and reservations which provide that pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part. Also impinged is section 157(1) of the act on participation of candidates in preference and reservations which provides that candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations particularly Regulation 28 of the *Public Procurement and Disposal Regulations, 2006*, the 2011 Regulations and the 2013 Amendment Regulations becomes relevant.

103. I find myself in agreement with the Respondent's finding that the Bid documents violated the provisions of the Constitution and the Act highlighted earlier. I am not persuaded that the Respondent's finding on the issue under consideration was tainted by an error of the law.

104. I now address the question of cash flow and unbundling. The applicant's counsel argued that the Respondent relied on section 60(1) and 89(d) of the Act, which provide as follows:-

“60. Specific requirements

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

89. International tendering and competition

If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply –

...

(d) The technical requirements shall, to the extent compatible with requirements under the Kenyan law, be based on international standards or standards widely used in international trade.”

105. He argued that the Board found that since the tender provided for completion of the works within 24 months, the Procuring Entity had an obligation to provide cash flow requirements based on work, which the Board prescribed to be 24 months. He argued that section 60(1) is permissive and requires the procuring entity to prepare specific requirements relating to the goods, works or services that are clear. He argued that clause 7 of the Bidding Document granted the first Interested Party the right to attend a pre-bid meeting at which it could raise any matter, have a site visit and seek clarification. He cited Clause 7.4 which provided: - *“The Bidders representative is invited to attend a pre-bid meeting. The purpose of the meeting would be to clarify issues and to answer questions on any matter that may be raised at that stage.”*

106. He argued that the first Interested Party had the right to raise the issue of cash flow at any stage of the procurement, up to fourteen (14) days before the date of opening the tender. He argued that it was unlawful, unreasonable and contrary to the provisions of the Act for the Respondent to arrive at the conclusion that the contract value was over stated without evaluation of the items as provided for under section 60(3) of the Act and by disregarding the application of the tax legislation to the said provisions. It was his submission that the determination that the cash flow requirements were unattainable by Kenyan contractors was beyond its powers and/or scope at the stage of submitting tenders. He argued that the Board arrived at this determination despite the fact there were seven local contractors who had actually submitted their bids. He relied on *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [34] and sections 107 and 109 of the Evidence Act [35] and submitted that the Board ought to operate within the confines of the law.

107. He submitted that the Respondent's finding that *that the procuring entity ought to have considered the provisions of Regulation 19(1) of the 2011 Regulations as amended by Regulation 6 of the 2013 Amendment Regulations read together with Section 3(i) and (j) of the Act in order to unbundle the Sub-station works in the subject tender with a view of encouraging participation of citizen contractors (and local contractors) in order to promote the local industry* was predicated on Regulation 19(1) of the 2011 Regulations which provides:- *For the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small and micro- enterprises in public procurement, procuring entities may unbundle goods works and services in practicable quantities pursuant to section 31(7) of the Act.”* He argued that the Respondent found that:-

“Pursuant to the provision of Regulation 19(1) of the 2011 Regulations as amended by Regulation 6 of the 2013 Amendment Regulations, citizen contractors were included in the list of persons who ought to benefit from unbundling of goods, works and services in practicable quantities to ensure maximum participation of citizen contractors.”

108. He argued that the said finding disregarded the provision of Section 54(1) of the Act which provides that *no procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed.* He submitted that this section prohibits unbundling as a basis of promoting any principle under the Act and thereby abrogates the provision of Regulation 19(1) as promulgated under the revoked legislation. He argued that even if the provision applies, the power extended to the Procuring Entity by the said Regulation was discretionary and could not be elevated to the level of a breach of procurement process. It was his submission that the Board acted unlawfully by directing the applicant to unbundle the Project contrary to the provisions of the Act and the Regulations made thereunder. He argued that the requirement of unbundling is not applicable to the subject contract by virtue of Regulation 5 of the 2013 Regulations, and, that the same was found to be technically impracticable despite the request by the applicant to the

Lender, the response to which was provided to the Board through the confidential documents under section 67(4) of the Act.

109. Citing Regulation 19 (1) of the 2013 Regulations, he argued that due to the complexity and requirements of the process of unbundling the provision of contracts and services, the application of the 2013 Regulations has been made discretionary and not mandatory on the part of a procuring entity. He argued that it is the applicant's contention that no reasonable tribunal would have elevated a discretionary provision of the Regulations to a mandatory requirement, particularly where the procuring entity had emphasised the position that the works were incapable of being unbundled.

110. Lastly, the applicant's counsel submitted that the Respondent lacked jurisdiction to direct the applicant to unbundle the Project against the express provisions of the tender documents and the legislation. He placed reliance on *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another* [36] and argued that the unbundling was contrary to Section 54 of the Act, and expressly prohibited under section 176 of the Act.

111. Mr. Odhiambo did not directly address the above issue. His position expressed at the start of his written submissions is that the applicant's motion is essentially a review of the merits of the impugned decision which is outside the province of judicial review. He cited *Republic v Public Procurement Administrative Review Board & another Ex parte Gibb Africa Ltd & Another* [37] which citing authorities emphasized the grounds for judicial review. He also cited *Pastoli v Kabale District Local Government Council and Others* [38] which citing *Council of Civil Unions v Minister for the Civil Service* [39] and *An Application by Bukoba Gymkhana Club* [40] which laid down the grounds for judicial review as illegality, irrationality and procedural impropriety.

112. The golden thread running through the main applicant's argument and the counter-argument concerns the lawfulness of the procurement process. At the heart of the dispute lies the perennial issue of procurement of goods and services by a public entity. Accordingly, it is worth paying regard to the legal framework and legislative prescripts that govern state or public entities when entering into contracts of goods and services.

113. It is common cause that the applicant is a public entity as contemplated in Article 227(1) and it is bound by the principles in section 3 of the Act. Like all other public entities, it is duty-bound to discharge all its duties and functions in accordance with the law. Its conduct should be beyond reproach and is expected to measure up to its policy and legislative prescripts that concern the procurement of goods and services by public entities.

114. To appreciate the issues at hand, I deem it appropriate to consider the broad principles that underlie the importance of lawful conduct on the part of public statutory bodies when discharging their public duties. In that regard, a brief survey of the applicable constitutional and legislative principles underscoring the importance of a transparent and open public tender process is merited. As was held in *Head of Department, Department of Education, Free State Province v Welkom High School* [41] the rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.

115. The foregoing principles are premised on the supremacy of the Constitution and the rule of law. The principle of legality is an aspect of the rule of law and the exercise of public power is only legitimate where lawful. The principle of legality requires that the exercise of public power must be rationally related to the purpose for which the power was given. This lies at the heart of the rationality test. Our courts have consistently held that rationality is a minimum requirement applicable to the exercise of public power in that decisions must be rationally related to the purpose for which the power is given otherwise they are in effect arbitrary and inconsistent with the requirement of rationality. The rational connection means that objectively viewed, a link is required between the means adopted by the person exercising the power and the end sought to be achieved.

116. The test therefore in relation to rationality requirements is twofold, being, first, that the decision-maker must act within the law and in a manner consistent with the Constitution, untreated not to misconstrue the nature of his or her powers and, second, that the decision must be rationally related to the purpose for which the power was conferred. This is because if it is not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law.

117. It is with this in mind that it must be remembered that Article 227 is the source of the powers and function of a government tender board. It lays down that an organ of state in any of the three spheres of government, if authorized by law, may contract for goods and services on behalf of the government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in the FAA Act and the basic values governing public administration.

118. The Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of a tender to a successful tenderer. Article 227 requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be 'fair, equitable, transparent, competitive and cost-effective.

119. To achieve the constitutional imperative in relation to procurement, various pieces of national legislation were enacted among them the *Public Procurement and Asset Disposal Act (the Act)*, the *Public Finance Management Act* and the FAA Act. The object of the various pieces of legislation is to give effect to the constitutional provisions in securing transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which it applies. Further, the import of the requirements found in Article 227 has also been recognized by the English Court of Appeal in *R (on the application of the Law Society) v Legal Services Commission; Dexter Montague & Partners (a firm) v Legal Services Commission* [42] which stressed the requirements of impartiality and the promotion of a "level playing field enabling all tenderers to know in advance on what criteria their tenders will be judged."

120. Froneman J in *Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd & Others* [43] affirmed the importance of transparency in tender processes. In the same vein, the learned academic writer, Professor Bolton has expressed the view that:- "Transparent procurement procedures encourage good decision making and, to a large extent, serve to combat corrupt procurement practices. It is a well-

known phenomenon that corruption thrives in the dark. Transparency also fosters competition because it allows interested parties to participate in the procurement process. Competition, in turn, to a large extent ensures the attainment of value for money.”^[44]

121. The learned academic writer, Professor Bolton further puts the point thus in her work on government procurement:-

“One of the primary reasons for the express inclusion of the five principles in section 217(1) of the Constitution is to safeguard the integrity of the government procurement process. The inclusion of the principles, in addition to ensuring the prudent use of public resources, is also aimed at preventing corruption.”^[45]

122. In *Choice Decisions v MEC, Department of Development, Planning and Local Government, Gauteng (no 2)*^[46] it was held that:-

"It is in the public interest that officials comply diligently with regulations and other directives, especially when those directives have in mind the attainment of transparency and accountability and the prevention of corrupt practices."

123. Compliance with the requirements of a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required and it is not open to a state entity to simply disregard these at a whim as, to hold otherwise, would undermine the demands of equal treatment, transparency and efficiency under the Constitution.

124. It is now necessary to consider applicant has established existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that any of the grounds for review exist. The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved. My reading of Article 227(2) and the various provisions of the Act implicated discussed above leave me with no doubt that preference is a constitutional and statutory requirement, thus an important part of the Request for Proposals. This important overall purpose of the Request for Proposals must be kept in mind when assessing whether any non-compliance with its particular provisions was material.

125. *First*, tenderers have a right to a fair tender process, irrespective of whether they are ultimately awarded the tender. *Second*, the subject matter of the review is the decision which upheld the Request for Review, hence the question is whether the Respondent's finding on the issue under consideration is tainted with illegality. *Third*, any irregularities in the process, may affect the fairness of the outcome.

126. The Respondent examined the provisions of Regulations **8** and **14** of the 2011 Regulations and concluded that local citizens and contractors can benefit from a margin of preference if they meet the threshold set out in the said Regulations. The Respondent also cited Regulations **15** and **16** of the 2011 Regulations and concluded that the Regulations provide for preference schemes applicable to local citizen contractors where a procuring entity applies international competitive bidding procedure in order to achieve the guiding principles under section **3 (i) & (j)** of the Act. It concluded that Clause **33** of Section **1**, Instruction to Bidders as read with ITB **33.1** of Section **11**, Bid Data Sheet and Clause **2** of section **111** and the addendum dated **24th** December 2019 offend Article **27, 227 (2) (a) and (b)** of the Constitution, section **3 (a) (b) (i) (j), 86 (2), 89 (f), 155, 157 (8) (9)** of the Act and Regulation **28** of the 2006 Regulation and the 2011 & 2013 Regulations.

127. I have carefully studied the above provisions and the impugned clauses of the Tender document. It is my finding that the aforesaid clauses of the tender document cannot be read in a manner that is consistent with the above provisions. I find the Respondent correctly evaluated and interpreted the said legal provisions correctly and arrived at the correct finding. It is my finding that the Respondent's decision on the issue under consideration is not tainted will illegality.

128. The applicant's counsel cited section 54 (1) of the Act and argued that Regulation **19(1)** is discretionary. This argument is attractive. However, as repeatedly stated above, the starting point is the principles in Article **227** and the Act which prevail over the Regulations.

129. On the argument sustained by the applicant's counsel on the tender value, it is my view that this argument goes to the merit of the decision, which is outside the scope of judicial review province. On the issue of the cash flow requirement, I note that the Respondent construed and applied the provisions of section **60 (1) & 89 (d)** of the Act and correctly concluded that the Procuring Entity ought to have considered the aforesaid provisions.

130. Addressing the issue of unbundling, the Respondent considered Regulation **6** of the 2013 Regulations and Regulation **19 (1)** of the 2011 and concluded that the Procuring Entity contravened Article **27, 227 (2) (a) and (b)** of the Constitution, section **3 (a) (b) (i) (j), 86 (2), 89 (f), 155, 157 (8) (9)** of the Act and Regulation **28** of the 2006 Regulation and Regulation **19 (1)** of the 2011 Regulations & Regulation **6** of the 2013 Regulations. The legislative authority to pursue preferences and reservations for the targeted entrepreneurs already exists in the Constitution, the enabling statute and the Regulations. Preferential procurement policies can be pursued as long as those policies do not discriminate against foreign owned firms and are otherwise permitted by national legislation.

131. Save for submitting that the Respondent lacked jurisdiction to direct the applicant to unbundle the Project against the express provisions of the tender documents and the legislation and advancing the argument that the unbundling was contrary to Section **54** of Act and expressly prohibited under section **176** of the Act, the applicant never provided any detail why the decision offends the said sections. Section **54(1)** provides that no procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed. Parliament in its wisdom provided an exception. A holistic reading of the Act shows that sections **70 (e) (vi) & 74 (1) (g), 88(f), 94(4) (f), 114 (f), 155(1), 157(3) (4) (5) (8) (15) (16) (17), 158(1) and 93(4) & (f)** of the Act expressly provide for preferences and reservation. I find that the impugned decision is supported by the said provisions.

132. Section **176** of the Act cited by the applicant's counsel is totally inapplicable in the instant case. The section deals with prohibited offences. None of the offences listed in section **176 (1) (a) to (m)** has been alleged or proved nor was any of the said offences the subject of discussion before the Respondent or even before this court. The said argument collapses.

133. Lastly, the applicant's counsel submitted that it was unlawful, unreasonable and beyond the jurisdiction of the Respondent to direct a procurement entity to issue a tender document in breach of the terms of the Act and the Bilateral Agreement with an external entity, when the Act and the Regulations did not require it to do so, and to further provide the timeline within which the process ought to be completed. He argued that the Board's directive that the applicant be guided by the Public Procurement Regulatory Authority in preparing a fresh tender document is contrary to the Bilateral Agreement which requires the applicant to adopt the AFD Guidelines as part of the tender process as much as possible.

134. He also argued that the Board provided unreasonable timelines within which to comply with said directive which would cause a breach of the Bilateral Agreement under Clause **13.1(n)**. He submitted that the Board had no jurisdiction to guide the manner in which the tender was to be floated. To support this position he cited *Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & another* (Supra) for the proposition that the Board ought not to step into the shoes of the Procuring Entity. It was his submission that the Board acted *ultra vires* in dictating how the procuring entity is to perform various obligations which were clearly outside the scope of the tender documents, the law and pertinent regulations. (Citing *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & another* [47]).

135. In the impugned decision, the Respondent issued the following orders:-

- a) *The Procuring Entity's Bidding Document for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD), Project IPC No: KP1/6A.1/PT issued on 20th August 2019 be and is hereby nullified and set aside.*
- b) *The Procuring Entity I hereby directed to prepare a fresh Bidding Document for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD) within thirty (30) days from the date of thi decision taking into consideration the Board's findings in this case.*
- c) *The Procuring Entity I hereby directed to re-tender for the Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD) within forty five (45) days from the date of this decision.*
- d) *Each party shall bear it own costs in the Request for Review.*

136. A useful starting point for a discussion of jurisdictional error is the following proposition:- "any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions." [48] When the legislature grants authority to an administrative decision-maker, the authority will perforce be limited; the decision-maker must act within the jurisdiction it has been granted.

137. As Lord Pearce put it, administrative decision-makers must "confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament." [49] When courts intervene to keep an administrative decision-maker within boundaries established by legislation, this represents "simply an enforcement of Parliament's mandate to the tribunal." [50] That the "very effectiveness" of statute should be ensured by judicial review [51] is underpinned by rule-of-law concerns: "By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law." [52]

138. A statute might, however, grant significant decisional authority to an administrative decision-maker, which a court paying due respect to the scope of the authority would be obliged to take into account:-

"The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more... [In such a case] it is an erroneous application of the [jurisdictional error] formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends..." [53]

139. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. [54] In this regard, section 173 of the Act provides for the powers of the Review Board. It provides that upon completing a review, the Review Board may do any of the following:-

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

140. The above section has been the subject of construction in numerous cases in this country. Discussing a similar provisions in repealed *The Public Procurement and Disposal Act*,^[55] the Court of Appeal in *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd.*^[56]

“... It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

141. A reading of the Respondent’s powers conferred by section 173 of the Act and the order reproduced above leave me with no doubt that the Respondent did not exceed its jurisdiction by granting the said orders. Judicial review is about setting the boundaries for exercise of statutory power. It is about ensuring public bodies obey the law and act within their prescribed powers. There is no prove before me that the Respondent overstepped its jurisdictional boundaries by issuing the above orders. An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations^[57]and intervene only when an applicant has demonstrated grounds for review.

Conclusion

142. A public procurement process must be construed against the background of the system envisaged by Article 227(1) (2) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective." The impugned decision has not been shown to be legally frail on any of the known grounds for judicial review. Judicial Review is concerned with testing the legality of the administrative decisions. A decision does not ‘involve’ an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.^[58] Simply put, subjecting the entire procurement process to the values set out in Article 227(1), I am not persuaded that the tender process can be read in a manner that is consistent with the said values and the dictates of the procurement laws and Regulations. Differently put, it is my finding that the applicant has not demonstrated that the impugned decision is tainted with illegality, irrationality or procedural impropriety or any of the known grounds for judicial review.

143. Accordingly, I dismiss the *ex parte* applicant’s Notice of Motion dated 13th February 2020 with no orders as to costs.

Signed, Dated and Delivered electronically at Nairobi this 14th day of August 2020

John M. Mativo

Judge

[1] Act No. 33 of 2015.

[2] Cap 2, Laws of Kenya.

[3] Act No. 33 of 2015.

[4] Act No. 4 of 2015.

[5] See *Minister of Health and another vs New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 95-97; *Bato Star Fishing (Pty) Ltd vs Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) paras 25-26.

[6] Act No. 18 of 2012.

[7] See *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 9.

[8] {2019} e KLR.

[9] {2018} e KLR.

[10] {2015} e KLR.

[11] {1989} e KLR.

[12] {2012} e KLR.

[13] See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227, 270–71 (1999).

[14] Ibid.

[15] Henry M. Hart, JR. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375–76 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

[16] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 13 (1998).

[17] <https://www.dictionary.com/browse/seemed>.

[18] <https://www.lexico.com/definition/clarification>

[19] <https://www.yourdictionary.com/clarification>

[20] <https://www.dictionary.com/browse/clarification>

[21] {2015} eKLR.

[22] Act No. 23 of 2015.

[23] Cap 2, Laws of Kenya.

[24] {2017} e KLR.

[25] **{2008} e KLR.**

[26] {2017} e KLR.

[27] Nai HC Millimani Commercial Courts Misc. JR Application No's 402 & 405 (Consolidated) of 2016.

[28] Petition No 58 of 2014 {2014} e KLR.

[29] NAI HC Constitutional and Judicial Review Misc. Application No. 540 of 2008.

[30] Nai Misc. Appl. No 334 of 2015.

[31]{2016} e KLR.

[32] {2007} e KLR.

[33] AIR CAL 102 (2001, 2 CALLT 417 HC, 2001 (2) CHN 300).

[34] {2004} e KLR.

[35] Cap 80, Laws of Kenya.

[36] {2016} e KLR.

[37] {2012} e KLR.

[38] {2008} 2 EA 300.

[39] {1985} A C 2

[40] {1963} EA 478 at 479.

[41] [2014 \(2\) SA 228](#) (CC).

[42] [\[2008\] All ER 148](#) (CA).

[43] [\[2007\] JOL 20448](#) (SE) at paras 29-30.

[44] Bolton, *The Law of Government Procurement in South Africa*, 2007, page 54.

[45] Bolton, *The Law of Government Procurement in South Africa* 2007, pg 57;

[46] [2003 6 SA 308](#) (W), at para 12.

[47] {2016} e KLR.

[48] *Union des employés de service, local 298 v Bibeault* [1988] 2 SCR 1048 at 1086, per Beetz.

[49] {1969} 2 A.C. 147, at p. 194.

[50] {1969} 2 A.C. 147, at p. 196. See similarly *R. v Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338, at p. 346.

[51] *R. (Cart) v Upper Tribunal*, [2009] EWHC 3052, [2010] 1 All E.R. 908, at para. 38, per Laws L.J.

[52] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 29.

[53] *R v Income Tax Special Commissioners, ex parte Cape Copper Mining Company* (1888) 21 QBD 313, at pp. 319-320, per Lord Esher MR. See e.g. *Tithe Redemption Commission v Wynne* {1943} KB 756.

[54] See *R v Hillingdon London Borough Council, ex parte Puhlhofer*, {1986} AC 484, at p. 518, per Lord Brightman.

[55] Act [No. 3 of 2005](#).

[56]{2012} eKLR.

[57] See *Gauteng Gambling Board v Silverstar Development & others* 2005 (4) SA 67 (SCA) para 29, Heher JA.

[58] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 per Mason CJ. See also comments by Toohey and Gaudron JJ at 384.