



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION NO. 60 OF 2020**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....1<sup>ST</sup> RESPONDENT**

**ACCOUNTING OFFICER,**

**KENYA BUREAU OF STANDARDS.....2<sup>ND</sup> RESPONDENT**

**AND**

**PREMIER VERIFICATION QUALITY**

**SERVICES (PVQS) LIMITED.....INTERESTED PARTY**

**AND**

**TUV AUSTRIA TURK.....EX PARTE APPLICANT**

**JUDGMENT**

**The Parties**

1. The *ex parte* applicant, **TUV Austria Turk** is a limited liability company incorporated in Istanbul, Turkey.
2. The first Respondent, the Public Procurement Administrative Review Board, (herein after referred to as the Board) is a central independent procurement appeals review board established under section 27 of the Public Procurement and Asset Disposal Act<sup>[1]</sup> (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 second Respondent (herein after referred to as the Procuring Entity) is the accounting officer, **Kenya Bureau of Standards (KBS)**. **KEBS** is a body corporate with perpetual succession and a common seal capable of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of property, movable or immovable; and (c) entering into contracts and doing or performing all such other things or acts for the proper performance of its functions under the Act which may lawfully be done or performed by a body corporate. It is established under section 3 of the Standard Act.<sup>[2]</sup>
4. The Interested Party, **Premier Verification Quality Services (PVQS) Limited** is a limited liability company offering third party quality inspection and verification services for consumer goods. Its office controlling all its operations is in Dubai with satellite offices Located in Guangzhou, Mumbai, and Istanbul.

**Factual Matrix**

5. My reading of the respective parties position is that the factual matrix which triggered this dispute is essentially common ground or

uncontroverted. For example, it is admitted that on 3<sup>rd</sup> December 2019, the Procuring Entity advertised International Tender No. **KEBS/T009/2019-2021** for Enlargement of Provision of Pre-Export Verification of Conformity (PVoC) to Standard Services. It is undisputed that the applicant was among the bidders and that the tender closed on 7<sup>th</sup> January 2020. Its common ground that the Bids were opened in the presence of all the bidders' representatives.

6. It is agreed that the Tender attracted three Bidders, namely; **(a)** Premier Verification Quality Services Dubai; **(b)** TUV Austria Turk and **(c)** TUV Rheinland. It's admitted that the applicant was on or about 13<sup>th</sup> January 2020 invited through its agent, **Suzanne Mani** to participate in the financial proposal opening on 14<sup>th</sup> January 2020 when she was served with a Notification of Regret dated 13<sup>th</sup> January 2020 indicating that its tender was substantially non-responsive to the terms set for the Preliminary Evaluation.

7. It is admitted that the applicant challenged the Letter of Notification before the Board for being devoid of reasons in Request for Review No. **14** of 2020, *TUV Austria Turk v The Accounting Officer, Kenya Bureau of Standards* on the said ground. Other grounds cited are:- (i) failure to be notified personally on all Addenda issued amending the subject Tender; (ii) failure to announce the form and presence/ absence of Tender security at the Tender Opening; and, (iii) unfair and unprocedural rejection of its Tender at the Preliminary stage.

8. It is common ground that the Board allowed the Request for Review in as far as the Letter of Notification was concerned on grounds that the letter failed to meet the threshold of Section **87 (3)** of the Act as read with Article **47** of the Constitution. It Board ordered :-

i. ***That*** the Procuring Entity is hereby directed to issue a Letter of Notification of unsuccessful bid to the Applicant in accordance with Section 87 (3) of the Act, read together with Article 47 of the Constitution, within seven (7) days from the date of receipt of the signed decision of the Board, taking into consideration the Board's finding in this case;

ii. Further to Order No. 2 above, the Procuring Entity is at liberty to proceed with the procurement process to its logical conclusion.

iii. Each party shall bear its own costs in the Request for Review.

9. The point of divergence is that the applicant states that during the hearing the Board withheld evidence and only provided the evidence to the Board yet the evidence was non-confidential in nature which the applicant was entitled to be provided with. It states that the reasons as to the disqualification of its tender were only adduced by the Procuring Entity during the hearing, thus denying it sufficient opportunity to address the allegations. It also states that the Board's conduct offends the intent and purpose of the Act, the *Fair Administration Act*<sup>[3]</sup> (herein after referred to as the FAA Act) and the spirit and letter of the Constitution. It states that the hearing of the Request for Review was conducted in a manner that was secretive and clandestine, thus effectively compromising its right to a fair trial. It also states that in arriving at the decision, the Board acted *ultra vires* Articles **10, 47, 50 (2) (j)** and **(k)** of the Constitution, as read alongside Section **4 (3) (g)** of the FAA Act because it failed to afford the applicant a transparent, reasonable, and procedurally fair trial. Furthermore, the applicant states that it was never notified of addenda amending the terms of the tender, and that the Procuring Entity's action is expressly illegal and an affront to its statutory mandate.

10. The applicant also states that the failure to notify it about the addenda was a ground for review before the Board, but it unreasonably determined the said ground on the basis of oral testimony raised in the course of the hearing. The applicant states that the Procuring Entity during the trial through ambush revealed the identity of the e-mail it alleged to have notified the applicant of the addenda as [suziemahi@gmail.com](mailto:suziemahi@gmail.com). It states that the Board unreasonably admitted the same as sufficient evidence of an electronic message forwarded by the originator, through an electronic server, to the addressee. It claims that in absence of further evidence the decision arrived at by the Board cannot be said to have been rationally objective.

11. It states that in arriving at the impugned decision, the Board acted *ultra vires* Article **227** of the Constitution as read with the principles in Section **3** of the Act, in that it sanctioned a system of procurement that was neither fair, equitable, nor transparent. It also states that the Board improperly exercised its discretion by failing to take into account relevant considerations, thereby arriving at a decision on the basis of insufficient evidence. Additionally, it states that the Board improperly exercised its discretion by erroneously interpreting Section **78 (6)** of the Act by ignoring the double requirement of announcing the form and presence of tender security provided by tenderers and recording in the tender opening minutes the presence and form of tender security provided. It states that the Procuring Entity relied only on the presence of tender opening minutes as sufficient evidence as to the pronouncement required under the Act, and, that, the Procuring Entity never produced any evidence as to whether the Tender security was announced during the tender opening. The applicant further states that the Board's decision was materially influenced by an error of law in interpretation section **78 (6)** of the Act by equating the pronouncement and/or announcement of Tender security as synonymous to recording of the presence of the tender security in the tender opening register.

### **The Reliefs sought**

12. As a consequence of the foregoing, the *ex parte* applicant seeks the following orders:-

a. An Order of **PROHIBITION** to prohibit and/ or restrain the 2<sup>nd</sup> Respondent from awarding the Tender and/ or signing any Contract with respect to Tender No.: **KEBS/ T009/ 2019- 2021** International Tender for Enlargement of Provision of Pre- export Verification of Conformity (PVOC) to Standards Services.

b. An Order of **MANDAMUS** do issue, directing the 2<sup>nd</sup> Respondent, to terminate the current procurement process with respect to Tender No.: **KEBS/ T009/ 2019- 2021** International Tender for Enlargement of Provision of Pre- export Verification of Conformity (PVOC) to Standards Services, and commence a fresh and fair procurement process.

c. The remedy of a **DECLARATION OF RIGHTS** do issue, declaring the proceedings in Request for Review Application Number 14 of 2020 Between TUV Austria Turk and Accounting Officer, Kenya Bureau of Standards, were conducted in a manner *ultra vires*

Articles 10, 47, 50, and 227 of the Constitution, and the Guiding principles of Public Procurement and Asset Disposal under Section 3 of the Public Procurement and Asset Disposal Act, No. 33 of 2015.

d. Such Further Orders, and/ or incidental Orders or directions as the Honourable Court shall deem just and expedient; and

e. Costs for these Judicial Review proceedings.

### **The first Respondent's Replying affidavit**

13. Mr. Hennock Kirungu, the Board's Secretary swore the Replying affidavit dated 9<sup>th</sup> June 2020. He deposed that upon receiving the Request for Review, vide a letter dated 28<sup>th</sup> January 2020, the Board directed that the Procuring Entity be notified of the pending review as required by section 168 of the Act together with other bidders who participated in the subject tender, and in the said letter he directed the Procuring Entity to submit all confidential documents pertaining to the subject tender to the Board as required by section 67 (3) (e) of the Act including a list and contacts of all bidders who participated in the tender.

14. He deposed that upon receiving the said documents, he notified all the bidders of the existence of the Request for Review in a letter dated 4<sup>th</sup> January 2020 attaching the Request for Review and further informed all the bidders including the applicant herein and the Procuring Entity that the hearing was scheduled for 12<sup>th</sup> February 2020 at 12:30pm. He deposed that the Board notified all the parties that the Request for Review had a life span of 21 days pursuant to section 171 (1) of the act which would lapse on 18<sup>th</sup> February 2020 and that hearings were already scheduled on 13<sup>th</sup> & 14<sup>th</sup> February 2020 meaning that the only day remaining for the Request for Review to be heard and determined was 18<sup>th</sup> February 2020. He deposed that to afford the Procuring Entity an opportunity to respond to issues raised by M/ Niavana Agencies who had just been enjoined into the case, with the parties' concurrence the Board adjourned the matter to 18<sup>th</sup> February 2020 when hearing proceeded.

15. Mr. Kirungu deposed that the Board in its ruling of 18<sup>th</sup> February 2020 allowed the Request for Review in so far as the letter of notification of unsuccessful bid was concerned for failing to meet the threshold of section 87 (3) of the Act as read with Article 47 of the Constitution and it struck out the interested Party's Memorandum of response and directed the Procuring Entity to issue a letter of notification to the applicant in accordance with section 87(3) of the Act and Article 47 of the Constitution. It also directed each party to bear its costs for the review.

16. Mr. Kirungu deposed that on issue whether the Procuring Entity notified the applicant of all addenda applicable to the subject tender, the Board being in possession of the confidential file submitted to it pursuant to section 67(3) (e) of the Act observed that the applicant obtained the Tender Document from the Procuring Entity and thereafter indicated its address as [suziemahi@gmail.com](mailto:suziemahi@gmail.com) which was corroborated by an attendance lists for the Tender Opening Register of 7<sup>th</sup> January 2020. He averred that the Board found that the applicant's representative failed to indicate its e-mail address in a legible manner which omission cannot be visited on the Procuring Entity.

17. Mr. Kirungu averred that the Board observed that pursuant to section 78(6) of the Act, what is read out at the Tender Opening is reduced into writing in the Tender Opening Register and is also reflected in the Tender Opening Minutes and the documents filed together with the Procuring Entity's confidential file. He deposed that according to the Tender Opening Register it was recorded that "Bidder 2, TUV Austria did not provide security as required in the tender document's, therefore the Procuring Entity complied with section 78(6)(c) of the Act. He deposed that in accordance with clause 2.12.1 of section 11, Instructions to Tenderers, section 79 (1) & 80 of the Act, the Board found that the Tender Document had a mandatory requirement for bidders to furnish their tender security as part of their technical proposal to the Procuring Entity.

18. Mr. Kirungu averred that the Board observed that the subject tender was a two-enveloped tender (ie submission of technical proposal and financial proposal separately) and once a bidder is disqualified either after Preliminary Evaluation or after Technical Evaluation, their financial Proposal would not be considered/opened since they have not proceeded to financial Evaluation. He deposed that the applicant's own failure to comply with the tender conditions, namely its failure to submit the tender security as required in the Technical Proposal, which was a mandatory requirement rendered its bid non-responsive. He also deposed that the applicant never sought clarification from the Procuring Entity on the manner in which it ought to have submitted the tender security.

19. Reacting to the allegation that the applicant was never afforded a fair hearing, he deposed that the applicant was represented by an advocate who had ample time to prosecute his case and make submissions and that he never applied for a summary of the evaluation and comparison of tender under section 67 (4) of the Act as read with section 68 (2) (d) (ii) of the Act if at all it required additional information falling under section 67 (3) (e) of the Act. He averred that the Board observed the rules on natural justice and that it acted lawfully, fairly and reasonably in exercise of its powers under sections 28 and 173 of the Act.

### **The second Respondent's Replying Affidavit**

20. **Bernard Njiraini** the Procuring Entity's Accounting Officer in his Replying affidavit dated 5<sup>th</sup> June 2020 averred that the application is based on an incorrect and misleading narrative and deliberate misrepresentation and omission of the true facts. He averred that by an advertisement in the Daily Newspapers, on KEBS website and My Gov. [www.mygov.go.ke](http://www.mygov.go.ke), made on 3<sup>rd</sup> December 2019, the Procuring Entity invited bids for the procurement of **Enlargement of Provision of Pre-export Verification of Conformity (PVO) to Standard Services** as specified in the tender document. He deposed that the tender closing date was scheduled 24<sup>th</sup> December 2019, and it was opened held on 7<sup>th</sup> January 2020 at 12.00 pm by the Tender Opening Committee in the presence of tenderers and/or their representatives, and it was established that three (3) companies had submitted bids, namely, TUV Reinland; TUV Austria TURK and Premier Verification quality services LC.

21. Mr. Njiraini deposed that since it was a two envelope tender, the Tender Opening Committee only opened the Technical tender envelope in compliance with Regulation 45(1) (b) of the *Public Procurement and Asset Disposal Regulations 2006*, (herein after referred to as the Regulations) and after reading out the applicant's Tender, it was observed that it had not provided a tender security as required under Clause 2.7 as read together with Clause 2.12 of the Tender Document.

22. He averred that the Tender Evaluation Committee met from 9<sup>th</sup> to 12<sup>th</sup> January 2020 and undertook a Preliminary Evaluation as required under the Regulations and Clause 2.20 of the Tender Document. He deposed that the Tender Evaluation Committee established that the applicant had failed to meet all the preliminary requirements set out in Regulation 47(1) and in the Tender Document. In particular, he deposed that the applicant had failed to submit all the required documents and information as required under Clause 2.7 of the Tender Document, Clause 2.1 as read together with Clause 2.11.2 of the Appendix to the Instructions to Tenderers hence its bid was considered non-responsive pursuant to the provisions of section 79 of the Act as read together with Regulation 48. He deposed that by a letter dated 13<sup>th</sup> January, the Procuring Entity notified the applicant that it did not meet the preliminary evaluation requirements specified in the evaluation criteria of the tender document and that the financial proposals would be opened on 14<sup>th</sup> January 2020 at 8:30 am and invited the applicant to attend and witness the opening.

23. Mr. Njiraini deposed that the applicant lodged a Request for Review on 28<sup>th</sup> January 2020, being Application No. 14 of 2020 challenging Board's decision on the following grounds: - (a) that the Procuring Entity failed to provide reasons for disqualification in the notification letter; (b) that it failed to notify the applicant of all the addenda; (c) that it failed to announce the form and presence/absence of tender security at tender opening for all tenderers; (d) it unfairly and unprocedurally rejected the applicant's Tender at Preliminary Stage. He deposed that after considering all the issues, the Board concluded that:-

*a) That it had jurisdiction to entertain the Request for Review as the same was filed within the statutory period of 14 days under section 167(1) of the Act.*

*b) That the notification letter of disqualification issued to the ex- Parte applicant by the 2<sup>nd</sup> Respondent failed to meet the threshold of section 87(3) of the Act, read together with Article 47 of the Constitution;*

*c) The 2<sup>nd</sup> Respondent had complied with section 78(6)(c) of the Act;*

*d) The 2<sup>nd</sup> Respondent rightfully found the ex parte applicant's bid non-responsive;*

*e) The allegations that 2<sup>nd</sup> Respondent had failed to notify the ex- Parte applicant of all addenda had not been substantiated to the satisfaction of the 1<sup>st</sup> Respondent; and*

*f) The 2<sup>nd</sup> Respondent was directed to issue a letter of notification of unsuccessful bid to the Ex- Parte Applicant section 87(3) of the Act, read together with Article 47.*

24. Mr. Njiraini deposed that by a letter dated 21<sup>st</sup> February 2020 forwarded to the applicant by an e-mail on 24<sup>th</sup> March, 2020 and their Advocates on record, the Procuring Entity notified the applicant that its bid was unsuccessful and set out reasons why the bid was disqualified for non-responsiveness in accordance with section 87(3) of the Act read together with Article 47 of the Constitution. He averred that the applicant did not challenge the reasons given for disqualification of its bid for non-responsiveness at the Preliminary Stage as provided in the letter of notification of unsuccessful bid dated 21<sup>st</sup> February 2020.

25. Mr. Njiraini deposed that all the documents, (including tender opening minutes indicating the developments during tender opening), submitted to the Board by the Procuring Entity were confidential in nature as provided under Section 67 of the Act. He also averred that one of the principles guiding procurement is non-disclosure of information relating to the procurement and therefore the issue of confidentiality militates against non-disclosure in procurement matters in general. Additionally, he deposed that without prejudice to the foregoing, in the event the applicant desired the confidential information, it was at liberty to apply for a summary of the said information under sections 67(3) and (4) of the Act, but it never requested for the said information.

26. He also deposed that the applicant's main complaint concerning fair hearing is based on the allegation that it was not given an opportunity to respond to the veracity of the reasons adduced by the Procuring Entity, yet it does not identify, with specificity, the alleged reasons.

27. He averred that the applicant is not candid to the court in alleging that it was not given a transparent, reasonable and fair trial because the Procuring Entity's Notice of Preliminary Objection and Memorandum of Response were served upon the applicant prior to the hearing; and that the its reasons for opposing the Request for Review were set out in Notice of Preliminary Objection and Memorandum of Response. He deposed that the applicant was aware that all the documents that the Procuring Entity intended to rely on were confidential documents yet it never raised the issue of not having been supplied with any documents prior to commencement of the hearing. He averred that the applicant was represented by an advocate who participated in the proceedings and during the hearing it was given a chance to present its case. Further, he deposed that the Board found in its favour by allowing the Request for Review in so far as the letter of notification failed to meet the threshold of section 87(3) of the Act, read together with Article 47 of the Constitution. He deposed that the applicant has not adduced any iota of evidence to establish that the Request for Review was conducted in a manner that was shrouded in secrecy or that the Procuring Entity consistently withheld crucial information that was revealed only during oral submissions.

28. He averred that the applicant's allegations that the Procuring Entity disclosed the identity of the e-mail address that it relied on to notify the applicant as [suziemahi@gmail.com](mailto:suziemahi@gmail.com) in the course of the hearing and that the Board unreasonably upheld the Procuring Entity's submission that addenda were notified using the said e-mail is untrue because the applicant received the 2<sup>nd</sup> Respondent's Memorandum of

Response on 7<sup>th</sup> February 2020 stating *inter alia* that copies of the e-mails sent to the applicant through its representatives are part of the documents submitted by the Respondent to the Board for consideration. He deposed that in their reply they stated that copies of those e-mails sending out addenda to parties, together with the minutes of the tender opening indicating the developments during tender opening including the reading out loud of the tender security, are all confidential documents as defined under Section 67 of the Act

29. Mr. Njiraini deposed that the applicant cannot complain that it was not afforded an opportunity to be heard because it was afforded an opportunity by law to request for a summary of the confidential documents but it did not do so, it was granted an opportunity to make submissions on the e-mail address submitted by its representative, and it did not object to the Procuring Entity's reference to copies of e-mails submitted to the Board. He deposed that the allegations relating to the e-mail address submitted to the Board amount to an appeal disguised as a judicial review which deals with the decision-making process. Further, he deposed that the applicant did not set out the alleged relevant considerations which were ignored. Mr. Njiraini deposed that the applicant has failed to produce evidence to show that the decision was influenced by an error of law in the interpretation of section 78(6) of the Act and in any event it amounts to inviting the court to engage in a merit review which is an appellate function. He averred that the applicant has not established the requisite tests to persuade this court to grant the orders sought and that the application is an abuse of court process aimed at delaying and/or frustrating the completion of the procurement process.

### **The Interested Party's Replying Affidavit**

30. Mr. Abdiwali Ali Mohamed the Interested Party's Manager swore the Replying Affidavit dated 28<sup>th</sup> May 2020. He deposed that the application lacks merit and is otherwise frivolous. He deposed that the applicant had conceded before the Board that it had enclosed its tender security in its financial proposal rather than in the technical proposal as expressly required in the tender document so that it could not be evaluated at the preliminary evaluation stage as other bids, and in accordance with the criteria provided. He averred that the applicant is seeking that it be given preferential treatment by having its tender security evaluated at the financial proposal stage, which is discriminatory and inconsistent with the requirement that a bid be evaluated according to the bid document and the law. He deposed that the applicant failed to provide mandatory documents that were set out in paragraph 26 of the Procuring Entity's memorandum of response at the Review Board.

31. Responding to the contention that the applicant was not given a transparent, reasonable and procedurally fair hearing before the Board, Mr. Mohamed deposed that the applicant was at all times represented by an advocate who actively participated in the proceedings and that the proceedings were fair, equitable and transparent. He also deposed that the applicant did not provide tender security in its technical proposal nor did it raise any objections at the time of opening the tender. He averred that the bids were evaluated against the criteria provided in the tender document.

32. Mr. Mohamed averred that it is not true that the Board did not take into account relevant considerations and in any event no such details were provided. He deposed that there was no error of law and that the applicant is seeking to annul the subject tender by any means because the same tender is subject to investigation by the Public Procurement Regulatory Authority which have been halted by the court in Judicial Review Application No. 96 of 2020 pending hearing and it is also the subject of **HC Constitutional Petition No. 34 of 2020**.

### **Mode of hearing**

33. This case was canvassed by way of affidavit evidence filed and written submissions. However, the counsel for the Board did not file submissions despite clear directions by this court made not less than four time prescribing time frames for parties to file. Hence, I proceeded to write the judgment the said failure notwithstanding.

### **Determination**

34. A germane ground upon which the applicant's Request for Review collapsed before the Board is because its tender was found to be non-responsive for failing to comply with mandatory bid terms. It turned out that the applicant failed to provide tender security which the Board held was a mandatory requirement.

35. A reading of the proceedings before the Board show that the applicant's counsel admitted before the Board that the applicant provided its tender security in its financial envelope. It's on record that that the applicant's representative informed the Procuring Entity that the tender security was in the applicant's financial envelope. The applicant's counsel's argument before this court dwelt on alleged failure by the Procuring Entity to provide the applicant with information and breach of fair hearing. He argued that the Tender Opening Minutes, or a summary thereof were only availed to the Board thereby influencing its decision. The bulk his argument was geared towards persuading the court that the proceeding were unfair as opposed to whether the applicant's tender was responsive. Before addressing the question whether the proceedings were unfair, I will first address the question of responsiveness. This is because barring the alleged unfairness, it important to satisfy ourselves whether the tender was responsive in the first place because if the tender was non-responsive, all the other grounds even if successful will become superfluous. Put differently, even if I were to be persuaded that the proceedings were unfair, such a finding, attractive as it may be cannot breathe life into an unresponsive tender.

36. Despite the fact that the question of non-responsiveness of the applicant's tender is the cog upon which the applicant's bid turns, the applicant's counsel gave it a wide berth. Similarly, the second Respondent's counsel did not address the issue at all. However, this pertinent issue did not escape the attention of the Interested Party's counsel. In a subtle but blunt statement, he argued that the applicant's bid cannot be salvaged even if it is evaluated again because before the Board the applicant conceded that it had failed to provide mandatory documents to prove its bid eligibility. He argued that the applicant admitted enclosing its tender security in its financial proposal rather than in its technical proposal as required in the tender document.

37. The administration of justice is highly contextual and fact sensitive. Consequently, what may amount to a fair-minded exclusion of a bidder on grounds of non-responsiveness in one context may not be regarded as fair in a different context. Judicial utterances on the issue of bid responsiveness must therefore be understood within the factual matrix of each decided case and the governing statute. In this regard, section 79 of the Act provides:-

## 79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

38. A proper construction of the above provision shows that the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.<sup>[4]</sup> Bid documents may provide for provision of security. Bid formalities usually require timely submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities, which bidders often overlook at their peril.<sup>[5]</sup>

39. Such formalities are usually listed in bid documents as mandatory requirements – in other words, they are a *sine qua non* for further consideration in the evaluation process.<sup>[6]</sup> The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

40. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

41. Under section 79 (2) (a) (b) of the Act, the Procuring Entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Guidance can be borrowed from the World Bank Procurement Guidelines thus:-

*“The Borrower shall ascertain whether the bids (a) meet the eligibility requirements specified in paragraph 1.8, 1.9, and 1.10 of these Guidelines, (b) have been properly signed, (c) are accompanied by the required securities or required declaration signed as specified in paragraph 2.14 of the Guidelines, (d) are substantially responsive to the bidding documents; and (e) are otherwise generally in order. If a bid, including with regard to the required bid security, is not substantially responsive, that is, it contains material deviations from or reservations to the terms, conditions and specifications in the bidding documents, it shall not be considered further. The bidder shall neither be permitted nor invited by the Borrower to correct or withdraw material deviations or reservations once bids have been opened.”<sup>[7]</sup>(Emphasis added)*

42. A bid that contains "minor informalities" is not considered non-responsive. A minor informality or irregularity, in turn, is defined as:-

*“one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.”<sup>[8]</sup>*

43. The decision as to whether or not a particular non-conformity constitutes a minor deviation or informality under procurement law has sometimes been characterised as a discretionary one. However, the major focus must be on the prejudice to other bidders rather than on the degree of non-conformity in determining if a bid is non-responsive. A material nonconformity that gives the bidder in question no advantage or that operates to the disadvantage only of the bidder will thus not result in rejection.<sup>[9]</sup> The Evaluation Committee can in other words under limited circumstances require the waiver of an otherwise significant deviation where no competitive advantage would result.<sup>[10]</sup> However, in the case of material non-conformities, it is "immaterial whether the nonconformity is deliberate or occurs by mistake, or whether the bidder is willing to correct or modify the bid to conform to the terms of the invitation."<sup>[11]</sup>

44. In essence, a conforming / compliant / responsive tender is defined as a tender that complies with all the "material" or "substantial" aspects of the tender invitation. Procuring entities are allowed to consider tenders even if they contain minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents, or if they contain errors or oversights that can be corrected without touching on the substance of the tender.

45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case. The applicant conceded before the Board that it omitted to provide the bid security. The Review Board at page 38 observed that under clause 2.12.1, section 11, Instructions to Tenders of the Tender document, it provides: - "The tender shall furnish ... a tender security for the amount specified in Invitation to Tender." The Board observed that: - "the above provision made it mandatory for bidders to furnish their tender security as part of their technical proposal. The Board observes that the applicant having obtained the tender document and submitted a bid in response to the Procuring Entity's Invitation Notice is deemed to have read and understood the provisions in the Tender Document and cannot therefore assert that it presumed that the tender security ought to have been provided in its financial envelope."

47. The Bid requirements are very clear. It's inconceivable why the applicant who admitted having not complied with the Bid terms would expect the Board to allow its request. Allowing the Request for Review on the face of the glaring omission to provide tender security is an open invitation to the Review Board to throw out of the window the tenets of fairness provided under Article 227 by subjecting the applicant's tender to different terms other than those in the Bid documents thereby according it preferential treatment different from the one accorded to the other bidders. The tender having been found to be non-responsive, it's unclear how the applicant expects this court to breathe life into it. More perplexing is the fact aware that despite conceding before the Board that it did not provide the Bid security, and aware that its Request for Review also collapsed on this ground, the applicant carefully crafted other grounds of attack and left this highly dispositive ground intact and unchallenged, thereby exposing its soft belly, which is, even if the grounds cited in this application were to succeed, the Bid would still remain non-responsive because the Board's findings on this ground remains unchallenged.

48. Clause 2.12.1 is explicit on Tender Security. The applicant collected the bid documents and admitted that it did not provide security at the evaluation stage. To argue otherwise or to purport to shift the blame to the Board as has happened in this case is to me the height of dishonesty. The attempt to cover the obvious non-responsive Tender by citing other grounds does not help at all. I agree with the Interested Party's advocate's submissions that even if the applicant's bid were to be evaluated again, it will still be un-responsive. Differently put, even if all the other grounds cited were to succeed, that is the furthest it can go, the tender would still remain, as it does, non-responsive. On this ground alone, the applicant's case collapses

49. I now turn to the grounds cited by the applicant in support of its application. The applicant's counsel assaulted the impugned decision several fronts. First, he argued that the applicant was not afforded a fair trial that was transparent, reasonable, and procedurally fair, hence it acted, *ultra vires* Article 10, 47, 50 (2)(j) and (k) of the Constitution and section 4 (3)(g) of the FAA Act. He submitted that the proceedings were conducted in an opaque and covert manner because the evidence relied on by the procuring entity was only adduced to the Board to the exclusion of the applicant. He argued that the applicant was not given an opportunity to scrutinize and challenge the evidence. He argued that the Board allowed the Procuring Entity to produce and rely on material not previously availed to the applicant which amounted to trial by ambush hence the Board relied on uncontroverted evidence in determining the matter.

50. He submitted that the procuring entity failed to notify the applicant of all the addenda, and that it not indicate the e-mail it used to notify the applicant which was only provided orally during the hearing as [suziemahi@gmail.com](mailto:suziemahi@gmail.com). He argued that the applicant ought to have been afforded an opportunity to scrutinize the evidence to confirm or deny the alleged handwriting is that of its agent/ representative. He also submitted that no evidence of e-mails containing any of the six (6) addenda were at any point availed to the Board or to the applicant, or any e-mail addressed and sent to the e-mail which appeared as [suziemahi@gmail.com](mailto:suziemahi@gmail.com). He submitted that without evidence in proof of the hand writing or any e-mail even sent to the erroneous e-mail the applicant was left completely at the mercy of the Board upon such an opaque and covert process.

51. He submitted that the right to fair hearing is guaranteed in the proceedings before the Board under Section 67 (3) (c), (4) and Section 68 (2) (d) (iii) which stipulates that disclosure to the applicant in a Request for Review constitutes a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotation, including the evaluation criteria used as prescribed. He also submitted that the summary provided is separate and distinct to the Memorandum of Response as it forms a Record of procurement that an Accounting officer of a procuring entity is mandated to keep under Section 68 (1) of the Act, hence, having participated in the procurement proceedings, the applicant is entitled to receive the evidence beforehand so as to challenge any discrepancies resulting from the summary. To fortify his argument, he cited *Juma and Another v the Honourable Attorney General*<sup>[12]</sup> which emphasized the right of a party to be provided with the evidence against him and *Joseph Ndungu Kageri v Republic*<sup>[13]</sup> which emphasized the importance of a fair hearing provided in Article 50 of the Constitution. He argued that the said right though it appears limited to criminal trials, it also applies to civil cases. To support this argument he cited *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish and Another*<sup>[14]</sup> for the proposition that while the wording of Article 50 of the Constitution on the right to a fair Hearing *prima facie* seems to focus on criminal trials it's not lost that fair trial in civil cases enjoys the same constitutional guarantees.

52. On the argument that the applicant was not entitled to the summary of records under Section 68(2) (d)(iii) of the Act, the applicant's counsel urged the court to find that such interpretation is misconstrued and would in effect amount to a limitation on the applicant's right to fair hearing contrary to Article 25 of the Constitution. He invited the court to find that the applicant was entitled to the summary under Section 68 (2)(d)(iii) as of right in order to safeguard the right to fair hearing, as well as to further the principles of accountability and transparency.

53. He submitted that section **68(3)** of the Act only applies where a contract has been made, and that the parties listed under section **68(3)** being a person who submitted a tender, proposal, quotation, or any interested member of the public... or a person with whom the procuring entity was negotiating with, are distinctly different from an applicant seeking a review under part XV as provided under section **67(4)**. He argued that a party to Review proceedings is independently identified at section **67 (3) and (4)** which indicates Parliament's will to secure an applicant's Right to fair Hearing. He submitted that section **68 (4)** of the Act permits the accounting officer to charge a fee for making the records available to any person requesting for the same. He argued that the misconstrued interpretation by the Board and the Procuring Entity would result in an applicant in a review hearing having to pay the fees charged so as to obtain the evidence necessary to defend a party's position, which he argued is an unfair, unconstitutional, and prejudicial which could not have been the intention of our Parliament.

54. Counsel submitted that disclosure for the purpose of a Review is permitted under section **67(3) (c)**, and no pre-conditions whatsoever are imposed for such disclosure, hence, the applicant cannot be faulted for failing to apply for the same. He relied on *Republic v Public Procurement Administrative Review Board & 2 Others* [15] for the proposition that the doctrine of *ultra vires* is based on the assumption that Judicial Review is legitimated on the ground that the court is applying the intent of legislature. He also relied on *Council of Civil Service Union v Minister for the Civil Service* which held that an authority could be acting *ultra vires* if it commits a serious procedural error, such as where the decision maker over looks or fails to properly observe statutory procedural requirements and common law rules of natural justice.

55. He also cited *Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Company Limited & Another Ex parte Kenya Power and Lighting Company Limited* [16] for the proposition that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution. He submitted that by considering only the evidence adduced by the Procuring entity, some of which was adduced orally during submissions, and by failing to acknowledge that the applicant was entitled to be afforded an opportunity to challenge such evidence, the proceedings contravened Article **10, 47, 50 (2)** of the Constitution, section **4** of the FAA Act, and the applicant's procedural legitimate expectation. He urged the court to find that the applicant was not afforded a fair hearing.

56. The second Respondent's advocate submitted that the applicant was accorded a fair hearing; that all the issues it raised were addressed and that the applicant fully participated in the proceedings. He pointed out that the Board upheld the applicant's argument that the notification letter failed the threshold of section **87(3)** of the Act and Article **47** of the Constitution. (Citing *Kenya National Highways Authority v PPP Petition Committee & 2 others*. [17] On the submission that the Procuring Entity withheld evidence from the applicant, he submitted that the spirit of confidentiality in section **67** of the Act is an important tenet of public procurement, if the objectives of fairness, equitability, impartiality and transparency under Article **227** of the Constitution and the Act are to be realized or achieved. He submitted that the documents in question fell within the ambit of section **67(1) (a) to (d)** of the Act and thus could not be furnished to the applicant in the manner suggested and that the Act provides a mechanism of obtaining confidential material under sections **68(2) (d)** and **67(4)**.

57. Citing section **68(2)(d)(iii)** referred to in section **67(4)** of the Act, he argued that it provides that the summary shall be of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed. He submitted that the applicant was at liberty to apply for a summary of the said information under sections **67(3)** and **(4)**. It was his submission that the Procuring Entity supplied all the tender documents, including the Evaluation Report, Minutes of the Tender Opening Committee and the Evaluation Committee to the Board so that it could access all the information necessary to determine the request for review. He submitted that the said documents were only submitted to the Board as they could not be disclosed to the applicant without the applicant making an application for disclosure because the review body is under a duty to ensure confidentiality of the procurement process. He relied on the European Court of Justice decision in *Varec v Belgian State* [18] concerning disclosure of tender documents that:-

*“the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.*

*...the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.”*

58. Counsel submitted that the procurement law forbids disclosure of confidential information save as provided under Section **68(2) (5)** of the Act. He submitted that the applicant's argument that the hearing was conducted in a secretive manner lacks merit because the applicant was served in time with the Respondent's pleadings, hence it was aware of all the documents the Procuring Entity intended to rely on among them the confidential documents submitted to the Board. He argued that the applicant never raised the issue of disclosure of documents prior to commencement of the hearing or after. Additionally, he argued that the applicant did not make an application for a summary of the confidential information under section **68(2) (d)** and section **67(4)** of the Act even though he was represented by an advocate. He also argued that the Board found in favour of the applicant regarding the letter of notification.

59. He argued that despite knowing that all tender documents, including copies of e-mails sending out addenda to parties and tender opening minutes were confidential documents as defined under section **67** of the Act, the applicant did not request for disclosure of those documents. He argued that that in any event the applicant was fully heard on all the issues and the Board held that:- *“the Board studied the confidential documents filed before it to ascertain the email provided by the Applicant for purposes of communication in the subject procurement process and notes the following:-*

*On 11th December 2019, the Applicant obtained the Tender Document from the Procuring Entity and indicated (by hand) an address that appears as [suziemahi@gmail.com](mailto:suziemahi@gmail.com) at page of the Procuring Entity's bundle of documents. Further, the Attendance List*

for the Tender Opening Register of 7th January 2020, shows an entry No. 3, made by a representative of the Applicant (by hand) who indicated an email which appears as [suziemahi@gmail.com](mailto:suziemahi@gmail.com)

The Applicant contended that the email provided by its representative is [suziemani@gmail.com](mailto:suziemani@gmail.com) and not [suziemahi@gmail.com](mailto:suziemahi@gmail.com).

The Board having studied the Procuring Entity's documents observes that email of the Applicant's Representative appears as [suziemahi@gmail.com](mailto:suziemahi@gmail.com) and not [suziemani@gmail.com](mailto:suziemani@gmail.com). The Procuring Entity cannot therefore be faulted if the Addendum did not reach the Applicant, since, the Applicant's Representative failed to clearly indicate its correct email to the Procuring Entity."

60. Fortified by the above excerpt, counsel maintained that the applicant was heard and granted an opportunity to make submissions on the e-mail address submitted by its representative and they did not object to the Procuring Entity's reference to copies of e-mails that had been submitted to the Board.

61. Counsel for the Interested Party submitted that the applicant has not proved that the decision is illegal, unconstitutional, irrational, unreasonable or outlandish. On the argument that the applicant was not afforded a transparent, reasonable and procedurally fair hearing, he counsel submitted that the applicant was at all material time represented by an advocate.

62. I will now address the question whether the trial was secretive. Mr. Kirungu's averment that he directed the Procuring Entity to submit all confidential documents pertaining to the subject tender to the Board as required by section 67 (3) (e) of the Act is relevant. The provision reads-

(3) This section does not prevent the disclosure of information if any of the following apply—

- a. the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;
- b. the disclosure is for the purpose of law enforcement;
- c. the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;
- d. the disclosure is pursuant to a court order; or
- e. the disclosure is made to the Authority or Review Board under this Act.

63. There is no contest that the confidential file was submitted to the Board in conformity with the law. The applicant was at all material times aware of the case mounted by the Respondent and the Interested Party having been served with their pleadings. The applicant was ably represented by an advocate. The applicant is carefully selectively citing the provisions of the law governing fair trial and avoiding subsection (3) cited above which entitled him to request for the information. He never invoked the said provision. Ironically, the alleged information is an e-mail address provided by non-other than its own agent. Having failed to utilize such a clear provision of the law, the applicant cannot now turn around to blame the Board. The argument that the trial was conducted in a clandestine manner is shallow, unsupported by evidence and totally unsustainable.

64. To further support his argument that the trial was unfair the applicant cited the alleged failure to be provided with document held by the Board, thereby citing breach of its right to be provided with evidence against it in advance a guaranteed by the Constitution. To buttress his argument, he cited *Juma and Another v the Honourable Attorney General*<sup>[19]</sup> in which the court emphasized the right of a party to be provided with the evidence against him and *Joseph Ndungu Kagere v Republic*<sup>[20]</sup> in which the court emphasized the importance of a fair hearing provided in Article 50 of the Constitution. He argued that the said right which appears limited to criminal trials also applies to civil cases citing *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish and Another*.<sup>[21]</sup>

65. The above argument sounds attractive, but as explained shortly, the applicant appears to have confused a fair trial under Article 50 of the Constitution and a fair administrative action guaranteed under Article 47 of the Constitution and section 4 of the FAA Act.

66. Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.<sup>[22]</sup> In *Local Government Board v. Arlidge*,<sup>[23]</sup> Viscount Haldane observed, "...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal (or body) whose duty it is to meet out justice." Procedural fairness contemplated by Article 47 and the FAA Act demands a right to be heard before a decision affecting ones right is made. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure.

67. However, the standards of fairness are not immutable. They may change with the passage of time, both in the general, and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.<sup>[24]</sup> Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.<sup>[25]</sup> In this regard, the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*<sup>[26]</sup> is relevant. It held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50(1) (2) of the Constitution. The Court of Appeal stated that fair administrative action broadly refers to administrative justice in public administration and it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional and statutory duties. It opined that such bodies exercise their functions guided

by constitutional principles and policy considerations. In addition, it stated that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.<sup>[27]</sup> Additionally, the Court of Appeal stated that fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies. This Court of Appeal decision extinguishes the applicant's counsel's argument. In any event, relied upon by the applicant's counsel were rendered by courts of coordinate jurisdiction which are not binding to this court unlike the Court of Appeal decision. In any event, the High Court decisions relied one of which was rendered by myself have been totally misconstrued and misapplied and as argued shortly, cases are context sensitive and a decision is only an authority for what it decides and it is not meant to be a general exposition of all the law.

68. The applicant's counsel argued that the Board improperly exercised its discretion by failing to take into account relevant considerations, thereby arriving at a decision on the basis of insufficient evidence. He submitted that the procuring entity failed to notify it of most of the addenda issued amending terms of the tender document, contrary to section 75(3) of the Act. He argued that the Procuring Entity had issued a total of 6 addenda to the terms of the Tender, not the 3 as believed by the applicant. It was his argument that it was critical to establish whether the procurement process was fair, equitable, transparent, competitive, and cost-effective as required under Article 227 of the Constitution.

69. He argued that the e-mail address which the procuring entity allegedly sent notification of addenda was shown as [suziemahi@gmail.com](mailto:suziemahi@gmail.com), while the applicant's advocate clarified that the correct e-mail address is [suziemani@gmail.com](mailto:suziemani@gmail.com), to which the Procuring Entity had once sent an email. It was his argument that for the Procuring Entity to comply with the requirement of section 75 (3) it ought to personally notify each candidate. He submitted that the Board relied on the tender opening register and the register of candidates who had acquired tender documents from the procuring entity, where the e-mail address appeared as [suziemahi@gmail.com](mailto:suziemahi@gmail.com).

70. Counsel for the Procuring Entity's submitted that a court will merely require the decision-maker to take the relevant considerations into account but it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion. He argued that the applicant has failed to set out the relevant considerations that it alleges were overlooked, hence, this court's intervention is unjustified. He relied on *Republic v Public Procurement Administrative Review Board & another Ex Parte Tropical Technology Limited*<sup>[28]</sup> and added that the Board addressed all the issues raised before it and in doing so it took into account all the relevant considerations and added that the applicant has not identified any issue the Board failed to consider. He submitted that the fact that the applicant does not agree with the findings does not and cannot amount to relevance/irrelevance as a ground for judicial review.

71. It is an established ground that if in the exercise of its discretion on a public duty, an authority takes into account considerations, which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds. These are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury-unreasonable* manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

72. The law on relevant and irrelevant considerations was explained in *R. v. Somerset County Council, ex parte Fewings*<sup>[29]</sup> in which [Lord Justice of Appeal Simon Brown](#) identified three categories of considerations that decision-makers need to be aware of:-<sup>[30]</sup>

- a) those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had;
- b) those clearly identified by the statute as considerations which must not be had; and
- c) those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so.

73. Lord Justice Brown elaborated that for the third category, there is "a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process," subject to *Wednesbury unreasonableness*.

74. The Singapore case of *City Developments Ltd. v. Chief Assessor*<sup>[31]</sup> illustrates a similar point. The [Court of Appeal](#) stated, "Where a wide range of considerations needs to be taken into account or a power is conferred on an authority exercisable on the authority's 'satisfaction', the courts are reluctant to intervene in the absence of bad faith or capriciousness." It was also said that "what is or is not a relevant consideration will depend on the statutory context."<sup>[32]</sup>

75. The duty of the court is to determine whether it has been established that in reaching its decision, an administrative body directed itself properly in law, and, had in consequence taken into consideration the matters which upon the true construction of the Act it ought to have considered and excluded from its consideration matters that were irrelevant to what he had to consider. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations.

76. A reading of the impugned decision shows that the Board appreciated that the applicant was aggrieved by the Procuring Entity's failure to notify it of the addenda issued in the subject tender. The Board went further to observe that it studied the confidential documents filed before it to ascertain the e-mail provided by the applicant for purpose of communication in the subject procurement process. The Board having so observed noted that the applicant obtained the Tender Document from the Procuring Entity and indicated (by hand) an address. The same address appeared at the attendance list. The Board held that it could not be blamed for the said address and declined the allegation that the Procuring Entity failed to notify the applicant of all the addenda to the subject tender in contravention of section 75 (3) of the Act as read with Article 10 and 232 of the Constitution.

77. I find nothing irrelevant in the above finding. In any event, once the decision-maker has taken into account the relevant considerations,

the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot*[33] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The Court emphasized that the weighing of those relevant considerations was a matter for the Commission, not the courts.[34]

78. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment*,[35] a [planning law](#) case. [Lord Hoffmann](#) discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority." [36] His Lordship stated:-

*“Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at.”*

79. The necessity to comply with the obligations imposed by Article 227 of the Constitution relating to public procurement policies and procedures to be adopted by organs of state, has resulted in the enactment of numerous interrelated statutes, regulations and directives. This, in turn, has given rise to a convoluted set of rules and requirements. In practice, procuring entities usually include a condition in their tender documents that bidders must provide contact details.

80. In the instant case, the accusation is that the applicant was not supplied with all the addendum. The counter argument is that the information was communicated through the e-mail address provided by the applicant's own agent. In my view, confronted with the same set of facts and circumstances, any reasonable tribunal properly directing its mind to the facts and the law would have arrived at the same conclusion. Differently put, by referring to the confidential file submitted to it under the law, the Board properly took into account relevant considerations and arrived at the correct decision.

81. The next issue is whether the applicant is citing grounds of appeal. The applicant's counsel cited beautiful authorities in support of his position that the applicant is not citing grounds of appeal among them *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Rongo University*[37] which citing *Carephone (Pty) limited v Marcus*. [38] I had the benefit of deciding the said case hence the facts and the law are still fresh in my mind. As I have stated severally, it is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage:-[39]

*“A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ... a case is only an authority for what it actually decides....”* (Emphasis added)

82. The ratio of any decision must be understood in the background of the facts of the particular case. [40] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. [41] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [42]

83. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. [43] In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. [44] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. [45]

84. The applicant's counsel faulted the Board for misconstruing the provisions of the Act in arriving at the impugned decision by indicating that an e-mail which appears as *suziemahi@gmail.com* is sufficient evidence to prove that an email correspondence bearing any of the six addenda was at any point sent from the procuring entity to the alleged e-mail address. He argued that the issue before the Board was that the Procuring Entity had failed to notify the applicant of the addenda amending the terms of the Tender which the Procuring Entity claimed it communicated by the e-mail provided by its Representative. He submitted that the Board ought to have to inquired whether any e-mail bearing the addenda to the terms of the tender was indeed sent to the e-mail address, which appears as '*suziemahi@gmail.com*.' He argued that section 75 (3) of the Act requires personal notification of the addendum to each bidder. He relied on section 1061 of the Evidence Act [46] which stipulates that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed is sufficient evidence for the court to presume that an electronic message was indeed sent. He urged the court to read the said section with section 106B on the admissibility of electronic records which requires the Certificate to show how the documents were produced, and what devices were used. He submitted that it is grossly unreasonable for the Board to solely rely on a handwritten impression on a register provided by the procuring entity because it is not sufficient to satisfy the requirement of an electronic message sent to an addressee under section 1061 of the Evidence Act. [47] He submitted that the decision cannot be supported by the facts because the alleged e-mail does not exist. He also faulted the Procuring Entity for not using the supplementary e-mail address which had been provided to it.

85. Counsel for the Procuring Entity submitted that judicial review is concerned with the process by which a decision was arrived at as opposed to the merits and the court cannot interfere with a decision on findings of fact or substitute it with its own conclusions. He cited *R v Kenya Revenue Authority, Ex Parte Yaya Towers Limited* [48]. He relied on *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others* [49] which held that so long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. Additionally, he submitted that the allegations relating to the e-mail address submitted to the Procuring Entity amount to an appeal from the decision of the Board as it requires this court to address the merits of the decision in light of the evidence that was before it.

86. The applicant's counsel is challenging the Board for what he calls misconstruing the provisions of the Act in concluding that an e-mail,

which appears as [suziemahi@gmail.com](mailto:suziemahi@gmail.com) is sufficient evidence to prove that an e-mail correspondence bearing any of the six addenda was at any point sent by the procuring entity to the alleged e-mail address which is clearly a contested issue of fact. He also submitted that the Board ought to have to inquired whether any e-mail bearing the addenda to the terms of the tender was indeed sent to the e-mail address. It is beyond argument that whether the e-mail was sent or not is a disputed question of fact.

87. The applicant's counsel relied on section 1061 of the Evidence Act<sup>[50]</sup> which stipulates that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed is sufficient evidence for the court to presume that an electronic message was indeed sent. Again this is an issue of fact because prove of sending the e-mail must be established before the said section comes into play.

88. Talking about contested issues of fact, it is an established position that Judicial Review is ill equipped to deal with disputed matters of fact which would involve fact finding on an issue, which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. Resolving the above issues require direct evidence to be adduced and tested through cross-examination of witnesses before the court can determine which version is probable. In *Republic v Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 Others*<sup>[51]</sup> the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.<sup>[52]</sup> In *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*<sup>[53]</sup> it was held as follows:-

"...where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant...."

89. The above excerpt captures the correct statement of the law with sufficient clarity. Judicial Review does not deal with contested issues of facts which requires parties to adduce evidence and be cross-examined. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

90. It is my finding that the matters raised in the issue under consideration are contested questions of fact which should not be subject to intrusive judicial oversight by way of judicial review. 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.

91. A statute might grant significant decisional authority to an administrative decision-maker, which a court paying due respect to the value of democracy would be obliged to take into account. The legislature may entrust 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. I decline the invitation to venture into contested issues of fact. The applicant's argument on the issue under consideration fails.

92. Next I will address the assault based on the ground of *ultra vires*. The applicant's counsel submitted that the Board acted *ultra vires* Articles 10 and 227 of the Constitution as read with section 3 of the Act by sanctioning a system of procurement that was neither fair, equitable, nor transparent. In support of this argument counsel argued that the applicant was never informed of any addenda amending the terms of the tender. The Respondent and the interested parties' Advocates did not directly confront this issue.

93. 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. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.<sup>[54]</sup> One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

94. I can usefully refer to *Council of Civil Service Unions v. Minister for the Civil Service*<sup>[55]</sup> in which Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality*, *irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality*.<sup>[56]</sup> What Lord Diplock meant by "Illegality" as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term "Irrationality" by succinctly referring it as "unreasonableness" in *Wednesbury Case*.<sup>[57]</sup> By "Procedural Impropriety" His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

95. As was held in *Republic v National Water Conservation & Pipeline Corporation & 11 Others*,<sup>[58]</sup> once a Judicial Review court fails to sniff any *illegality, irrationality or procedural impropriety*, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision.

96. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and *errors as to precedent facts*; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill *substantive legitimate expectations* are grounds within the second category.

100. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

101. I find no contest that the enabling statute confers mandate upon the Board. I have placed the impugned decision side by side with the provision of section 28 and 173 of the Act. I find nothing to suggest that the Board acted *ultra vires*. This ground of assault fail.

102. Next, I will address the question whether the decision is tainted with an error of law. The applicant's counsel submitted that the decision was influenced by an error of law in the interpretation of section 78(6) of the Act. He argued that the Board erred in law in relying on the entries of the Tender Opening Minutes without testing out any validity of a contrasting position held by the applicant. He urged the court to find that the Tender Opening Minutes are not evidence of the dual requirements under section 78(6) (c) and that the Review Board erred in law in making no attempt whatsoever to investigate the position advanced by the applicant.

103. Counsel for the Procuring Entity submitted that a reading of the ruling shows that before making the decision the Board complied with section 78 (6) (c) of the Act hence the allegation that the Board committed an error of law has no merit. On his part, counsel for the Interested Party submitted that the decision is legally sound.

104. 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.<sup>[59]</sup> There is no error of law in making a wrong finding of fact.<sup>[60]</sup> To me, the Board's decision is clearly supported by the law and the facts. It cannot be described as tainted by an error of law. This ground of attack collapses.

## Conclusion

105. An "acceptable tender" must be construed against the background of the system envisaged by Article 227(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective." In other words, whether "the tender in all respects complies with the specifications and conditions set out in the bid documents" must be judged against these values. An "acceptable tender" means any tender, which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. I find nothing convincing to suggest that the applicants could pass an Article 227 (1) analysis test and the above definition of an acceptable tender. Simply put, subjecting the entire procurement process to the values set out in Article 227(1), I am not persuaded that the tender process cannot be read in a manner that is consistent with the said values and the dictates of the procurement laws and Regulations.

106. I also find nothing to suggest that the impugned decision has 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. The applicant's case fails this test.

107. Accordingly, I dismiss the *ex parte* applicant's substantive Notice of Motion dated 12<sup>th</sup> March 2020 with costs to the Respondents and the Interested Party.

**Signed, Dated and Delivered via e-mail at Nairobi this 5<sup>th</sup> day of August, 2020**

**John M. Mativo**

**Judge**

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[1] Act No. 33 of 2015.

[2] Cap 496, Laws of Kenya.

[3] Act No. 4 of 2015.

[4] The concept of bid responsiveness is used most often in relation to compliance with bid formalities.

[5] Hoexter 2012: 295.

[6] *Xantium Trading 42 (Pty) Ltd vS South African Diamond and Precious Metals Regulator and another* {2013} JOL 30148 (GSJ) para 25.

[7] Para 2.48 of the World Bank Procurement Guidelines. The Guidelines makes use of the term "bid" as opposed to the term "tender".

[8] US FAR 14.405. Also see the rest of the Regulation for examples of minor informalities or irregularities.

[9] Cibinic and Nash, *Formation of Government Contracts* 544

[10] Cibinic and Nash *Formation of Government Contracts* 545.

[11] Cibinic and Nash *Formation of Government Contracts* 557.

[12] {2003} e KLR.

[13] {2016} e KLR.

[14] {2019} e KLR.

[15] {2019} e KLR

[16] {2019} e KLR.

[17] {2018} e KLR.

[18] *Case C- 450/06*.

[19] {2003} e KLR.

[20] {2016} e KLR.

[21] {2019} e KLR.

[22] Article 47(1) of the Constitution.

[23] {1915} AC 120 (138) HL.

[24] See *R v. Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560.

[25] See also *McInnes v. Onslow-Fane* [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[26] {2015}eKLR

[27] *Ibid*.

[28] {2020} e KLR.

[29] {1995} 1 W.L.R. 1037, [Court of Appeal](#) (England and Wales).

[30] *Ibid*, pp. 1049–1050.

[31] {2008} 4 S.L.R. (R.)

[32] p. 159, para. 17.

[33] {1983} Q.B. 600, C.A. (England and Wales).

[34] Ibid, pp. 635–637.

[35] {1995} 1 W.L.R. 759, H.L. (UK).

[36] Ibid, p. 780

[37] {2018} e KLR.

[38] NO 1999 (3) SA 302 (LAC)

[39] As observed in *State of Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967

[40] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986

[41] Ibid

[42] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[43] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr.* (Citing Lord Denning).

[44] Ibid

[45] Ibid

[46] Cap 80, Laws of Kenya.

[47] Ibid.

[48] Misc. Civil App, No. 374 of 2006

[49] {2012} e KLR.

[50] Cap 80, Laws of Kenya.

[51] {2016} eKLR.

[52] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.

[53] {2014} eKLR.

[54] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[55] {1985} AC 374.

[56] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[57] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[58] {2015} eKLR.

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

[60] *Waterford v Commonwealth* (1987) 163 CLR 54, 77.