REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 207 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTIONS 88 AND 167 OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF SECTION 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT DISPOSAL REGULATIONS OF 2006

AND

IN THE MATTER OF WORLD BANK'S GUIDELINES: PROCUREMENT OF GOODS, WORKS AND NON- CONSULTING SERVICES UNDER IBRID LOANS AND IDA CREDITS & GRANTS BY WORLD BANK BORROWERS

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD APPLICATION NUMBER 28 OF 2018

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

SHENZHEN INSTRUMENT CO. LIMITED.....1ST INTERESTED PARTY

M/S ZTE CORPORATION.....2ND INTERESTED PARTY

AND

KENYA POWER AND LIGHTING

COMPANY LIMITED.....EX PARTE APPLICANT

JUDGMENT

Factual matrix.

1.The uncontested facts of this case are that on **2nd** February 2017, the *ex parte* applicant published on line invitation for Tender No. **KPI/6A.1/PT/13/16/A58** Procurement of Design, Supply, Installation and Commissioning of Advanced Metering Infrastructure (AMI) System to support Revenue Recovery and Protection Programs (RPP), (herein after referred to as the Tender). On **9th** February 2017, it advertised the Tender in the Daily Nation and the Standard Newspapers. The submission dead line was **4th** April 2017 10am. Various bidders presented their respective bids. The bids were opened on **12th** May 2017 at 10.00am in the presence of the bidders or their representatives.

2. The *ex parte* applicant states that the tender was donor funded, hence, it was subject to the World Bank's Guidelines; Procurement of Goods, works and Non-Consulting Services under IBRID Loans and IDA Credits & Grants by World Bank Borrowers (herein after referred to as the World Bank Guidelines). It is also uncontested that owing to the complexity of the tender and in accordance with the World Bank Guidelines, the ex parte applicant extended the Tender Validity Period for at least seven vide e-mails dated **8th** September 2017, **9th** October 2017, **3rd** November 2017, **15th** December 2017, **6th** January 2018, **7th** February 2018 and **12th** March 2018, which extensions were communicate to all the bidders. However, the validity of the extensions is a contested issue.

3. It is further averred that during the evaluation, **5** bids out of the **14** submitted were found to be non responsive, among them the first Interested Party's while the remaining **5** were subjected to Commercial Evaluation where they were checked for errors, deviations or omissions and corrections. The ex parte applicant also states that this was followed by a detailed evaluation for the lowest ranked **6** bidders whereupon the second Interested Party emerged the successful bidder and all the parties were notified vide a letter dated **3rd** April 2018.

4. The *ex parte* applicant asserts that despite having adhered to the procurement laws, regulations and procedures, the first Interested Party challenged the award of the Tender to the second Interested Party before the Respondent with the consequence that the Tender was eventually annulled vide a decision dated **4th** May 2018 delivered to the *ex parte* applicant on **9th** May 2018 in which the Respondent directed the ex parte applicant to re-advertise the tender within **14** days of the decision. As a consequence, the ex parte applicant avers that it is losing immense public funds.

Legal foundation of the application.

5. It is contended that the impugned decision was marred by **procedural improprieties**. It is alleged that the Respondent entertained a request for Review from a party who had not participated in the Tender process contrary to section **167(1)** of the Public Procurement and Asset Disposal Act (herein after referred to as the act). It is also averred that the Respondent denied the *ex parte* applicant a fair hearing by ignoring and or disregarding submissions on weighty questions of law. Also, it is contended that the Respondent totally ignored and or refused to consider fundamental questions of its jurisdiction to entertain the review. Further, it is alleged that the Respondent acted un procedurally by delving into the merits of the tender without satisfying itself on whether it had the requisite jurisdiction, and, that, it acted un procedurally by considering one issue in isolation of all others.

6. It is also contended the decision is *ultra vir*es. The contest here is that the Respondent exercised jurisdiction it did not possess. It is contended that section **167** of the Act provides for strict time limits within which an applicant must apply for the review of an administrative decision, yet, the Respondent entertained the application for Review filed almost six months from the time provided under the act.

7. Additionally, it is also contended that the Respondent misdirected itself as to the applicable law and applied the wrong provisions of the law. In support of this contention, the *ex parte* applicant contends that the Tender was governed by the World Bank's Guidelines, and, that where there is a conflict between the World Bank's Guidelines and the Provisions of the Act, the World Bank Guidelines prevail, yet, the Respondent applied provisions of the Act in circumstances where they were in conflict with the World Bank's Guidelines.

8. The *ex parte* applicant further states that the Respondent violated its legitimate expectation that it would be accorded a fair hearing and would not be condemned unheard.

9. The *ex parte* applicant also contends that if the impugned decision is allowed to stand, it would suffer irreparable financial harm owing to the magnitude and scale of the sums involved to the chagrin, embarrassment and suffering of the Kenyan public. Lastly, it avers that it is in the interest of justice and fairness that the application be allowed.

The Reliefs sought.

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

*a. **Certiorari** to remove into this honorable court for the purposes of quashing the Respondent's decision dated **4th** May 2018;*

*b. **Prohibition** restraining the Respondent by itself, its agents or persons acting on its behalf from implementing the Respondent's decision dated **4th** May 2018;*

*c. **Declaration** to effect that the advertisement, evaluation and award of Tender No. **KPI/6A.1/PT/13/16/A58** Procurement of Design, Supply, Installation and Commissioning of Advanced Metering Infrastructure (AMI) Systems to Support Revenue Recovery and Protection Programs (RPP)was done in conformity with the Procurement Laws, Regulations as well as the laid down Procedures and that none of the bidders' rights were violated;*

d. That the costs of the application be provided for.

Respondent's Replying Affidavit.

11. **Hennock K. Kirungu,** the Respondent's Secretary swore the Replying Affidavit dated **30th** June 2018. He averred that the procurement in question was commenced by an on line invitation and advertisements in the Daily Nation and Standard Newspapers referred to earlier. He deposed that the bids were opened on **12th** May 2017 in the presence of bidders and or their representatives. Also, he averred that the bid prices and bid security amount were read out and recorded on the Tender Opening Certificate, and, that there were no contentions during the bid opening process.

12. He averred that fourteen bids were opened, five of which were rejected as non-responsive at preliminary evaluation stage, and, thereafter nine bids were subjected to commercial evaluations, checked for errors, deviations or omissions and corrections, and, subsequently, detailed technical evaluation was done for the lowest ranked six bidders. He stated that out of six bids, M/s ZTE Corporation, M/s Shenzhen Inhemeter and Metsex & Powercom Limited (JV) were found to be substantially responsive and the other three bids; M/s Shenzhen Clou, M/s Nari and M/s Sagemcom, Energy & Telecom were found to be technically non-responsive. He also averred that the bid from M/s Metsec Cables & Power Limited (JV) had an inconsistency that was addressed through clarification, while M/s ZTE Corporation's was found to be the lowest evaluated, substantially responsive bidder and was determined to have met the post qualification requirements.

13. **Mr. Kirungu** deposed that the acting general manager supplies of the procuring entity in his professional opinion dated **31st** January 2018 stated that pursuant to section **84** of the Act, he had reviewed the tender evaluation report and noted that the referenced procurement process was in compliance with section **96** of the act. Additionally, he averred that subsequent to the award of the tender, a Request for Review was lodged before the Respondent by the first Interested Party. He averred that the Respondent afforded the parties an opportunity to file and argue their respective positions and after hearing the parties and considering all the material before it, the applicable law and principles, it reached a considered determination.

14. **Mr. Kirungu** further averred that the Respondent acted within its jurisdiction. In particular, he averred that the *ex parte* applicant was afforded a fair hearing and its submissions were considered. He deposed that the Respondent's findings that the procuring entities' submission that the procurement was governed by the World Bank Rules and Guidelines which permitted extension of the tender validity period was not supported by any material that the ex parte applicant had placed before the Respondent, and, that, donor conditions only prevail if they are in conflict with provisions of the act, which was not proved by the *ex parte* applicant. He averred that the decision can only be re-examined based on material placed before it and not on additional material that was not before the Respondent.

15. With leave of the court granted on **5th** November 2018, the Respondent filed a further Affidavit dated **8th** November 2018 also sworn by **Mr. Kirungu.** He reiterated that the Respondent served all the parties with Notification of the Request for Review and Hearing Notice vide letters dated **20th** April 2018 and Hearing Notices dated **30th** April 2018 via e-mail, hence, the allegation by the second Interested Party that it was not notified is incorrect.

First Interested Party's Replying Affidavit.

16. **Yang Xichieng** the first Interested Party's Manager, African Market/ International Salesman swore the Relying Affidavit dated **29th** June 2018. He averred that the first Interested Party is a partner and the lead bidder in an association with Huwaei Technologies Co. Ltd pursuant to a consortium agreement dated **24th** April 2017. He deposed that the two companies joined hands to participate in the tender, and, that under the consortium agreement, the first Interested Party was to be the leader of the association with authority to represent the two companies for the purposes of the tender. He further averred that on **3rd** April 2018, the *ex parte* applicant sent a Notification letter to the first Interested Party notifying them that they were unsuccessful in the tender and providing reasons therefore, and, also, notifying them that the second Interested Party was the successful bidder. **Mr. Xichieng** averred that its Request for Review before the Respondent was filed on **13th** April 2018, well within the fourteen days of the notification as provided for under section **167(1)** of the act. Additionally, he averred that the Respondent had the requisite jurisdiction to hear and determine the Request for Review.

17. **Mr. Xichieng** also averred that whether the procurement in question was governed by the Act or the World Bank Guidelines, as at **3rd** April 2018, when the notification of the award was issued, there was no valid tender to award. He averred that the Respondent extended bid validity period seven times to an aggregate period of **200** days, well over six months, whereas section **88(3)** of the act provides that an extension under subsection **(1)** shall be restricted to not more than **30** days and only be done once. He also averred that the World Bank Guidelines provide that extensions of the validity period shall only be in exceptional circumstances and added that in his view no exceptional circumstances were disclosed by the *ex parte* applicant to the bidders in all the **7** extensions of the validity period.

18. **Mr. Xichieng** also averred that under the terms of the tender, the request for extension of the validity period after the first request is not permissible. He averred that there were no procedural improprieties nor was there any illegality in the Respondents actions.

Second Interested Party's Replying Affidavit.

19. **Justice Njiru Nyagah**, a legal counsel at ZTE Corporation, the second Interested Party swore the Replying Affidavit dated on **8th** August 2018 in support of the application. He averred that the second Interested Party submitted its bid prior to the deadline for the submission, and, that, the procuring entity notified it that its bid had been accepted vide a letter dated **3rd** April 2018 sent to it by e-mail on **3rd** April 2018. Additionally, he averred that the second Interested Party communicated its acceptance of the notification of award by it letter dated **5th** April 2018.

20. He averred that the second Interested Party had no prior knowledge of the Request for Review, and that it only learnt about it on the day

it was determined after it was notified that the ruling was scheduled for delivery the same day. He deposed that on **7th** May 2018 he proceeded to the Respondent's offices where he confirmed that the Ruling was delivered on **4th** May 2018, and, that the decision was not supplied to him until **9th** May 2018. He deposed that vide a letter dated **15th** My 2018, it notified the Respondent that it was entitled to be notified of the filing of the Request for Review as well as a reasonable notice of the date fixed for the hearing.

21. **Mr. Xichieng** also averred that on **16th** May 2018, he visited the Respondent's offices where a Request for Review dated **13th** April 2018 was supplied to him by the Respondent's Secretary at around 2.30pm, which documents were supplied to him together with a copy of a Notification letter addressed to the second Interested Party dated **20th** April 2018 notifying the second Interested Party about the Request for Review and the hearing date. He averred that the e-mail address used in the said communication belonged to one **Zhang Xiaosong** who had since left the country. He averred that vide letters dated **6th** November 2017, **16th** March 2018 and **5th** April 2018, the second Interested Party provided the *ex parte* applicant with details of the new contact persons and their contact e-mail addresses.

22. He also averred that Regulation **74(1)** of the Public Procurement and Disposal Regulations, 2006 (The Regulations) obligated the Respondent to serve the *ex parte* applicant with a Request for Review immediately it was filed. Further, he averred that upon being served as aforesaid, the *ex parte* applicant was required to notify the Respondent with the names and contact details of all parties to the review including the second Interested Party who was the successful bidder pursuant to Regulation **74(3)**, and, that, Regulation **75(1)** obligated the Respondent to give reasonable notice of the date fixed for hearing to all parties to the review including the second Interested Party who was the successful bidder.

23. **Mr. Xichieng** also averred that he believed that the *ex parte* applicant was aware of the change of the second Interested Party's contact persons, hence, all notices ought to have been sent to the up dated addresses. He averred that the Respondent condemned the second Interested Party un heard by reason of failure to notify it of the filing of the Request for Review and the date fixed for hearing through the up dated contact address. He deposed that had the second Interested Party been notified as required, it would have made representations and submissions on the allegations made, among them, the fact that the claim was filed out of time, and, that, the World Bank Guidelines governed the procurement process and supersede local laws to the extent of any inconsistency. Additionally, he averred that the proceedings were carried out in contravention of Article **50** of the Constitution which guarantees a fair hearing.

24. **Mr. Xichieng** deposed that the *ex parte* applicant requested for extension of tender validity period prior to the award of the tender which requests were approved from time to time in accordance with the Instructions to Bidders dated **6th** January 2017. He averred that this was done procedurally and in accordance with the World Bank Guidelines. Further, he averred that the terms of the tender envisaged that bidding for the project would be governed by the World Bank Guidelines. It was his contention that clause ITB2 provided *inter alia* that the tender was subject to both World Bank Guidelines and the Act, and, that, in the event of a conflict, the World Bank Guidelines would prevail.

25. He further deposed that Guideline **2.57** of the World Bank Guidelines provides that a procuring entity may extend the period of validity of the bid in exceptional circumstances. He averred that the requests for extension were made in writing to all bidders and any bidder could have objected to the request if it was so inclined, in which event it would have been disqualified from the tender process. It was his view that all the bidders approved the requests for extension, and, in any event, he believes that the first Interested Party would not have raised the objection had it been successful. He also averred that the guideline does not limit the number of times a procuring entity may extend the validity period nor does it require the request to come from an Accounting Officer of a procuring entity.

26. **Mr. Xichieng** further averred that the Respondent chose to apply section **88** of the act as read with Regulation **14(2)** and determined that there was an illegality in the extension of the tender validity period which provisions are in conflict with the World Bank Guidelines. He averred that in the circumstances of this case the World Bank Guidelines prevail, hence, the *ex parte* applicant was within terms of the Guidelines in extending the tender validity period. He also averred that the Respondents decision favoring the provisions of the act and the Regulations instead of the Guidelines is *ultra vires.*

27. Lastly, **Mr. Xichieng** averred that the second Interested Party's bid was declared successful upon evaluation, its technical ability was not brought into question, and, that the Respondent acted unreasonably and in excess of its powers.

Issues for determination.

28. Upon analyzing the diametrically opposed facts presented by the parties, I find that the following issues distil themselves for determination, namely:-

a. Whether the decision was tainted by procedural impropriety, and, whether the first Interested party lacked the locus standi to file the Request for Review.

b. Whether the Request for Review was filed out of time.

c. Whether the tender validity period was illegally extended.

d. Whether the Respondent violated the ex parte applicant's and the second Interested Party's Right to Legitimate expectation.

e. Whether the second Interested Party raised "new" issues.

a. Whether the decision was tainted by procedural impropriety, and, whether the first Interested party lacked the locus standi to file the Request for Review.

29. The *ex parte* applicant's counsel submitted that the Respondent violated the principles of natural justice in that the *ex parte* applicant was not afforded a fair hearing.[1] To buttress his argument, counsel cited Lord Reid's holding in *Ridge v Baldwin* that a decision given contrary to the principles of natural justice is void. He submitted that the Respondent ignored its submissions that the Request for Review was time barred and failed to appreciate that the law applicable was the World Bank Guidelines.

30. It was also argued that the decision is marred by procedural improprieties, and, that, the Respondent entertained a Request for Review from a party who had not participated in the tender process contrary to section **167(1)** of the act. Further, he contended that the Respondent failed to consider the fundamental question of jurisdiction and that the Respondent acted un procedurally by "considering one issue in isolation of all others."

31. The *ex parte* applicant's counsel further submitted that the Respondent lacked jurisdiction to entertain a request for Review filed by non-parties. He argued that the first Interested Party lacked the *locus standi* to Request for Review. He cited section **167** of the act and argued that a Request for Review can only be filed by a candidate or a tenderer. He submitted that the Request for Review was neither filed by a candidate or a tenderer because there was no evidence that the first Interested Party was a candidate or tendered in the bid. He submitted that the tenderer was a consortium of two companies, hence, it was unlawful for the Respondent to entertain a decision from a party who was neither a bidder nor a tenderer.

32. The Respondent's counsel's submission on the alleged procedural impropriety was that section **167(1)** of the act provides that a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on procuring entity may seek administrative review within fourteen days. He cited the definition of a candidate and a tenderer in section **2** of the act and went further to refer to page **493** of the proceedings before the Respondent, which is the letter of bid in the name of the first Interested Party. He argued that for one to be a candidate or a tenderer, he must be a person who obtained the tender document from the public entity or who submitted a tender, either in a consortium or independently. It was his submission that the documents before the Respondent attested to the fact that the first Interested Party had the capacity to institute the Request for Review.

33. On the submission that the *ex parte* applicant was denied a fair hearing by ignoring and or disregarding its submissions on weighty questions of law, jurisdiction and by considering one issue in isolation of all others, the Respondent's counsel argued that the Respondent gave due consideration to the *ex parte* applicant's submissions. He referred to the Review Board proceedings to demonstrate that the *ex parte* applicant's submissions were considered. Lastly, counsel submitted that the Respondent considered and satisfied itself on its jurisdiction to hear the Request for Review.

34. Counsel for the first Interested Party referred to clause **4.1** (pages **38** to **39**) of section **1**, Instructions to bidders which provides for eligible bibbers in the following terms:-

> *4.1 A bidder may be a private entity or government-owned private entity-subject to ITB 4.5-or any combination of such entities in the form of a joint venture, or association (JV) under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. In the case of a joint venture or association:*
>
> > *(a) unless otherwise specified in the BDS, all partners shall b jointly and severally liable for the execution of the Contract in accordance with the Contract terms, and*
> >
> > *(b) the JVA shall nominate a Representative who shall have the authority to conduct all business for and on behalf of any and all the partners of the JVA during the bidding process and, in the event the JVA is awarded the Contract, during contract execution.*
>
> *4.2 A bidder , and all partners constituting the Bidder, shall have a nationality of an eligible country as defined in Guidelines:…*

35. It was counsel's submission that the above clause contemplated that there could be tenderers who were joint ventures or associations, made up of partners. He pointed out that the first Interested Party and Huawei Technologies Co Ltd were the tenderers pursuant to the consortium agreement. He argued that as provided under clause **4.1(b),** the consortium nominated the first Interested Party to be its representative pursuant to Article **2** of the Consortium Agreement. Consequently, he submitted that the first Interested Party as a partner in the consortium and as a representative of the consortium had a right to file the Request for Review. He relied on the definition of a Partner in section **3(1)** of the Partnership Act[2] and maintained that the first Interested Party was a partner, and, that, a partner can sue or be sued for and on behalf of the partnership.[3] He maintained that the first Interested Party had the *locus Standi* to Request the Review.

36. The second Interested Party's counsel did not address this particular issue. However, it is important to point out some of its issues and submissions were dismissed as "new issues." I will address the question whether the issues were new later.

37. It is convenient to start by stating that a decision suffers from **procedural impropriety** if in the process of its making the procedures prescribed by statute are not followed or if the "**rules of natural justice**' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

38. There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. *First*, legislation or another legal instrument which give a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision. *Second*, no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter. In this context, justice should not only be done, but should be seen to be done. *Third*, no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work. *Fourth*,

statutes often require that decisions made under them to be supported by reasons.

39. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision *Council of Civil Service Unions v. Minister for the Civil Service* **[4]** to explain that a public authority could be acting ultra vires (that is, beyond the power given to it by statute) if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.[5]

40. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.[6] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety.[7]

41. The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or *nemo judex in causa sua* – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem* – "hear the other side").[8] More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to procedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken.[9]

42. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[10] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.

43. However erroneous the judgment or a decision may be in law or whatever injustice that erroneous judgment or decision may inflict, the erroneousness or injustice of the judgment or decision does not make the judgment contrary to natural justice. A decision contrary to natural justice is where the presiding Judge or Magistrate or Tribunal or decision maker denies a litigant some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings, as for instance refusing to allow a litigant to address the court, or where he refuses to allow a witness to be cross-examined, or cases of that kind.[11]

44. Procedurally fairness has received a constitutional seal of approval. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[12]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[13]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

45. The issue that inevitably follows is whether or not the manner in which the Respondent made the impugned decision amounted to "procedural impropriety." Differently stated, did the Respondent violent procedural requirements or did the Respondent act *ultra vires* or in breach of the rules of *natural justice.*

46. Natural Justice has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement. It ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals. In *Local Government Board v. Arlidge*,**[14]** 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 whose duty it is to meet out justice." (Emphasis added)*

47. In *Snyder v. Massachussets*,[15] the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a *"principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."*

48. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action,[16] observed, "Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** *in Administrative Law* **[17]** says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

49. As Sir William Wade in his Administrative Law put it "Natural justice is concerned with the exercise of power, that is to say, with the acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected."[18]

50. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[19]

51. Section **4** of the Fair Administrative Act[20] re-echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Subsection **4**[21] obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an

opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.

52. Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of Judicial Review of administrative action. This means 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.[22]

53. Procedural fairness contemplated by Article **47** and the Fair Administrative Action Act[23] demands a right to be heard before a decision affecting ones right is made. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. 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. But there is no doubt that the idea of fairness is also a substantive principle."[24]

54. What does fairness require in the present case? 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 dependant on the context of the decision, and this is to be taken into account in all its aspects. [25]

55. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[26] In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

56. I now proceed to apply the above legal principles to the facts and circumstances of this case and the twin issues under consideration. It is argued that the Respondent entertained a request for Review from a party who had not participated in the tender process contrary to section **167(1)** of the act, hence, the Respondent acted *ultra vires*. It was also argued that the first Interested Party had no *locus standi* to file the Request for Review. To address these twin issues, I find it fit to examine the provisions of section **167(1)** of the act. The section provides that

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

57. Section **2** of the act defines a **"candidate"** as follows:- means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity. It is common ground that the first Interested party signed a consortium agreement dated **24th** April 2017 with Huawei Technologies Co. Ltd. It is undisputed that the first Interested Party was a partner in the consortium which participated in the tender. It is uncontested that the consortium issued a power of Attorney to the First Interested Party to conduct business on behalf of the consortium. This information is captured at page **493** of the *ex parte* applicant's application.

58. I propose to paraphrase the definition of a candidate provided in the act. I define a **"candidate"** to mean any supplier seeking an invitation to take part in a restricted or a negotiated procedure or the competitive dialogue. The first Interested party was a candidate who participated in the tender process as a partner in a consortium and above all was granted a power of Attorney to conduct business relating to the tender in question on behalf of the consortium. Such business included filing a Request for Review. I find the *ex parte* applicant's argument to be legally flawed and unsustainable. It is not supported by the law. It is my finding that the first Interested Party had the *locus standi* to file the Request for Review.

59. The *ex parte* applicant also argued that it was not afforded a fair hearing and or the Respondent disregarded its submissions. I have carefully studied the record. The *ex parte* applicant was represented by its Manager, Legal Services and an Advocate. The record shows that counsel for the *ex parte* applicant was heard. He made submissions. The argument that the *ex parte* applicant was not afforded a hearing is not supported by the record.

60. It is contended the *ex parte* applicants submissions on jurisdiction were not considered.

61. Courts generally grant tribunals a degree of latitude when it comes to dealing with evidence. Courts have said that the weighing of various pieces of evidence is generally a matter for the tribunal, and 'merely to ignore "relevant material" does not establish jurisdictional error.[27] There is no obligation on decision makers 'to refer to every piece of evidence and every contention made by an applicant in their written reasons'; and, inferences should not be drawn that an issue or evidence has been overlooked simply because a piece of evidence was not expressly discussed in the course of the reasons for decision.

62. A justification sometimes offered by courts on review for leaving matters of facts/evidence to tribunals is the advantage that decision-makers have over the supervising courts in relation to evaluating the evidence and assessing credibility. But if a court on review regards a tribunal's fact-finding methodology is deficient, the court will be disposed to intervene. None, the less, courts are reluctant to become involved in factual and evidentiary controversies. This is consistent with the proper limits on Judicial Review that requires courts not to

intrude upon the merits of the decision. The Respondent made a final on the Interested Party's *locus standi*. Inviting this court to find otherwise on the same issue is a merit review.

63. 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 and hence not contravening the will of Parliament, then a court will not interfere with the decision.

64. 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 the Constitution, a statute or delegated legislation. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public 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.

65. Determining whether a precondition is or is not a jurisdictional fact is always a question of statutory interpretation. If the statutory construction leads to the conclusion that Parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts’, the review court is required to give effect to that intention by inquiry into whether the fact or facts exist. The *ex parte* applicant's argument that the Respondent failed to consider the question of jurisdiction lacks legal basis and must fail. I hasten to support my conclusion by two reasons, namely, first, the Respondent properly applied its mind to the question of *locus standi* of the first Interested Party, and, second, the Respondent acted *intra vires* in arriving at the decision. I find no difficulty in concluding that the ex parte applicant has not demonstrated procedural impropriety or breach of the rules of Natural Justice or un fairness or *ultra vires*.

b. Whether the Request for Review was filed out of time.

66. The *ex parte* applicant's counsel submitted that the Request for Review ought to have been brought not later than October 2017, that is, within fourteen days after the date of the occurrence of the alleged breach. He submitted that the Request for Review was filed on **13th** April 2018, almost six months after the breaches complained of. In his view, the Request for Review was time barred. It was his submission that the Respondent lacked jurisdiction to entertain Request for Review, and, that, it could not have adjudicated on the question of extensions pursuant to section **167** of the act. It was his submission that the decision was *ultra vires.*

67. The Respondent's counsel submitted that section **167 (1)** of the act permits a bidder to lodge a complaint either within **14** days from the date of the alleged breach or from the date of notification of the outcome of its tender.

68. The first Interested Party's Advocates submitted that the tender validity period was extended seven times, and, consistent with section **167(1)** of the act, the Request for Review was filed after the last extension on **12th** March 2018.

69. Counsel for the second Interested Party did not address this issue.

70. At the risk of repeating myself, I reproduce Section **167(1)** of the act which provides Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed. It is common ground that the tender period was extended seven times. I will address the legality or otherwise of extensions in the next issue. For now, it will suffice to address the issue whether the Request for Review was filed within time.

71. It is common ground that vide a letter dated **3rd** April 2018, the procuring entity communicated to the *ex parte* applicant that its bid was unsuccessful. The Request for Review dated **13th** April 2018 was lodged at the Public Procurement Administrative Review Board on the same day, that is, on **13th** April 2018. It was signed by the Board Secretary on the same day signifying the date it was lodged. A simple computation of time leaves me with no doubt that it was filed within time. This is consistent with the clear wording of section **167(1)** of the act which provides that a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

c. Whether the tender validity period was illegally extended.

72. Counsel for the ex parte applicant argued that the impugned decision is illegal because the Respondent applied the provisions of the act whereas the tender was governed by the World Bank Guidelines. He submitted that section **88(3)** of the act provides that the extension of Tender Validity Period shall be restricted to not more than **30** days and may only be done once, while Article **2.57** of the World Bank Guidelines provides extension in the circumstances prescribed therein. To buttress his argument he cited *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Coast Water Services Board & Another,*[28] where it was held that in the event of any conflict between the terms of the act and the agreement, the latter would prevail.

73. The Respondent's counsel's rejoinder to this submission was that the *ex parte* applicant did not place evidence before the Respondent to support the assertion that the procurement in question was governed by the World Bank Guidelines which permitted extension of tender validity period. Further, he argued that the World Bank Guidelines supersede the act in the event of conflict. He argued that the mere fact that a project is being financed by funds from a donor cannot deprive the Respondent or the court the oversight and supervisory jurisdiction.[29]

74. The first Interested Party's counsel's submitted that section **88(1)** of the act provides that "before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period" while subsection **(3)** provides "an extension

under subsection **(1)** shall be restricted to not more than **30** days and may only be done once." He further argued that the extension of the tender validity period is provided for under the World Bank Guidelines at paragraphs **2.57** under exceptional circumstances which must be disclosed to the bidders. He argued that in the present case, there were no exceptional circumstances, hence, the extensions were invalid. Additionally, he argued that the extension offended paragraph **2.57** of the World Bank Guidelines, hence, it was invalid. Consequently, he argued that the award was null and void having been made outside the tender validity period. He urged the court to remit the matter back for reconsideration.

75. The second Interested Party's counsel submitted that the applicable law/rules were the World Bank Rules. Regarding the extension of the validity period, she argued that the Respondent ought to have been guided by paragraph **2.57** of the World Bank Guidelines which does not limit the period for extension of tender validity period and the number of times the extension can be sought, or which officer can seek extension nor does it specify the exceptional circumstances.

76. Counsel further submitted that sections **6** of the act provides that the act does not apply in the event of a conflict with an international agreement. To buttress her submissions, counsel drew a parallel with similar provisions in sections **6** & **7** of the repealed Public Procurement and Disposal Act, 2005 which have been the subject of court interpretation with the courts holding that where there is a conflict between the provisions of the act and the terms and conditions of the donor in instances of negotiated grants or loans, the Board in determining the dispute ought to take into account the fact that those terms and conditions supersede the provisions of the act. To buttress her argument, she relied on *Revital Health (EPZ) Limited v Public Procurement Oversight Authority & 6 Others,[30]Republic v Public Procurement Administrative Review Board & 2 Others ex parte Coast Water Services Board & Another[31] and Okiya Omtatah Okoiti & 2 Others v AG & 3 Others*.[32]

77. It is common ground clause **2.57** of the World Bank Guidelines provided for extension of validity of bids. It is common ground that the tender validity period was extended up to seven times. None of the parties raised any objection to the extensions. All the parties are in agreement that the World Bank Guidelines applied to the tender in question. Again, all the parties are in agreement that the Tender is donor funded.

78. At page **18** of the impugned decision (appearing at page **509** of the ex parte applicant's record), the Review Board observed that:-

> *" The Procuring Entity's second submission on this issue was that since the procurement in issue was governed by the World Bank Rules and Guidelines which allowed for extension of the tender validity period, then the provisions of section 88 and other relevant provisions of the act do not apply and that the extension of tender validity which were given by the Procuring Entity where therefore valid.*
>
> *With respect to the Board that the above submission is not correct because the Procuring Entity did not place any evidence before the Board to support the above assertion and secondly because donor conditions even where it is shown that the same apply can only prevail over the provisions of the act if they are in conflict with any of the provisions of the act, a fact which counsel for the Procuring Entity did not again demonstrate……the Board however finds that the provisions o section 88 of the Public Procurement and Asset Disposal Act sets out very strict conditions for the extension….Taking into account all the above findings and observations, the Board holds that there was in fact no valid extension of the tender validity period in this case at all and the tender validity period expired by operation of law on the 30 day from the date of tender opening.*
>
> *Where the tender validity period for any tender has lapsed, the tender ceases to exist and there can be no tender to evaluate or to award after that. The law on this issue has been dealt with by the Board on several occasions."*

79. Section **1** of the Instructions to Bidders, at clause **2** with the short title **"Source of Funds"** provides as follows:-

> ***2.1***
>
> *"The Borrower or Recipient (hereinafter called "Borrower" indicated in the BDS has applied for or received financing (hereinafter called "funds") from the World Bank (hereinafter called "the Bank") towards the cost of the project named in the BDS. The Borrower intends to apply a portion of the funds to the eligible payments under the contract(s) for which this Bidding Document is issued."*
>
> ***2.2***
>
> *"Payment by the Bank will be made only at the request of the Borrower and upon approval by the Bank in accordance…"*

80. Section **11** entitled Bid Data Sheet at paragraph **ITB 2.1** defines the Borrower as the Government of Kenya. It is trite that the contract was donor funded. All these documents were on record during hearing of the Request for Review. The Respondent's finding that there was no evidence before it to support the argument that the World Bank Guidelines applied is not supported by the material before it.

81. More significant is the provisions of section **6(1)** of the act with a short title "Conflicts with International Agreements" which provides that "Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail."

82. Clause **2.57** provided for extension of validity of bids. Section **6(1)** cited above provides that the terms of the agreement prevails over the provisions of the Act. It follows that the extension in question was valid and in conformity with the World Bank Guidelines.

83. Before I conclude this issue, it is important to mention that counsel for the second Interested Party argued that the World Bank

Guidelines do not define the special circumstances under which the tender validity period may be extended. None of the parties attempted to define what constitutes exceptional circumstances nor was there any attempt to persuade the court that special circumstances existed. In other words, the parties left this issue, though important hanging. I decline to leave it hanging. Instead, I will spare some time and ink and share my thoughts on what in my view amounts to exceptional circumstances.

84. It is my humble view that the Guidelines or even a legislation may not go into details of prescribing what amounts to special circumstances. This is because it is not possible to draw a closed list. It is the duty of courts of justice to try to get at the real intention of the parties or legislation by carefully attending to the whole scope of the documents or the legislation. The meaning and intention of the Legislature or the parties to the document must govern. The meaning is to be ascertained not only from the phraseology of the document or legislation, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

85. What constitutes exceptional circumstances depends on the facts of each case.[33] The following points from the judgment of **Thring J** are relevant:-[34]"

> *i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . "*
>
> *ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*
>
> *iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
>
> *v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.*

86. To my knowledge, there is no definition of 'exceptional circumstances' in any of our statutes but this court's interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require the tender process to proceed. The circumstances must in other words be such as to require the tender validity period to be extended. Exceptional circumstances defy definition, they are context sensitive, hence, where proceeding with the tender would render the process untenable or defeat the entire process, the court would be inclined to allow the extension.

87. Put differently, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where proceeding with the tender process would be futile, a court may find that exceptional circumstances exist and permit the extension. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

88. In this case, the extensions were not objected to by the parties, hence, it was not necessary for the parties to cite the reasons for the extension for the court to determine whether or not they were exceptional.

89. In view of my analysis herein above, it is my finding that had the Review Board properly addressed its mind to the provisions of the tender documents which expressly provided that the tender was governed my World Bank Guidelines as read with section **6(1)** of the act, it could have arrived at a different conclusion, that is, the World Bank Guidelines prevailed over the provisions of the act. It follows that the extensions of the tender validity period were valid. On this ground alone, I find that this Judicial Review application succeeds.

d. Whether the Respondent violated the ex parte applicant's and the second Interested Party's Right to Legitimate expectation.

90. The *ex parte* applicant's counsel argued that the decision violated the ex parte applicant's right to legitimate expectation.[35] He argued that the Respondent is expected to abide by the statutory provisions that govern its functions and that it is expected to act fairly. He submitted that the Respondent failed to carry out its mandate in accordance with the law, hence, it breached the ex parte applicant's legitimate expectation.

91. Counsel for the second Interested Party submitted that Article **47** as read together with Article **260** guarantees every person's the right to administrative action which is lawful, and, that, section **7(2)** confers powers to this court to review a decision if found to be materially influenced by an error of the law and that courts will intervene to ensure that the powers of public decision making bodies are exercised lawfully.[36] She submitted that there is a general presumption that a public decision making body has no jurisdiction to commit an error of law.[37]

92. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*****[38]** where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

> **"…***The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles*

previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

93. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a two step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the *second* question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.

94. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[39] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification", **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

95. I am not persuaded that the *ex parte* applicant has established the existence of any of the above tests in the circumstances of this case. The alleged expectation cannot be said to be devoid of qualification. It fails the first test stated above. This is because the ex parte applicant participated in the proceedings. It was afforded an opportunity to be heard and argued its case. It is aggrieved by the decision, hence, these proceedings. There is nothing to demonstrate that the Respondent violated the *ex parte* applicant's right to legitimate expectation.The claim for alleged violation of legitimate expectation fails.

96. The second Interested party argues that it was not notified about the proceedings, hence it was denied the opportunity to be heard. It says as a consequence its right to legitimate expectation has been violated. As stated in the next issue, this contention raises a fundamental question, that is, whether an Interested Party can raise new issues in a suit. I will address this issues next.

e. Whether the second Interested Party raised "new" issues.

97. The second Interested Party's counsel submitted that the second Respondent was not notified of the Review proceedings nor was he informed of the hearing date for the review. Further, she argued that the alleged notification for review was sent to the wrong contact person. Also, she submitted that Regulation **74(4)** obligates the Respondent to notify all the parties to the Review while Regulation **75(1)** requires a reasonable notice of the date for hearing to be given to all the parties to the review. She submitted that the second Interested Party was denied the opportunity to make its presentations,[40] a denial of the right to be heard and a violation of the right to a fair administrative action.

98. The Respondent's counsel faulted the second Interested party for raising "new" issues that were never raised before the Review Board by the principal parties among them whether the second Interested Party was served with a Notification for the Request for Review. It was his submission that the second Interested party ought to have filed its own Judicial Review application if it was aggrieved.[41] It was counsels contention that the second Interested Party was served with a Notification for Review and a hearing Notice.

99. The first Interested Party's counsel also submitted that the second Interested Party raised "new" grounds not raised in the *ex parte* applicant's application, and, that, the "new" matters are prejudicial to the Respondent and the first Interested Party since they have not had the opportunity to respond to them.

100. He also submitted that pursuant to Regulation **74(3),** the Respondent wrote to *ex parte* applicant vide its letter dated **13th** April 2018 requesting *inter alia* the contact address of those who participated in the tender. Further, counsel urged this court not to consider the allegation that the second Interested party was condemned unheard since if at all it never received the notification, it was to blame for failing to provide contact addresses as requested. Also, counsel argued that the allegation by the second Interested Party that it was not heard is a new issue that was not raised before the Review Board, since, only three issues were framed before the Review Board.

101. In her rejoinder to the above submissions, counsel for the second Interested party argued that the authority cited by the first Interested Party in support of their argument supports the second Interested Party's position.[42]

102. I had the benefit of determining *Republic v Public Procurement Administrative Review Board & 4 Others ex parte BRITAM Life Assurance Company (K) Ltd & Another*[43] from which counsel for the second Interested Party relied on an observation in paragraph **42** of the decision. I can confirm without fear of contradiction that the said paragraph has no relevancy to the issue under consideration. The assault on the second Interested Party's case as is that it introduced "new issues yet it is not a principal party." The Respondent's and the first Interested Party went a step further and stated that the second Interested Part ought to have filed its Judicial Review proceedings.

103. The question is whether an Interested Party can raise new issues not presented by the principal parties. It is common ground that the second Interested Party did not participate in the proceedings before the Review Board. It now wants this court to review the decision on grounds raised in its replying Affidavit and legal arguments which were not raised before the Respondent. Can this court take into account the "new" issues which the Respondent did not have the opportunity to rebut nor did the Review Board have the opportunity to consider?

104. The correct position which I reiterate here is captured at paragraph **44** of the decision in Republic v Public Procurement Administrative Review Board & 4 Others ex parte *BRITAM Life Assurance Company (K) Ltd & Another*[44] in which I stated:-

> *"The position remains that an Interested Party is not a principal party in the proceedings. The issues to be determined by the Court are those arising from the pleadings presented by the principal parties. The interested Party can only participate by assisting either of the parties or making submissions to help Court. This view is reinforced by the Supreme Court decision in the case of Francis Karioki Muruatetu & another vs Republic & 5 others* ***[45]*** *cited by* ***Mr. Moenga*** *whereby the Court stated that in every case, whether some parties are enjoined as Interested Parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court."*

105. It is my view that he above paragraph represents the correct position of the law. I find no need to add more. The second Interested Party cannot properly raise new issues at this stage which were never raised before the Review Board. It would be prejudicial to the Respondent and the first Interested Party since they will not have the opportunity to challenge the issues.

f. Whether the ex parte applicant has established any grounds to warrant any of the orders sought.

106. The Respondent's counsel contented that Judicial Review is concerned with reviewing the decision not merits.[46] He submitted that this application is an appeal disguised as a Judicial Review application. He argued that so long as the process followed is lawful, a court should be slow to interfere. To buttress this proposition, he relied on Municipal Council of Mombasa v Republic & Another[47]and *Republic v Kenya Power & Lighting Company Limited & Another.*[48]

107. Further, he also relied on *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others*[49]whereby the Court of Appeal ruled that the Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by a procuring entity, hence, it is better equipped to handle disputes relating to breach of duty of a procuring entity.

108. The second Interested Party's counsel argued that a decision is irrational in the strict sense of the term if it is unreasonable, if it is lacking ostensible logic or comprehensive justification and that the reasons for the decision must be both adequate and intelligible.[50] She further submitted that the Respondent acted irrationally as it ignored the evidence placed before it and parties submissions and also was inconsistent with its previous decisions.[51]

109. A proper construction of the impugned decision, the bid documents and the relevant statutes leave me with no doubt that the impugned action is legal and in conformity with the bid documents and terms. Put differently, the *ex parte* applicant has not demonstrated that the Respondent acted *ultra vires* its statutory mandate. Simply put, the applicant has not demonstrated *illegality*.

110. There is nothing before me to suggest that the decision is either unreasonable or irrational. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (a)(i)** of Fair Administrative Action.[52] which provides that:- "A court or tribunal under subsection (1) may review an administrative action or decision, if— the person who made the decision— was not authorized to do so by the empowering provision."

111. The test for rationality was stated as follows:-**[53]** *"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."* In applying the this test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at."[54]

112. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[55] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout is whether the decision in question is one which a reasonable authority could reach. The converse was described by Lord Diplock[56] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[57]

113. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:-

> *i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;*
>
> *ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;*
>
> *iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circu*mstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;

114. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[58]

115. There is nothing to show that a reasonable body, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the *ex parte* applicant has not demonstrated that the decision was tainted with unreasonableness or irrationality.

116. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

117. It is trite that Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

118. A Judicial Review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a Judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a Judicial Review court may not interfere only because it favours a different option within the range.

119. 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. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

120. *Certiorari* issues to quash a decision that is *ultra vires*.[59] Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

121. The *ex parte* applicant also seeks an order of *prohibition*. The writ of *prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A *prohibiting* order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a *prohibiting* order acts prospectively by telling an authority not to do something in contemplation.

Final determination.

122. I have already held above that the impugned decision offends the World Bank Guidelines and section **6 (1)** of the act. In view of my analysis and determinations of the issues discussed above, the conclusion becomes irresistible that the ex parte applicant's application succeeds, but, only on one ground, that is, the decision is amenable for review on grounds of error of law.[60] Judicial Review is concerned with testing the legality of the administrative decisions. A decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.[61]

123. In conclusion, I allow the *ex parte* applicant's Notice of Motion dated **31st** May 2018 on the above stated ground and make the following orders:-

> *a. An order of **Certiorari** be and is hereby issued quashing the Respondent's decision dated **4th** May 2018 (Public Procurement Administrative Review Board application No. **48** of 2018- Shennzhen Star Instrument Co. Ltd (Applicant) and Kenya Power Lighting Company Limited (Procuring Entity);*
>
> *b. An order of **Prohibition** be and is hereby issued restraining the Respondent by itself, its agents or persons acting on its behalf from implementing the Respondent's decision dated **4th** May 2018;*
>
> *(Public Procurement Administrative Review Board application No. **48** of 2018- Shennzhen Star Instrument Co. Ltd (Applicant) and Kenya Power Lighting Company Limited (Procuring Entity);*
>
> *c. A **declaration** be and is hereby issued that the Advertisement, Evaluation and Award of Tender **No. KPI/6A.1/PT/13/16/A58,** Procurement of Design, Supply, Installation and Commissioning of Advanced Metering Infrastructure (AMI)Systems to Support*

Revenue Recovery and Protection Programs (RPP) was done in conformity with the procurement Laws, Regulations as well as the laid down Procedures.

d. No orders s to costs

Signed and Dated at Nairobi this 26th day of February 2019

John M. Mativo

Judge

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[1] Citing Msagha v Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004.

[2] Act No. 16 of 2012.

[3] To buttress his argument, counsel cited Owino Okeyo & Company v Fuelex Kenya Limited Misc App No 382 of 2004 where it was held that "this rule clearly recognizes that a partner may sue or be sued in the name of the firm of which he was a partner at the time the cause of action accrued dissolution notwithstanding.

[4] Council of Civil Service Unions v. Minister for the Civil Service [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

[5] Ibid.

[6] *Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford:* Oxford University Press*, pp. 342–360 at 331,* ISBN 978-0-19-921776-2.

[7] Supra, note 18.

[8] Supra, Note 20, at p 342.

[9] Ibid, page 313.

[10] David J. Mullan, Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making? http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[11] (1897) 18 N.S.W.R. 282, 288 (S.C.).

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

[13] Article 47(2) of the Constitution.

[14] {1915} AC 120 (138) HL

[15] {1934} 291 US 97(105)

[16] (1980), at page 161.

[17] (1977) at page 395.

[18] 6th Ed at pages 570.

[19] Kioa v West (1985), Mason J.

[20] Act No. 4 of 2015.

[21] Ibid.

[22] In the South African Case Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others, Chaskalson, J (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674.

[23] Act No. 4 of 2015.

[24] See S. De Smith, Judicial Review ofAdministrativeAction,4th ed. J. Evans (1980), 352- 4.

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

[26] 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).

[27] Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99 at [97].

[28] {2016} eKLR.

[29] Citing Republic v Public Administrative Review Board, Machiri Limited, Athi Water Services Board and Weihia International Economic & Technical Cooperation Company Ltd, Nairobi HC Milimani Commercial Courts JR App Nos 403 & 405 of 2016; Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Coast Water Services Board & Another {2016} eKLR and Okiya Omtata Okoiti & 2 Others v The Hon Attorney General & 3 Others, Pet No. 58 of 2014, {2014} eKLR

[30] {2015}eKLR.

[31] {2016}eKLR.

[32] {2014} eKLR.

[33] See Avnit v First Rand Bank Ltd [2014] ZASCA 132 (23/9/14) para 4; S v Dlamini; S v Dladla & others; S v Joubert; S v Scheitikat [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[34] In MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another 2002 (6) SA 150 (C) at 156H

[35] Citing Republic v Public Procurement Administrative Review Board & 3 Others ex parte Adan Osman Godana t/a Eldoret Standard Butchery {2017}eKLR.

[36]Citing Halsbury's Laws of England, 5th Edition, Volume 61, page 447, paragraph 610.

[37] Citing Halsbury's Laws of England, 5th Edition, volume 61, page 452, paragraph 612.

[38](CCT16/98) 2000 (1) SA 1, at paragraphs135 -136.

[39] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in South African Veterinary Council and another v Szymanski 2003 (4) BCLR 378 (SCA) at paragraph 19 and in Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA) at paragraph 65.

[40] Counsel cited Peesam Limited v Public Procurement Administrative Review Board & 2 Others {2018}eKLR.

[41] To buttress his argument, counsel cited Republic v Public Procurement Administrative Review Board & 4 Others ex parte BRITAM Life Assurance Company (K) Ltd & Another {2018}eKLR.

[42] See note 42 above.

[43] {2018}eKLR

[44] {2018}eKLR

[45] {2016} eKLR.

[46] Citing Republic v Kenya Revenue Authority ex parte Yaya Towers Ltd {2008} eKLR, Seventh Day Adventist Church (EA) Ltd v Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another {2014}eKLR, Republic v Kenya Revenue Authority & Another ex parte Bear Africa (K) Ltd & Republic v Commissioner of Customs Services ex parte Africa K-Link International Limited {2012} eKR

[47] {2002}eKLR.

[48] {2013} eKLR.

[49] {2012}eKLR

[50] Citing De Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5 Edition, page 559, paragraphs 13-019-13-020.

[51] Counsel referred to Phootlas-DMA-Greco Joint Venture v Kenya Railways & Another PPARB No. 18 of 2018.

[52] Act No. 4 of 2015.

[53] By Chaskalson P, in Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (4) SA 674 (CC) at page 708; paragraph 86.

[54] In Trinity Broadcasting (Ciskei) v ICA of SA, 2004(3) SA 346 (SCA) at 354H- 355A, Howie P

[55] Act No. 4 of 2015.

[56] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[57]Lord Cooke in R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd, {1995} 1 All ER 129 (HL) at 157.

[58] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[59] See Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others {2011} eKLR.

[60] Citing Republic vs Public Procurement Administrative Review Board & Another ex parte Uto Creations Studio Limited {2013}eKLR.

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