



REPUBLIC OF KENYA

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

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 407 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

ARID CONTRACTORS & GENERAL SUPPLIES.....INTERESTED PARTY

AND

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY.....EX PARTE APPLICANT

JUDGMENT

The Parties

1. The applicant, Meru University of Science and Technology (M.U.S.T.), is a Public University established under the Universities Act.^[1]
2. The Respondent, the Public Procurement Administrative Review Board, is a central independent procurement appeals review board established under section 27 of the Public Procurement and Asset Disposal Act^[2] (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 Interested Party *Arid Contractors and General Suppliers Ltd* is a Limited Liability Company carrying on business in Kenya and was a bidder in the procurement subject of these proceedings. It was the Applicant in *Request for Review Number 117 of 2018 between Arid Contractors and General Suppliers Ltd and Meru University of Science and Technology*.

Factual Matrix

4. *The applicant states that it is* a public body within the meaning assigned to a public entity under section 3 of the act and the Regulations made thereunder. It states that as part of its strategic plan and objectives it intends to construct a “Sports Facility.” It maintains that the procurement of the necessary services is a vital part of its procurement plan and it intends to conduct the same in accordance with the Law. Pursuant to the said strategic plan, the applicant states that it prepared a detailed “Bidding Document” prescribing the applicable criteria to govern the intended procurement and publicly invited bids, and, that, it received 10 bids among them the bid by the Interested Party.
5. It states that upon conclusion of the evaluation process, the evaluation report as well as the records of the evaluation committee were presented to the Head of Procurement function in accordance with Section 84 (1) of the act in order to render a signed professional opinion on the procurement proceedings. The applicant states that upon review of the said records and in particular the “Responsiveness Table C” signed by the individual members of the “Evaluation Committee” it was noted that none of the bidders provided or met ALL the mandatory requirements set out in the tender. Accordingly, the “Responsiveness Table C” signed by individual members of the Evaluation Committees in relation to the Interested Party reads that it:-

a) *Did not provide a line of credit from a reputable bank of NOT LESS than Kshs. 100 Million (Kenya Shillings One Hundred*

Million) only.

b) Did not provide certified bank statements for the last 6 months.

6. The applicant states that the Head of Procurement Function, on reviewing the records concluded that the bids in the procurement were indeed “non-responsive” and she rendered an opinion as such in accordance with the statutory obligation under Section 84 (1) of the act. The applicant maintains that acting on the said professional opinion, pursuant to Section 84 (3) of act, the Accounting Officer lawfully terminated the subject procurement proceedings as contemplated under Section 63 (1) (f) of act. In addition, the applicant states that the bidders were advised of the cancellation in accordance with Section 63 (4) of act vide a letter dated 22nd August 2018. The applicant states that pursuant to Section 63 (2) and 63 (3) of the act, a written report on the termination was issued to the Public Procurement Regulatory Authority stating the reason for termination, that is, the tender was non-responsive.

7. The applicant states that vide a Notification of Appeal received on 6th September 2018, the applicant was notified that on 4th September 2018, the Interested Party had commenced a Request for Review being Request for Review Number 117 of 2018 between Arid Contractors & General Suppliers Limited and Meru University of Science and Technology. Subsequently, it received a Hearing Notice for hearing scheduled for 21st September 2018 before the Respondent.

8. Vide a Gazette Notice No. 9703 of 21st September 2018, pursuant to Section 29 (1) (a) of the act, the Cabinet Secretary for the National Treasury and Planning appointed a one Faith Waigwa as the Respondent’s Chairperson and revoked the appointment of the Chairperson Paul Gicheru with effect from the same day. Accordingly, the applicant states that, Paul Gicheru, could not lawfully preside over the Respondent’s proceedings with effect from 21st September 2018. Notwithstanding the said revocation, the applicant states that on 21st September 2018, the said Paul Gicheru considered the said Request for Review. Accordingly, the applicant states that the Review Board was not lawfully constituted, hence, it lacked Jurisdiction.

9. The applicant states that it filed its pleadings in opposition to the Request for Review and supplied the Respondent with **all** the confidential documents in its possession relating to the subject procurement which contained pertinent information supporting the decision to terminate the procurement process and explaining why it reached the decision and demonstrated that it had in fact complied with the requirements of Section 63 of the act.

10. The applicant states in the impugned ruling the Respondent directed as follows:-

a) *The Applicant’s Request for Review dated 4th September, 2018 and filed with the Board on 4th September 2018, against the Meru University of Science and Technology by M/s Arid Contractors in respect of Tender No. MUST/022/2017-2018 for construction of the Proposed Sports Fields Main Builders Works is hereby allowed.*

b) *The Procuring Entity is directed to proceed with the procurement process in respect of Tender No. MUST/022/2017-2018 for construction of the Proposed Sports Fields Facility Main Builders Works to its logical conclusion.*

c) *Pursuant to the powers of the Board by dint of section 173 of the Public Procurement and Disposal Act, 2015 the Board directs that Tender No. MUST/026/2017-2018 for construction of the proposed sports facility main builders is hereby set aside and vacated.*

d) *The procuring entity is ordered to pay the applicant costs assessed at **Kshs. 100,000** plus filing costs of the Request for Review.*

Legal foundation of the application

11. *The applicant states that the Respondent committed a grave jurisdictional error because the Chairperson’s appointment had been revoked at the time of the hearing and he could not lawfully preside over the Request for Review or adjudicate the same. Further, the applicant states that the Respondent acted *ultra-vires* Sections 29 (a) and 31 of the act by adjudicating the proceedings whereas it was not lawfully constituted following the revocation of the Chairperson’s appointment prior to the hearing.*

12. In addition, the applicant states that the Respondent acted *ultra-vires* sections 3 (e), (g), and (h) of the act, by ignoring the principles of prudent public finance in awarding a public tender to a bidder who did not meet the mandatory bid requirements. Further, it states that the Respondent acted *ultra vires* Sections 47 and 84 of the act, by subjugating, and disregarding the role and opinion of the Procuring Entity’s head of procurement function and proceeding to overrule the professional’s considered and reasoned opinion that the subject tender was non-responsive. Additionally, the applicant states that the Respondent acted *ultra vires* sections 63 of the act, by subjugating the Procuring Entity’s right to terminate or cancel the subject procurement. It also states that the Respondent breached sections 64, 67 and 68 of the act, by failing to enquire into the manifest yet unexplained breach of the procuring entity’s communications pointing to a breach of confidentiality regarding the information procurement and its records.

13. Further, the applicant states that the Respondent acted *ultra vires* section 80 (2) of the Act by failing to uphold the procuring entity’s obligation to conduct the evaluation and comparison of the tenders strictly in accordance with the procedures and criteria set out in the tender documents. Also, the applicant states that the Respondent violated Articles 201 and 227 of the Constitution by disregarding the principles of public finance and the public procurement to the detriment of the applicant and the public at large.

14. Further, the applicant contends that the Respondent failed to consider the relevant and material facts placed before it by the Procuring Entity demonstrating the veracity and validity of its decision to terminate the subject procurement. Also, it states that the decision was premised on irrelevant and irrational matters and that it abridged the right of the procuring entity and coerced it into continuing with the procurement proceedings despite being an evidently unlawful procurement process. The applicant also states that the Respondent deliberately ignored the import and effect of the decision of the procuring entity’s accounting officer to terminate the subject procurement proceedings

and subjugated the role of the procuring entity's procurement professional completely disregarding the same.

15. Lastly, the applicant states that the decision is was irrational and it was *wednesbury* unreasonable to order the continuation of an evidently non-responsive procurement in which none of the bidders met the mandatory criteria set out in the tender documents.

The Reliefs sought

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

*a. An order of **Certiorari** to quash the decision made by the Public Procurement Administrative Review Board on 24th September 2018 in Request for Review Number 117 of 2018 between Arid Contractors & General Suppliers Ltd and Meru University of Science and Technology.*

*b. An order of **Prohibition** directed at the Respondent restraining it from visiting any sanction upon the *ex parte* applicant on account of its decision delivered on 24th September 2018 in Request for Review Number 117 of 2018 between Arid Contractors & General Suppliers Ltd and Meru University of Science and Technology.*

*c. An order that the costs of this application be awarded to the *ex parte* applicant.*

Respondent's Replying Affidavit.

17. The Respondent's hard copy of the Replying Affidavit in the court file filed and dated 8th May 2019 is sworn by a one Philemon Kipro, a Senior Officer of the Respondent. However, the undated soft copy of the Replying Affidavit e-mailed to the court is sworn by a one **Henock Kirungu**, the Respondent's Secretary.

18. Curiously, both affidavits contain 20 paragraphs. Both are 100% identical. I will use the affidavit of Philemon Kipro, which is the one on record and ignore the affidavit of Henock Kirungu which was e-mailed to the court. In any event, even if the contents were different, no matter how attractive the soft copy affidavit would have been, I would still have used the one that is properly filed in court and totally ignore, as I hereby do, Mr. Kirungu's affidavit.

19. Mr. Kipro averred that upon receiving Request for Review, he notified the applicant of the pending review pursuant to section 168 of the act and the applicant filed a Memorandum of Response in opposition to the Request on 14th September 2018. He averred that the Request for Review was subsequently heard on 21st September 2018 and the Respondent considered the pleadings before it as well as the oral and written submissions. He stated that in its ruling delivered on 24th September 2018, the Respondent allowed the Interested Party's Request for Review, and directed the applicant to proceed with the procurement process to its logical conclusion.

20. Mr. Kipro further averred that the Respondent observed the rules of natural justice and acted lawfully, fairly and reasonably in exercise of its statutory mandate. He averred that after looking at the evaluation report and the tender documents and all the facts, the Respondent framed and considered the issue "whether the termination of the Tender by the procuring entity was done in accordance with the provisions of section 63 of the Act." He deposed that the Respondent was convinced that the process of carrying out the procurement was marred with glaring omissions and breaches of the law on the part of the procuring entity. As a consequence, he averred that the Respondent directed the applicant to proceed with the procurement process to its logical completion and ordered the procuring entity to pay the applicant's costs assessed at Kshs. 100,000 plus filing costs of the Request for Review.

21. He also averred that the Respondent considered all the relevant, pertinent and material facts, and, that, the decision by the Board was reasonable, rational and lawful. He added that this application is brought in bad faith, has no merit and is only calculated to injure the credibility of the Respondent's mandate and functions, while ultimately eroding the public's confidence in procurement procedures and processes and to delay the applicant from proceeding with the tender process to its finality.

The Interested Party's grounds of opposition

22. The Interested Party filed grounds of opposition dated 18th December 2018 stating that:-

a. That the Statement dated 8th October, 2018 is incompetent by virtue of Order 53 Rule 1(2) of the Civil Procedure Rules, 2010.

b. That the Respondent was properly constituted on 21st September, 2018 by virtue of Section 57(a) of the Interpretation and General Provisions Act, cap 2.

c. That the Respondent was quorate on 21st September, 2018 by virtue of Regulation 69(1) & (3) of the Public Procurement and Disposal Regulations, 2006.

d. That the Respondent did not act ultra vires by virtue of Section 173 of the Public Procurement and Asset Disposal Act, 2015.

*e. That the *ex Parte* Applicant's evaluation committee had jurisdiction and discretion under Section 79(2) & (3) of the Public Procurement and Asset Disposal Act, 2015 to waive minor omissions that did not affect the substance of the tender.*

f. That under Section 80 of the Public Procurement and Asset Disposal Act, 2015 as read with Regulation 16(1),(2),(5)&(7) of the Public Procurement and Disposal Regulations, 2006, tender evaluation referred to technical evaluation and financial evaluation only and does not include determination of responsiveness of tender (preliminary evaluation).

g. By virtue of Section 80(4) of the Public Procurement and Asset Disposal Act, 2015, the ex Parte Applicant's head of procurement review and professional opinion was limited to technical and financial evaluation and did not include the tender responsiveness.

h. That the Respondent and not the High Court was qualified to conduct merit review and facts of the tender by virtue of Regulation 68 of the Public Procurement and Disposal Regulations, 2006.

Interested Party's Replying Affidavit

23. **James Kugocha**, the Interested Party's Chief Executive Officer swore two Replying affidavits both dated 18th December 2018 and filed the same day. The first affidavit is a response to the Applicant's Notice of Motion dated 11th October, 2018, the Chamber Summons, the Statutory Statement and the Verifying Affidavit dated 8th October 2018. He averred that the evaluation committee comprised of experts in construction industry and properly exercised its discretion to disregard or waive any preliminary mandatorys that do not affect the substance of the tender.

24. He further averred that the professional opinion was not binding on the applicant and it was therefore not mandatory to terminate the tender. He also averred that the applicant did not draw the attention of the Respondent to Gazette Notice No. 9703 dated 21st September, 2018, and, in any event, Gazette Notice No. 9703 dated 21st September, 2018 became effective on 22nd September, 2018 and therefore Paul Gicheru was still the Chairman on 21st September, 2018.

25. In addition, Mr. Kugocha deposed that the Applicant has not demonstrated that the Respondent's decision was influenced by illegality or irrationality or unreasonableness or procedural impropriety. He further averred that the applicant's Statutory Statement is incompetent as it contains facts under paragraph 4.0 thereof and it ought to be dismissed with costs to the Interested Party. Lastly, he averred that the application lacks merits and is an abuse of the court process.

26. The second affidavit is in response to the applicant's affidavit highlighted below. In reply to the said affidavit, Mr. Kugocha deposed that the instant application deals with procedural fairness or otherwise leading to the Respondent's decision and not the proceedings before the Respondent. He averred that the Respondent conducted a merit review of annexure "**RO 1**" annexed to the applicant's supplementary affidavit and that this court cannot be invited to consider its merits.

27. He further averred that the issue of confidentiality does not arise since the matter touches on expenditure of public finance which must be open and transparent and added that the deponent did not adduce any evidence to demonstrate that the evaluation committee refused to resolve the purported discrepancies at its joint meeting where each member's findings were discussed.

28. He also deposed that the evaluation committee being a committee of experts was in a better position than the head of procurement to determine whether the non-compliance, if any, affected the substance of the tender. In addition, he averred that the technical evaluation and financial evaluation by the evaluation committee constituted a waiver and the applicant was estopped from cancelling the tender on the basis of abandonments during the preliminary evaluation.

29. He also stated that the head of procurement exceeded her mandate by reviewing the preliminary evaluation as her mandate was limited to review and to write a professional opinion only on technical evaluation and financial evaluation. Mr. Kugocha further deposed that the Interested Party submitted the lowest evaluated bid and was justified to be awarded the tender and added that the decision to cancel the tender was arbitrary and was not in public interest. He also stated that the Respondent considered all the relevant and pertinent facts before it including the fact that the applicant unjustifiably cancelled the tender for the third time, hence, the Respondent acted within its wide statutory powers.

30. Lastly, Mr. Kugocha averred that the application is an ego trip, lacks merit, is frivolous and a callous cause designed to deny the students access to a sporting facility.

The applicant's supplementary Affidavit

31. **Prof. Romanus Adhiambo**, the applicant's Vice-Chancellor and Accounting Officer swore the supplementary affidavit dated 23rd October 2018 annexing the bidding documents, the Evaluation Committee's Report, the Responsiveness Table, the Professional Opinion; the Report pursuant to section 63 (2) of the act and copies of the letters issued pursuant to Section 63 (4) of the act. He averred that the said documents were presented to the Respondent in the course of deliberations and it is the Applicant's case that an objective perusal of the same leaves no doubt that:-

a) There were glaring discrepancies in the individual records kept by the members of the evaluation committees.

b) In relation to all the bids submitted, it was clear that none of the bidders met ALL the mandatory criteria set out in the tender documents.

c) In particular regard to M/s Arid Contractors & General Supplies Limited who was the Applicant in the Request for Review the bidder was found by ALL of the evaluation committee members of the evaluation committee not to have provided:

(i) A line of credit from a reputable bank of **NOT LESS** than Kshs. 100 Million (Kenya Shillings One Hundred Million) only.

(ii) Certified Bank Statements for the last six (6) months.

32. Prof. Adhiambo deposed that as a consequence of the foregoing, the procuring entity's Head of Procurement reached the decision that the bids in the subject tender were in fact non-responsive, and, all the bidders were informed in accordance with section 63(4) of the act about the termination of the subject tender. Further, he averred that a written report on the termination was issued to the Public Procurement Regulatory Authority in accordance with Section 63(2) and 63(3) of the Act.

33. He stated that the decision to terminate the subject tender was arrived at in a cogent, lawful and rational manner and is supported by the records and, that, the Respondent ignored the relevant and pertinent facts, leading it to the Wednesbury irrational decision impugned in these proceedings. He also deposed that in directing the Applicant to proceed with the procurement, the Respondent was directing it to proceed contrary to the Law despite the manifest non-responsiveness of the subject bids.

Issues for determination

34. Upon analyzing the fiercely diametrically opposed positions presented by the parties, I find that the following issues distil themselves for determination:-

- a. Whether the Review Board was properly constituted.
- b. Whether the Interested Party's bid was responsive.
- c. Whether the tender was lawfully terminated.
- d. Whether the impugned decision is tainted with illegality.

a. Whether the Review Board was properly constituted.

35. The applicant's case is that vide a Gazette Notice No. 9703 of 21st September 2018, pursuant to Section 29 (1) (a) of the act, the Cabinet Secretary for the National Treasury and Planning appointed a one Faith Waigwa as the Respondent's Chairperson and revoked the appointment of the Chairperson Paul Gicheru with effect from the same day. The applicant argued that Paul Gicheru, could not lawfully preside over the Respondent's proceedings with effect from 21st September 2018. The applicant faults the proceedings on that the Review Board was improperly constituted, hence, it lacked Jurisdiction. In counsel's view, by presiding over the proceedings after the revocation of his appointment, the Respondent committed a jurisdictional error.

36. The Respondent's counsel argued that none of the parties raised an objection to the question of jurisdiction of the respondent on account of the appointment of a new chairperson. He also argued that at the time the request for review was filed, the Respondent was properly constituted and the proceedings having commenced could not be left in abeyance on account of the appointment.

37. The strongest opposition to the issue under consideration was presented by counsel for the Interested Party. He cited the functions of the Respondent under section 27 of the act and argued that by dint of section 29 (1) of the act, the Respondent comprises of 15 members. He referred to Regulation 69(1) of the Public Procurement and Disposal Regulations, 2006 which provides that "*the quorum of the Respondent is three members including the chairman*" while Regulation 69(3) permits "*members to designate one member to act as the chairman for purposes of the meeting.*"

38. It was his submission that any three members of the Respondent lawfully constitute quorum with powers to review, hear and determine tendering and asset disposal disputes. He submitted that the Request for Review in issue was reviewed and heard by four members Chaired by Paul Gicheru and the panel was therefore quorate. In addition, the Interested Party's counsel argued that the Gazette Notice No. 9703 that appointed a new Chairman is dated 21st September, 2018, yet, the applicant did not object to the constitution of the Respondent during the hearing and it is therefore estopped by the doctrine of abandonment or waiver or acquiescence.

39. Counsel further argued that pursuant to Section 57(a) of the *Interpretation and General Provisions Act*^[3] the gazette Notice took effect on 22nd September, 2018, hence, jurisdictional error does not arise. To buttress his argument, he cited *Craig v South Australia (1995) HCA 58* which held that:-

"A jurisdictional error occurs when the extent of that authority is misconceived. Decisions affected by jurisdictional error can be quashed by judicial review. Examples of jurisdictional errors include asking the wrong question, ignoring relevant material, relying on irrelevant material, and breaching natural justice.

Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers."

40. To further fortify his argument, counsel placed reliance on *Judicial Review of Administrative Action*^[4] in which the learned author Mark Aronson identified 8 categories or types of jurisdictional error namely: a mistaken assertion or denial of the very existence of jurisdiction; a misapprehension or disregard of the nature or limits of the decision-maker's functions or powers; acting wholly or partly

outside the general area of the decision-maker's jurisdiction, by entertaining issues or making the types of decisions or order which are forbidden under any circumstances. An example would be a civil court trying a criminal charge; mistakes as to the existence of a jurisdictional fact or other requirement when the relevant Act treats that fact or requirement as something which must exist objectively as a condition precedent to the validity of the challenged decision; disregarding relevant considerations or paying regard to irrelevant considerations, if the proper construction of the relevant Act is that such errors result in invalidity; errors of law, although where the decision-maker is an inferior court or other legally qualified adjudicative body, the error will probably have to be such that it amounts to a misconception of the nature of the function being performed or of the body's powers; acting in bad faith and breaching the hearing or bias rules of natural justice. Counsel concluded that the Applicant did not prove that the Respondent committed any jurisdictional error.

41. The argument by counsel for the Respondent and the Interested Party that the applicant did not object to the composition of the Review Board is legally frail and unsustainable. As was correctly held in *Niazons (K) Ltd. Vs. China Road & bridge Corporation (K)*^[5] cited in *Republic v Complaints Commission Media Council for Kenya & 2 others*,^[6] jurisdiction cannot be conferred by estoppel, consent, acquiescence or default. This sound proposition of the law extinguishes the said argument.

42. The question here is whether the Review Board was properly Constituted or not. The starting point is that the effective date of an appointment, acting appointment, promotion, re-designation or revocation of an appointment is the date of the decision to appoint, promote or re-designate, revocation of appointment or such date as the appointing authority may determine. The Gazette Notice Number 9703 revoked the appointment of Mr. Paul Gicheru with effect from 21st September 2018.

43. Regulation 67 (1) provides that members of the Review Board shall be appointed for a term of three years and shall be eligible for reappointment for one further term of three years. Regulation 69 (1) provides that the quorum of the Review Board shall be three members including the Chairman. Regulation 69(3) provides that in the absence of the Chairman, the Review Board may designate one member to act as Chairman for the purpose of that meeting. The proceedings of the impugned decision show that Paul Gicheru chaired the Review Board that heard and rendered the decision.

44. It is a correct statement of the law to state that a tribunal is only competent to adjudicate on a matter only if:-

a. it is properly constituted as regards number and qualification of the members of the Bench and no member is disqualified for one reason or the other;

b. the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

c. the case came before the court initiated by due process of law and upon fulfilment of any conditions precedent to the exercise of jurisdiction.

45. Section 57 of the *Interpretation and General Provisions Act*^[7] provides for computation of time as follows:-

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;

(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

46. Where days are prescribed in the *Interpretation and General Provisions Act*^[8] without there being any exclusion of the application, either in express terms or by necessary implication, the natural inference would be that the Legislature intended the section to apply. However, the scope of the *Interpretation and General Provisions Act* is limited to the computation of days.^[9] It does not apply to the calculation of such time when such time in any other unit than days is expressed.^[10]

47. In the above provision, all the legislature has done is to mention the first day and the last day, and has left it open to the courts to determine which is which. It follows, therefore, that the first and the last days are to be established solely by reference to the language of the statutory provision under consideration and with due regard to the circumstances of each particular case.

48. When reckoning days in a statutory provision a court is enjoined to apply the provisions of section 57 of the *Interpretation and General Provisions Act*^[11] unless there is something in the language or context of the particular provision repugnant to such provision or unless a contrary intention appears therein. It is important to note that the phrase ***unless the contrary intention appears—*** in section 57 of the *Interpretation and General Provision Act*^[12] is a clear invitation to the court to remain conscious of the clear intention, meaning and purpose

of the provision under consideration.

49. *First*, the law provides for Members of the Respondent to serve for three years, meaning, unless re-appointed, once a member serves three years, the term lapses by operation of the law and cannot be extended even for a day. *Second*, the wording of the Gazette Notice clearly reads “with effect from 21st September 2018.” The Cabinet Secretary was clear on the effective date. With such certainty, it cannot be argued that he meant the following day or any other date. This is a perfect case where the contrary intention has been demonstrated. I find nothing in the language or context of section 57 of the act, the Regulations or the Gazette Notice to suggest that the application of the effective date as prescribed by the Cabinet Secretary would lead to a repugnancy or offend the method of computation prescribed in the *Interpretation and General Provisions Act*.^[13] In the interests of legal certainty, a departure from the provision of section 57 is not readily to be assumed by the court unless the contrary intention appears as it does in the instant case. The Cabinet Secretary meant what he said and said what he Gazetted. This court would be acting contra to his express intention if it prescribes any other effective date other than the revocation date in the Gazette.

50. A classic example can be drawn from the provisions of the act which requires a person who participated in a procurement process to file a Request for Review within 14 days from the date of the occurrence of the breach. Unlike the Gazette Notice in the instant case, the date of the occurrence of the breach is usually not specified. Such provisions whereby the exact date not specified are the ones which require the application of section 57 of the *Interpretation and General Provisions Act*. But where the date is specified with such clarity as in the instant Gazette Notice, it is not necessary to seek the interpretative aid of section 57.

51. The primary rule of interpretation is that the words of a statute must be interpreted in their ordinary, literal meaning. But where to give the words their ordinary meaning would lead to an absurdity so glaring that the legislature could not have contemplated it, or to a result contrary to the intention of the legislature as shown from the context or otherwise, the court may so interpret the language of the statute as to remove the absurdity, and give effect to the intention of the legislature.

52. In the present case the governing statute provides for a Member of the Respondent to serve of three years, unless the term is renewed upon expiry. The Minister revoked it the appointment the appointment and with great clarity specified the effective date. The computation of time in words of section 57 of *Interpretation of General Provisions Act*^[14] is very clear and unambiguous. As stated above, it applies where it is left to the court to determine the date of the occurrence of the event, not where the date of the occurrence of the event has been specified. This court is bound to interpret the words of section 57 in their ordinary, literal meaning. There is nothing to stop the court from applying the proper rules of interpretation as long as they do not cause absurdity so glaring that it could never have been the intention of the legislature to do so.

53. The task for the courts is essentially one of construing the content and scope of the instrument. 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. 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.

54. It follows that any computation of time that has the potential of extending the term fixed by the act or the appointing authority would be impermissible and an affront to the act that stipulates the period. In the same vein, when a Minister specifies with clarity the effective date of an instrument, the proper construction would be that he meant what he said. The provisions of section 57 of the *Interpretation and General Provisions Act* only come into play where the effective date is not specifically provided and the court is asked to determine it.

55. Guidance can be obtained from the Nigerian case of *Zakari v Nigerian Army*^[15] in which the court held, *inter alia*, that where a court properly constituted by way of membership, brings in an additional member who is not qualified to sit, it loses its competence to adjudicate because its constitution has changed resulting in a change of the number and qualification of the membership. As such its proceedings or any trial conducted by it is a complete nullity. In this case, revocation of the Chairperson’s appointment was sufficient to impugn the decision of the Review Board, notwithstanding the fact that he sat with three other members who formed the required quorum.^[16]

56. I need not emphasize the need to construe the provisions of a statute as a whole. The meaning of a statute should be looked for not in any single section, but in all the parts together and in their relation to the end in view. In other words, the provisions of a statute should be construed harmoniously. Where a court is faced with the interpretation of statutory provisions, the statute must be read as a whole in determining the objective of a particular provision. Thus, all the provisions of the statute must be read and construed together to determine unless there is a very clear reason why a particular provision of the statute should be read independently. To achieve a harmonious result, a section must be read against the background of another to which it relates. This principle is indispensable in giving effect to the true intentions of the makers of the statute. In this regard, where the appointment of a Member of a Tribunal is revoked or expires, the competence of that member to sit comes to an end.

57. It is my finding that the Review Board was not properly constituted, hence, the impugned proceedings were a nullity. On this ground alone, this judicial review application succeeds.

b. Whether the Interested Party’s bid was responsive.

58. The applicant’s counsel referred to the Responsiveness Table C signed by all the individual members of the evaluation committee which noted that none of the bidders met all the mandatory requirements of the tender. He singled out the Interested Party who did not provide a line of credit from a reputable bank of not less than Ksh. 100 Million and certified bank statements.

59. He stated that the Head of Procurement rendered a professional opinion pursuant to the provisions of Section 84 (1) of the Act that all the bids were non-responsive. He submitted that acting on the professional opinion rendered by the Head of Procurement, the Accounting officer terminated the procurement proceedings pursuant to the provisions of Section 63 (1) (f) of the Act which stipulates *inter alia* that an accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset

disposal proceedings without entering into a contract where all the bids are non-responsive. Further, he submitted that all the bidders were notified of the cancellation of the tender in accordance with the provisions of Section 63 (4) of the Act. Counsel also pointed out that the Procuring entity prepared and submitted a written report to the Public Procurement regulatory Authority pursuant to the provisions of Section 63 (2) and 63 (3) of the Act.

60. The Respondent's counsel submitted that all the issues raised by the Applicant were properly addressed by the Respondent and all the parties were given a chance to respond to the Requests for Review before the Board gave its decision.

61. The Interested Party's counsel submitted that it was not disputed that the applicant's Evaluation Committee examined the Interested Party's bid under Section 79(1) of the act and did not declare it non-responsive nor did it reject the bid as non-responsive. He referred to Regulation 47(1) which outlines what should be examined for purposes of Section 79(1) of the act and argued that the applicant did not adduce any evidence to demonstrate that its Evaluation Committee rejected the Interested Party's bid after conducting an examination to determine its responsiveness.

62. Counsel argued that once the tender was declared as responsive, Section 80(1) of the act and Regulation 49(1) kicked in. He submitted that the evaluation committee appointed by the accounting officer pursuant to section 46 of the Act, is required to evaluate and compare the responsive tenders other than tenders rejected under section 82(3). In addition, he argued that the evaluation committee is required to conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document. Counsel argued that pursuant to the above provisions, the applicant was under a statutory estoppel not to reject the bid as non-responsive in the subsequent technical and financial evaluation stages under Section 80(1) of the act and Regulation 49(1). In counsel's submission, the Respondent's decision cannot therefore be had to be *ultra vires* the Act, 2015 and the Constitution.

63. Article 227 of the Constitution is the source of the powers and function of Public Procuring Entity. It lays down that an organ of State if authorized by law may contract for goods and services. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in Article 47 of the Constitution and the basic values governing public administration.

64. The Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer at Article 227. The Article requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be 'fair, equitable, transparent, competitive and cost effective'. Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of the Fair Administrative Action Act^[17] apply to the process.^[18]

65. An organ of state must indicate in the invitation to submit a tender: (a) if that tender will be evaluated on functionality; (b) that the evaluation criteria for measuring functionality are objective; (c) the evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality; (d) that no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation; and (e) that tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the applicable prescribed point systems.³⁶

66. An acceptable tender under the Act is any "tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document."

67. Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescriptions that the Procuring Entity or the Review Board or even this court may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution.

68. The legislative framework for procurement policy under Article 277 of the Constitution does not seek to give exclusive content to that Article. The framework thus provides the context within which judicial review of state procurement decisions must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to either procedural unfairness, irrationality, unreasonableness or any other review ground under the Fair Administration Action Act.^[19] The judicial task is to assess whether the evidence justifies the conclusion that any one or more of the review grounds do in fact exist.

69. Judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.^[20] 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. What matters is to establish whether the decision was taken in a manner, which is lawful, reasonable, rational and procedurally fair.

70. Article 227 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in the Fair Administrative Action Act.^[21] The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in the Fair Administrative Action Act.^[22]

71. In accordance with the approach set out above it is now necessary to consider whether the evidence on record establishes the factual existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that any of the grounds for review. The materiality of irregularities is determined primarily by assessing whether the tender requirements have been substantively achieved. The starting point is Section 79 of the act which provides as follows:-

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.

72. A proper construction of the above provision shows that the requirement of responsiveness operates in the following manner:-

a. *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.* [23]

b. *Bid formalities usually require timeous 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.* [24]

73. 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. [25] 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.

74. In several decisions of this court I have stated that 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.

75. 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 obtained from The World Bank Procurement Guidelines which similarly provide as follows:-

“... 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.” [26](Emphasis added)

76. 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.” [27]

77. The decision as to whether or not a particular nonconformity 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 nonconformity in determining if a bid is nonresponsive. 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. [28] The Evaluation Committee can in other words

under limited circumstances require the waiver of an otherwise significant deviation where no competitive advantage would result. [29] However, in the case of material nonconformities, 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." [30]

78. 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.

79. For there to be fairness in the public procurement process as required under Article 227, 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.

80. 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 forms an integral part of the procurement process. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case. The Bid documents contained clear instructions to bidders. No contest was raised before me that the requirements cited by were not in the bid documents. In fact, at pages 386 to 387 of the bundle attached to the applicants supplementary affidavit, the line of credit from a reputable bank of not less than 100 million and certified bank statements for the last six months are listed among the mandatory conditions. The professional opinion regarding the Interested Party's bid made three observations, namely:-

a. *The firm line of credit is 100 million though this was not captured in the report.*

b. *The firm had done partial serialization of the tender document though this was not captured in the report.*

c. *Bank statements were not for the last 6 months.*

81. A Procuring Entity is bound by its Bid Documents. Mandatory conditions cannot be waived. No argument was advanced before me to the effect that such deviations do not prejudice the other bidders or confer a benefit to the Interested Party.

82. The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the Tender Documents by examining the documents before it. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of Review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground has been established.

83. *First*, 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 purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. *Second*, 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. *Third*, 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. *Fourth*, fairness must be decided on the circumstances of each case. Whatever is done may not cause the process to lose the attribute of fairness or, in the constitutional sphere, the attributes of transparency, competitiveness and cost-effectiveness.

84. In the context of a tender process, the tender documents give notice of the proposed administrative action (i.e. failure to comply with mandatory requirements would lead to rejection of the bid), while the responding bids in effect constitute representations before the decision is made (i.e. their bids would be treated as responsive). [31] Adequate notice would require sufficient information to enable prospective tenderers to make bids that cover all the requirements expected for the successful award of the tender. In this regard, all the bidders were notified of the bid requirements.

85. The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive. [32]

86. The Procuring Entities Procurement Officer observed that no bidder met the mandatory evaluation criteria and observed that the tender was non-responsive since no bidder met the mandatory requirements. It is my finding that the Respondent erred by not appreciating that procuring entities should consider only conforming, compliant or responsive tenders. I also find that the tender was validly terminated under section 63 (f) of the act since all the evaluated tenders were unresponsive. This is a legal requirement and to hold otherwise would be an affront to the principles of public procurement prescribed in Article 227 of the Constitution. For all these reasons the decision to award the tender to the Interested Party is constitutionally invalid. On this ground alone, the impugned decision cannot be allowed to stand.

d. Whether the tender was lawfully terminated

87. The applicant's counsel placed reliance on *Republic v Public Procurement Administrative Review Board & 2 others Ex- parte Rongo University* [33] and submitted that the Respondent herein derives its jurisdiction from the provisions of Section 167 of the Act. He argued that section 167 (4) (b) of the Act stipulates *inter alia* that a termination of a procurement or asset disposal proceedings in accordance with Section 62 of the Act shall not be subject to review of procurement proceedings under Section 167 (1) of the Act.

88. Counsel submitted that termination of tender proceedings is provided for under Section 63 of the Act and that it is now well settled that

“a plain reading of Section 167 (4) (b) of the Act is to the effect that a termination that in accordance with Section 63 of the Act is not subject to review. Therefore there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of Section 63 of the Act, and that the circumstances set out in Section 63 were satisfied before the jurisdiction of the Respondent can be ousted.

89. Counsel placed reliance on *Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (interested Party); Ex parte Kenya Veterinary Vaccines Production Institute*^[34] held *inter alia* which held:-

“in a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act”.

90. Buttressed by the above decision, the applicants counsel argued that the procuring entity placed sufficient evidence and reasons to support the termination of the tender and demonstrated that the substantive and procedural requirements under Section 63 have been complied with, thus ousting the Respondent’s jurisdiction. He maintained that the applicant through evidence on record exemplified sufficient reasons for termination of the tender on the ground of non-responsiveness of the Mandatory Requirements by all the tenderers and further demonstrated that all the substantive and procedural requirements set out in Section 63 were complied with and in the premise the Respondent acted *ultra vires* in directing the applicant to proceed with the procurement process.

91. Counsel argued that tender evaluation must be carried out in strict compliance with the terms of the tender document and must be measured against the constitutional values set out under Article 227 of the Constitution of Kenya, 2010. Counsel submitted that evaluation criteria are the standards and measurements used to determine how satisfactorily a proposal has addressed the requirements identified in the Request for Proposals. He argued that suppliers must meet the mandatory criteria and any bidder failing to meet the mandatory criteria must be deemed incapable of performing the contract and is rejected. Counsel placed reliance on *Republic v The Public Procurement Administrative Review Board Ex-parte Meru University of Science & Technology*^[35] where the Honorable court held *inter alia* as follows:-

“In public procurement regulation it is a general rule that procuring entities should only consider 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 equal footing. Moreover, they have a legitimate expectation that the Procuring entity will comply with its own tender conditions...”

92. Counsel continued to quote from the said decision thus:-

“it is beyond argument that our procurement law provides for compliance with tender conditions in all respects. On a literal interpretation of the definition of an acceptable tender in the act, therefore, it would appear that procuring entities must exclude tenders that fail to comply with the exact requirements of the tender conditions. The legislator does not appear to afford procuring entities any discretion in the matter nor does the Respondent herein or this Court have any discretion on such matters...”

93. Counsel argued that procurement process ought to strictly comply with the provisions of Article 227 of the Constitution which provides that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In addition, counsel relied on *Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati*^[36] and argued that the applicant’s termination of the tender pursuant to the provisions of Section 63 of the Act was in line with the values of Article 227 of the Constitution of Kenya and are in the public interests and the said terminations ought to be upheld by this Honourable Court.

94. The Respondent’s counsel argued that the applicant’s head of procurement erred in law by reversing the decision to recommend two bidders who were technically conforming to section 79(1) and terminating the tender contrary to the provisions of section 87 of the PPAD Act and article 227 of the constitution of Kenya.

95. Counsel for the Interested Party argued that from the evaluation report by 8 experts including two independent consultants dated 26th July, 2018, the Interested Party’s bid was responsive after examination. He also argued that it was technically responsive after technical evaluation and was the lowest evaluated financially and was the most preferred tender. He added that the evaluation report was supported by the independent individual evaluation of each committee member.

96. It was his submission that the professional opinion dated 15th August, 2018 was limited to reviewing of the evaluation report as per Section 80(4) of the act, and, that, the said opinion can only be issued by the head of procurement. He added that looking at the professional opinion dated 15th August, 2018, it was issued by an amorphous team of Maxwell Mugo, Patrick Kiruki and Josephine Naitore in contravention to section 84(1) of the act.

97. Counsel argued that the opinion was preceded by a memo by Josephine Naitore dated 14th August, 2018 opining that the entire tender process be termed as non-responsive. He added that it was subjected to an amorphous body called “Review Committee” that is unknown in law. It was his submission that the professional opinion was arbitrary and did not provide the guidance contemplated under Section 84(2) of the act, hence, it was null and void. Accordingly, counsel argued that the accounting officer was not bound by an opinion that was null and void and the Respondent was therefore right to direct the applicant to conclude the tender proceeding in favor of the Interested Party.

98. It is common ground that the act permits cancellation of a tender before signing of the contract. In this regard, section 63 of the act provides for termination or cancellation of procurement and asset disposal proceedings prior to signing of a contract on grounds stated therein among them if all evaluated tenders are non-responsive.

99. I have already determined in the above issue that all the bids were found to be non-responsive for failing to meet the mandatory bid requirements. The above provision provides for termination in the event of such an eventuality. No serious argument was rendered before me to suggest even in the slightest manner that the bid documents were responsive. I find and hold that the termination was consistent with the above provision.

e. Whether the impugned decision is tainted with illegality

100. The applicant's counsel argued that the Respondent erred in Law and in fact in holding that the applicant failed to notify the bidders pursuant to the provisions of Section 87 of the Act and argued that the notification under Section 63 (4) of the Act must be distinguished from that stipulated under Section 87 which addresses notification upon award of a tender.

101. He further argued that the Respondent acted *ultra vires* the provisions of Section 84 of the act and failed to consider relevant and pertinent material facts in holding that the role of the head of Procurement under Section 84 of the Act is limited to advising the Accounting Officer to require the evaluation committee to look at the tender documents again or seek an explanation as to why the signed reports and the tender forms had different outcomes.

102. Lastly, the applicant's counsel submitted that the role of the Head of procurement pursuant to the provisions of Section 84 of the Act goes beyond the interpretation put forth by the Board. For this proposition, he relied on *Republic v Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd* [37] which held that section 84(3) does not condition the taking into account of the said opinion on the existence of dissenting opinions.

103. On the question whether the decision is *ultra vires*, the Respondent's counsel argued that other than citing the provisions of the Act and the constitution, the actual sins of the tribunal have not been demonstrated and as such there is nothing on the face of the application that demonstrates that the respondent acted *ultra vires* the aforementioned provisions. He submitted that a closer reading of the respondent's decision reveals that the respondent made an observation that the applicant's head of procurement arrogated herself the powers to evaluate the tender being a deviation from her role as assigned in law.

104. On the argument that the decision was unreasonable/ irrational the Respondent's counsel submitted that courts have defined what would constitute unreasonable in various decisions. He relied on *Republic v Kenya Power & Lighting Company Ltd & another*[38] which defined reasonableness citing Lord Greene, M.R.in the *Wednesbury Corporation* case.

105. He also argued that the onus placed on the applicant is to demonstrate that the decision was so absurd that no sensible person could ever dream that it lay within the powers of the authority. He relied on *Republic v Public Procurement Administrative Review Board & Another ex Parte Gibb Africa Ltd & Another*[39] for the holding that the decision can only be challenged on grounds of unreasonableness or irrationality. He relied on the test of unreasonableness set out in *Associated Provincial Picture House Ltd Wednesbury operation*. [40] Further, the Respondent's counsel argued that the applicant is trying to have a hearing on the merits. To buttress his argument, he relied on *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited*[41] for the holding that the remedy of judicial review is concerned with reviewing not the merits. He also relied on *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another*[42]and *Municipal Council of ombasa vs. Republic & Umoja Consultants Ltd*[43] for the same proposition.

106. Counsel for the Interested Party argued that the Applicant did not adduce any evidence to demonstrate that the Respondent's decision was *ultra vires* the cited sections of the law and Articles of the Constitution. He argued that the applicant did not specify the relevant and material facts that the Respondent failed to consider in arriving at its decision.

107. On whether the Respondent's decision was irrational and unreasonable, counsel argued that the Respondent's decision was based on its wide powers provided for under Section 173 of the act and, that, it was guided by the fact that the applicant's evaluation Committee had evaluated the Interested Party's technical and financial bids and found it to be the lowest evaluated. He argued that only the Applicant's head of procurement who faulted the evaluation results by curiously purporting to evaluate the Interested Party's bid herself contrary to her mandate under Section 80(4) of the act which was limited to reviewing the evaluation report. He submitted that the Respondent acted rationally and reasonably by directing the *Ex Parte* Applicant to conclude the process in favour of the Interested Party. He relied on *Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium v Public Procurement Administrative Review Board & another* where the Court of Appeal held that the conclusion "... at liberty to proceed with the procurement process herein to its logical conclusion in accordance with the law" must be read in the context it was reached.

108. Section 63(4) of the act places an obligation on the accounting officer of the Procuring Entity to notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination. In this regard I note that pages 450 to 457 of the bundle of documents annexed to the applicants supplementary affidavit are letters addressed to all the bidders notifying them of the termination and the reason for the termination. The reasons cited is expressly provided in section 63 (1) of the act at paragraph (f). I have already in the earlier issues held that all the bids were non-responsive. I have also held earlier that the termination is not only provided under the law, but also the reason for the termination is expressly provided for under the act.

109. It is my conclusion that the termination, the reasons for the termination, and the manner in which the termination was undertaken and communicated is consistent with the relevant provisions of the law. Differently put, the applicant has succeeded in establishing that the Respondent's decision is tainted with illegality and that the procurement process if allowed to proceed as ordered will in the circumstances of this case offend the principles laid in Article 227, namely, fairness, transparency, competitiveness, equitable and cost effectiveness. It will also offend the principle that procurement entities are bound by the Bid terms and conditions and that bidders should compete on equal

footing. Differently put, mandatory bid terms must be complied with.

Disposition

110. In view of my analysis and determinations of the issues discussed above, the conclusion becomes irresistible that the applicant's application succeeds. The *impugned decision is amenable for review on grounds discussed above.*[\[44\]](#)

111. Accordingly, I allow the applicant's Notice of Motion dated **11th** October 2018 and make the following orders:-

*a. An order of **Certiorari** be and is hereby issued quashing the Respondent's decision dated **24th** September 2018 in Request for Review Number 117 of 2018 between Arid Contractors & General Suppliers Ltd and Meru University of Science and Technology.*

b. An order of prohibition be and is hereby issued restraining the Respondent from imposing any sanctions and or costs upon the applicant flowing from the said decision.

c. No orders as to costs.

Signed and Dated and Delivered at Nairobi this 27th day of November, 2019

John M. Mativo

Judge

[\[1\]](#) Act No 42 of 2012.

[\[2\]](#) Act No. 33 of 2015.

[\[3\]](#) Cap 2, Laws of Kenya.

[\[4\]](#) 4th Ed, 2009, [1.90].

[\[5\]](#) **Civil Appeal No. 187 of 1999.**

[\[6\]](#) **{2013} e KLR.**

[\[7\]](#) Cap 2 Laws of Kenya.

[\[8\]](#) Cap 2, Laws of Kenya.

[\[9\]](#) See also *Joubert v Enslin* 1910 AD 6, 37-38.

[\[10\]](#) See *Nair v Naicker* 1942 NPD 3 at 5; *Muller v New Zealand Insurance Co. Ltd* 1965 (2) SA 565(D) at 571E.

[\[11\]](#)Cap 2 Laws of Kenya.

[\[12\]](#) Ibid.

[\[13\]](#) Ibid.

[\[14\]](#) Ibid.

[\[15\]](#) {2015} 17 NWLR (Pt. 1487) S. C. 77 at 106, paras. C-E, per Ngwuta, J. S. C.

[\[16\]](#) Ibid.

[\[17\]](#) Act No. 4 of 2015.

[\[18\]](#) *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* {2007} ZASCA 165; 2008 (2) SA 481 (SCA) (Millennium Waste) at paras 28-32

[\[19\]](#) Act. No. 4 of 2015.

[20] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11.

[21] Act No. 4 of 2015.

[22] *Ibid.*

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

[24] Hoexter 2012: 295.

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

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

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

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

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

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

[31] Quinot "Administrative Law" (2010) *Annual Survey of South African Law* 41 at 63.

[32] See *Minister of Social Development and Others v Phoenix Cash and Carry Pmb CC* [2007] ZASCA 26; [2007] 3 All SA 115 (SCA) at para 2.

[33] {2018} e KLR

[34] {2018} e KLR.

[35] Misc Application No. 85 of 2018.

[36] Nairobi HCMA No. 1260 of 2007 [2008] KLR 728.

[37] {2017} e KLR.

[38] {2013} e KLR.

[39] {2012} e KLR.

[40] {1947} 2 ALL ER 680.

[41] {2008} e KLR.

[42] {2014} eKLR

[43] Civil Appeal No. 185 of 2001. Counsel also cited *Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited and Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012* [2012] e KLR.

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