REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

MISC. APPLICATION NOS. 71 AND 72 OF 2017

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW AN ORDER OF CERTIORARI

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT CAP 412A AND THE PUBLIC PROCUREMENT REGULATIONS, 2006

IN THE MATTER OF: IN THE MATTER OF PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BAORD APPLICATION NO.4 OF 2017

IN THE MATTER OF: AN APPLICATION FOR LEAVE BY GEOTHERMAL DEVELOPMENT COMPANY LIMITEDTO APPLY FOR CERTIORARI

BETWEEN

REPUBLIC……..APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD…..…….…….. RESPONDENT

M/S LEX OILFIELD SOLUTIONS LIMITED.INTERESTED PARTY

EX PARTE:

GEOTHERMAL DEVELOPMENT COMPANY LIMITED……..…. ……. 1ST APPLICANT

M/S NETFAST COMMUNICATIONS LIMITED…..... 2ND APPLICANT

REASONS FOR THE DECISION

1. On 7th August, 2017, I issued the following orders and informed the parties that reasons therefor would be furnished later.

1) In the premises the consolidated applications succeed and the Respondent's decision dated 8th February, 2017 made in Public Procurement Administrative Review Board Application No. 4 of 2017 is brought to this Court and is hereby quashed.

2) The Respondent is hereby directed to hear the request for review *de novo* while afforcing all the parties an opportunity to be heard on the issues upon which it arrived at its decision.

3) There will be no order as to costs.

2. I now give the detailed reasons for the decision.

3. In these consolidated applications, the 1st and 2nd applicants herein, **Geothermal Development Company Limited** (hereinafter referred to as "Geothermal" or "the Procuring Entity" or "the PE") and **Netfast Communications Limited** (hereinafter referred to as "Netfast") respectively seek the following orders:

1. An order of certiorari be issued removing to the High Court for purposes of being quashed the record, proceedings, decision and Ruling of the 1st Respondent in *Public Procurement Administrative Review Board Application No. 4 of 2017*;

2. An order of prohibition be issued against the 2nd Respondent precluding it, its officers, servants and or agents from awarding *Tender No GDC/ICB/DPL/015/2016-2017; Tender for Provision of Drill String Inspection & Remedial Services for Menengai Geothermal Development Project* to any person or entity other than the 1st Applicant herein;

3. An order of prohibition be issued against the 2nd Respondent precluding it, its officers, servants and or agents from annulling, re-advertising, revoking, canceling *Tender No GDC/ICB/DPL/015/2016-2017; Tender for Provision of Drill String Inspection & Remedial Services for Menengai Geothermal Development Project* or otherwise acting in compliance of the orders of 8th February 2017;

4. An order of mandamus be issued against the 2nd Respondent compelling it to reinstate the Applicant as the successful bidder of *Tender No GDC/ICB/DPL/015/2016-2017; Tender for Provision of Drill String Inspection & Remedial Services for Menengai Geothermal Development Project.*

5. Costs of the application.

6. Such other or further orders, writs and or directions as this Honourable Court may deem just and expedient.

Applicant's Case

4. According to the applicants, these proceedings arise from the decision and Ruling of the Respondent in Public Procurement Administrative Review Board Application No. 4 of 2017 whereby the Respondent ordered, *inter alia*, THAT: -

a. The award of Tender No. GDC/ICB/DPL/015/2016-2017 in respect of Drill String, Inspection and Remedial Services for Menengai Geothermal Development Project to Netfast Communications Limited, be annulled; and

b. The Geothermal Development Company Limited to re-advertise the said tender within 14 days of the date of the Award.

5. According to the applicants, the 2nd Applicant, **Netfast**, responded to the Procuring Entity's Tender No

GDC/ICB/DPL/015/2016-2017; for Provision of Drill String Inspection & Remedial Services for Menengai Geothermal Development Project (hereinafter referred to as "the Tender").

6. It was their case that since the works are wholly financed by the Africa Development Bank (hereinafter referred to as AfDB), the Tender was governed by the provisions of AfDB's Standard Bidding Document (hereinafter referred to as "the Tender document") which Tender document contained detailed and sufficient information and instructions regarding the Tender with the view of giving bidders a fair, equitable, transparent, competitive and cost-effective procurement process as mandated by Article 227(1) of the Constitution. It was averred that according to Article 35.1 of the Tender document on "Award Criteria", the Procuring Entity was required to award the contract to the Bidder whose offer was determined to be (i) the lowest evaluated bid and (ii) the most substantially responsive to the Bidding Document. Further, according to Article 32.4, the Award Criteria was to be determined on the basis of the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.

7. It was contended that the Applicant's bid was found to be responsive and passed the Preliminary Evaluation Stage and proceeded for the detailed technical evaluation stage which the Applicant also passed and was thus qualified to proceed to the final financial evaluation stage and was awarded the subject tender vide the PE's letter dated 28th December 2017.

8. However, the Interested Party, whose bid was unsuccessful, filed a Request for Review premised on the grounds that the PE breached the provisions of sections 3, 79 and 86 of the ***Public Procurement & Asset Disposal Act, 2015*** (hereinafter referred to as "the Act"); the PE breached the provisions of Article 227(1) of the Constitution; the Interested Party had suffered enormous loss and damage and would continue to so suffer unless the PE's decision was annulled.

9. It was disclosed that at Page 32 of the impugned Award, the Respondent upheld the PE's decision in regards to the Interested Party's bid holding that the same was non-responsive for failure to fulfil mandatory requirements of the Tender document. However instead of dismissing the Request for Review with costs, the Respondent proceeded to address matters that were not raised in the Request for Review, *to wit*, that:-

> a. There was a variation in the figures from what was read out and eventually awarded in contravention of Section 82 of the Act; and
>
> b. The PE breached Article 14.8 of the Tender document which required that all duties, taxes and other levies payable by the contractor under the contract to form part of the tender price (paraphrase of the Award at page 33).

10. The Respondent indicated that it could not "close its eyes to what appeared to be a breach of the Act and the tender document". The applicants relied on section 167(1) of the Act which 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…in such manner as may be prescribed."***

11. It was the applicants'' case that the review must be premised on alleged breaches of duty on the part of the PE which breaches must be exhaustively captured in the Request for Review. To the applicants, the Board is supposed to determine whether or not the alleged breaches have been proved and thereafter, make any of the orders provided in section 173 of the Act, which includes, annulling the decision of the PE. It was contended that the Board must be moved by way of a Request for Review since it does not have independent investigative powers to *suo motu* audit/review a tender process. Therefore the Board cannot frame its own issues outside of what is brought before it by a Request for Review. It was therefore submitted that the Award dated the 8th day of February 2017 is *ultra vires*, and is further vitiated by irrationality, bias, want of proper notice and irrelevant considerations.

12. It was contended that the Respondent overstepped its mandate and acted outside the powers donated to it by section 167 of the Act, by *inter alia*, not confining itself and its decision to the breaches alleged by the Interested Party in its Request for Review filed under section 167 of the Act; failed to appreciate that its jurisdiction was limited to determining whether or not the Interested Party had established the breaches of duty alleged in the Request for Review; clothed itself with powers to audit the tender process and in so doing, arrived at an erroneous conclusion; and engaged in a frolic of its own by dealing with matters not related to the Request for Review. In support of their submissions, the applicants relied on the Court of Appeal decision in **Law Society of Kenya vs. Centre for Human Rights and Democracy & 13 Others [2013] eKLR**.

13. To the applicants, an administrative body must restrict the exercise of its powers to the four corners of the law or instrument from which it derives its powers and reliance was placed on **Anisminic Ltd vs. Foreign Compensation Commission [1969] 1 All ER 208**, **Republic vs. Public Procurement Administrative Review Board Ex parte Kenya Electricity Generating Company Limited (KENGEN) & 3 Others [2016] eKLR**, **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others [2012] eKLR** and **R vs. The Public Procurement Administrative Review Board ex parte Kenya Medical Supply Agency, Crown Agents, Deutsche Gesellschaft Fur Technishe Zusammenarbeit and John Snow Inc. [2010] eKLR**.

14. It is also the Applicants' submission that the Award was based on irrelevant considerations to the extent that the Respondent based its decision on matters that were not raised in the Request for Review and relied on **Zachariah Wagunza & another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR.** To the applicants, the Award is further vitiated by a fundamental error of law and irrationality *to wit*: -

a. Holding that the PE corrected errors in the tender sums whereas the PE simply informed the Applicant that the award was exclusive of taxes;

b. Holding that the Applicant and the PE failed to comply with Clause 14.8 of the Tender document which requires all duties and taxes to be included in the total bid price and which is exactly what the Applicant did.

15. It was contended that the Award is further vitiated by want of prior notice to the extent that the Respondent did not give prior notice of its intention to raise the issue of the alleged breach of section 82 of the Act, in order to afford parties a reasonable opportunity to prepare their responses thereto. To them, it is a requirement of natural justice that the notice must give sufficient time to a person to prepare his case and that a notice whose intent is simply to satisfy the requirement that a party be notified; but whose actual import is to have an individual tried by ambush, as happened in this matter, does not meet the test of due notice and must be regarded as no notice in law. It was disclosed that the Request for Review was filed on 18th January 2017, the same came up for hearing on three (3) occasions, that is, 31st January, 3rd and 7th February 2017, though it was heard on last occasion. The Respondent only raised this issue when the PE's Counsel was making his submissions in reply to the Interested Party's submissions. In this respect the applicant relied on **Republic vs. Registrar of Companies Ex parte Charles Kariuki Githongo [2001] eKLR** and **Zachariah Wagunza & another vs Office of the Registrar Academic Kenyatta University & 2 others [2013]eKLR** and **Geothermal Development Company Limited vs. Attorney General & 3 others [2013] eKLR.**

16. In the applicants' view, the question is not whether or not the PE contravened section 82 but whether in arriving at its decision, the Respondent acted with due regard to the fundamental principles of natural justice. They contended that the Award is vitiated by bias to the extent that the Respondent entered into the arena of the dispute by tackling matters not pleaded before it and thereby litigating on behalf of the Interested Party.

17. The Applicants also contended that their legitimate expectation to fair administrative action as espoused in section 7 of the ***Fair Administrative Action Act, 2015*** was thwarted by the Respondent.

18. It was the applicants' case that the provisions of the ***Public Procurement and Asset Disposal Act, 2015***, do not apply to the procurement process in question because the subject procurement emanated from a bilateral Protocol Agreement between the Government of Kenya and the African Development Bank which is a foreign agency. By this agreement, the Bank was to fully finance the project from its inception up to conclusion. This was necessitated by the costly nature of the project. In this respect they relied on section 4(2)(f) and Section 6 of the ***Public Procurement and Asset Disposal Act, 2015***. In the premises, it was their submission that this is a classic case of the special categories of procurement which are not subject to the provisions of the ***Public Procurement and Asset Disposal Act, 2015***. Since the Respondent derives authority from the said Act, to wit section 27 (1) thereof, the Court was urged to agree find that the Board lacked jurisdiction to determine the application which was placed before it, bearing in mind that the procurement in question was one under a bilateral agreement. To support this submission the applicants relied on the sentiments espoused by **Lenaola, J** (as he then was) in the case of **Okiya Omtata Okoiti vs. Attorney General & 3 Others; Petition No. 58 of 2014 (Consolidated with Petition No. 209 of 2014) (2014) eKLR** where it was held as follows:-

> **"…I have already stated elsewhere above the conditions which the Government of Kenya had to satisfy before the financing of the SGR project. They include the following; the finances required would be met by the Chinese Government and that the mode of procurement of the SGR project had to be in line with the conditions made by Exim Bank; i.e. the 4th Respondent had to be awarded the contract. Whether that term of the contract was oppressive or not is not for this Court to interrogate as in fact all evidence before me points to the fact that Parliament has already done so and found it to be lawful. To my mind therefore, the arguments made by the Petitioners that the Government was involved in a restricted tendering or indirect procurement would not be valid. It is obvious therefore that the Public Procurement and Disposal Act does not apply to the issues at hand and I so find.**
>
> **66. I make that finding well aware of the arguments made by the 1st and 2nd Petitioners that the funding of the SGR project is 100% by the Government because it has to repay the loan advanced to it by Exim Bank and that the proceeds of the loan are to be released per the MoU and the terms and conditions of the agreement. That fact notwithstanding, it means that the guiding principles are those negotiated as between the two entities and Section 6(1) of the Act is the law on which such loans and grants are based. Parliament must have had a reason to exclude them from open tendering and generally the operations of the Public Procurement and Disposal Act. In that regard, my duty is to interpret the law as made by Parliament and not to rewrite it to suit popular opinions or beliefs or indeed my own beliefs, strong as they may be in this case.**
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> **67. Having found as above, it therefore follows that the arguments that the Petitioners ought to have lodged their complaints with the Public Procurement Administrative Review Board as established under Section 93 of the Public Procurement and Disposal Act, are irrelevant and would not apply in the context of the Petitions before me. See of Power Technics Ltd vs Kenya Power and Lighting Company Ltd (supra) Victory Construction Company Ltd vs Ministry of Regional Development Authorities(supra), Intex Consortium Ltd vs Ministry of Roads (supra) and Areva Td-Viscas Consortium and Another vs Kenya Power and Lighting Co Ltd (supra)for a discussion on that subject, generally."**

19. It was further submitted that the application was lodged way past the required time frame as per section 167 (1) of the Act. To the applicants, the Interested Party, having received its Letter of Rejection of bid on 28th December 2016, filed the application before the Respondent on 18th January 2017, outside the fourteen (14) days window period that is provided for hence for this reason as well, the Respondent did not have jurisdiction over the application placed before it.

20. The applicants therefore prayed that the application be allowed with costs.

Respondent's Case

21. The Respondent on its part opposed the application.

22. According to the Respondent, it received the Interested Party's Requests for Review in the matter of Tender No. Tender No. GDC/ICB/DPL/015/2016-2017 in respect of a Tender for Provision of Drill String Inspection & Remedial Services for Menengai Geothermal Development Project. Upon receiving the Request for Review, it immediately directed that the ex-parte Applicants herein be served and notified of the pending review as required by the provisions of section 168 of the Act.

23. It was averred that upon service with the Request for Review, the ex-parte Applicant filed a Preliminary Objection in opposition to the Request on 2nd February, 2017; and the interested party filed its memorandum of response on 2nd February, 2017. The 1st Ex-parte Applicant's Preliminary objection inter-alia raised issues of jurisdiction more particularly that the Respondent had no jurisdiction to hear and determine the Request for Review and alleged that the same was subject to the provisions of the African Development Bank Rules of Procurement. The Request for Review was subsequently heard on 7th February wherein the Respondent considered the documents submitted by all the parties including the Request for Review, the tender documents of both the Interested Party and the 2nd Ex-parte Applicant, the 1st Ex-parte Applicant's evaluation reports before it as well as the oral and written submissions of the parties and being guided by provisions of the Act dismissed the Preliminary Objection on the grounds that the same lacked merit.

24. According to the Respondent, by virtue of the powers granted to the Respondent by the Act and the fact that the Interested Party was not a party to the Agreement between the 1st Ex-Parte Applicant and the African Development Bank the modes of dispute resolution provided in the African Development Bank Rules and Procedures on Procurement were not applicable to the Request for Review presented by the Interested Party. It was disclosed that during the hearing, it also came to the attention of the Respondent that the bid prices read out during the Tender opening process were different from the price at which the Tender was awarded to the 2nd ex-parte Applicant which is contrary to the provisions of section 82 of the Act. According to the Respondent, it brought the matter to the attention of all the Parties in order to give each Party an opportunity to present its case on the matter more particularly the 1st Ex-Parte Applicant who had committed the breach of section 82 of the Act.

25. According to the Respondent, the 1st ex-parte Applicant in response to the issue raised by the Respondent admitted that the price at which the Tender was awarded to the 2nd Ex-Parte Applicant was indeed different from the price read out during the Tender Opening process and attempted to qualify the aforementioned difference by attributing the same to the removal of VAT. The Respondent informed the 1st ex-parte Applicant that the provisions of section 82 was absolute and the same did not allow any form of adjustment of the price read out during the Tender opening process and any attempt to do the same would amount to breach of section 82 of the Act. It was therefore contended that contrary to the allegations of the Ex-parte Applicants all the parties concerned were given an opportunity to address the Respondent on the clear disparity of the bid prices.

26. It was further averred that during the hearing the Interested Party brought it to the attention of the Respondent that even though the award of the Tender had been made to the 2nd ex-parte Applicant, the same party was not deserving since it did not meet the experience required to properly undertake the Tender project and urged the Respondent to look at the tender documents of both the Interested Party and the 2nd ex-parte Applicant to ascertain the truth of the allegations made. To the Respondent, although it questioned the 2nd ex-parte Applicant on the allegations made by the Interested Party, the 2nd Ex-Parte Applicant did not challenge the accuracy of the allegations made but instead sought to know the source of the said information claiming it was confidential information. It was disclosed that the Interested Party explained that the experience of the 2nd ex-parte Applicant was not confidential more specifically the number of projects it had undertaken since this was information that was readily available to the public and well known to the companies and individuals who were in the oil and gas industry such as the Interested party herein. Accordingly, the Respondent in agreement with the Interested Party stated that matters of general experience were issues that would be known by people who were in the oil and gas

sector such as the Interested Party and further stated that the bid documents would be examined to confirm whether the allegations made by the Interested Party were truth.

27. It was averred that after the hearing was concluded, the Respondent began the deliberations to determine whether the Request for Review was meritorious and further whether the allegations that had been made by the Interested Party with regards to the qualification of the 2nd ex-parte Applicant were merited and true.

28. According to the Respondent, upon examination of the evaluation report and the 2nd ex-parte Applicant's tender documents the Respondent also noted that the Successful Bidders had not qualified for the Tender. In addition to the foregoing, the Respondent also discovered that the 2nd ex-parte Applicant in its statement on general qualification and experience had not reached the requisite years of experience as all the projects undertaken had been in the position of a sub-contractor.

29. It was the Respondent's contention that guided by the Constitution, the Act, the Regulations and the documents submitted by the parties involved, the Board, in its ruling delivered on 8th February, 2017 allowed the request for review by the Applicant, ordered that:

> a. The award of the tender No. GCD/ICB/DPL/2015-2016-2017 in respect of drill string, inspection and Remedial services for Menengai Geothermal Development project to M/s Netfast Communication Ltd as set out in the procuring entity's letter be and is hereby annulled.
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> b. The 1st ex-parte Applicant hereinto re-advertise the said tender within 14 days from the date hereof, and;
>
> c. each party shall bear its own costs of the Request for Review.

30. In its view, in arriving at the aforementioned decision, the Respondent considered both the contents of the Interested Party's Request for Review and the original tender documents, the evaluation reports, and other documents submitted by the ex-parte Applicant's and the Interested Party which is well within the powers granted to the Board. To the Respondent, it was well informed of all the provisions of the law applicable to the raised facts and issues, including the provisions of the Constitution of Kenya, Constitution, the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act" or "the PPAAD Act") and the Public Procurement and Disposal Regulations, 2006 and that it observed the rules of natural justice and acted lawfully, fairly and reasonably in exercise of its statutory mandate under the Act and made the orders that the Applicant's Request for Review be allowed, that the ex parte Applicant restate the process afresh with no orders as to costs.

31. The Respondent insisted that it considered all the relevant factors in arriving at its decision and that its decision was reasonable, rational and lawful and guided by the Constitution, the Act and the Regulations.

32. The Respondent asserted that the two Applicants' applications were made in bad faith, had no merit and was only calculated to harass the credibility of the Respondent's mandate and functions, while ultimately eroding the public's confidence in procurement procedures and processes.

33. The Respondent maintained that it has continued to uphold procurement procedures as required by law and has promoted the integrity and fairness of these procedures and processes, and has not flouted any law nor acted in excess of their powers.

Interested Party's Case

34. The Interested Party similarly opposed the applications.

35. According to the interested party, on or around September 2016, it came across an advertisement from the 1st ex-parte Applicant inviting interested bidders to apply for Tender Number

GDC/ICB/DPL/015/2016-2017 for the provision of Drill String Inspection and Remedial Services at the 1st Applicant's Menengai Site. It then proceeded to fill in the relevant tender application forms and submitted the same on 14th November 2016. According to it, apart from the 2nd ex-parte Applicant's bid there were twelve (12) other bids which were opened ('Bid Opening') on 14th November 2016 at the 1st Applicant's offices at Kawi House in South C area of Nairobi.

36. It was averred that the aforementioned Bid Opening was conducted in the presence of all the bidders and their respective bid prices were read out. From the bid prices announced the Interested Party had the 3rd lowest bid of United States Dollar Six Hundred and Forty Four Thousand One Hundred and Seventy Four and Twenty Cents USD.644, 174.20) while the 2nd ex-parte Applicant had the sixth lowest bid of United States Dollar Eight Hundred and Seven Thousand One Hundred and Six and Fifty Four Cents (USD.807, 106.54).

37. However on or around 4th January, 2017 the interested party received an email from the 1st ex-parte Applicant containing a letter dated 28th December 2016 communicating that the Interested Party's bid had been unsuccessful and that the tender had been awarded to the 2nd ex-parte Applicant. Aggrieved by the 1st ex-parte Applicant's decision, the Interested Party filed a request for review on 17/01/2017 which according to it was filed within the requisite Fourteen (14) days under section 167 (1) of the Act since the actual date of notification of the award was on 04/01/2017. In response to the aforementioned Request for Review, the 1st ex-parte Applicant filed a Preliminary Objection dated 27th January 2017 which Preliminary objection was filed out of time but never the less argued ad dismissed for lack of merit.

38. It was disclosed that the hearing for the Request for Review took place on 7th February 2017 during which it was accurately argued that the Tender in dispute fell within the meaning of the term 'Public Procurement' as defined in section 2 and section 4(1) of the Act was therefore subject to the jurisdiction of the Respondent which finding the Respondent noted and upheld in dismissing the 1st ex-parte Applicant's Preliminary Objection.

39. According to the interested party, during the hearing of the Request for Review, it was noted that the 2nd ex-parte Applicant's bid read out during the bid opening process was not the same amount at which the tender was awarded thereby raising questions on what the cause of the change was. The Respondent being curious on the apparent disparity questioned the 1st ex-parte Applicant on why the amount read at the bid opening was different from the amount that the tender was offered gave the opportunity to the 1st ex-parte Applicant to explain to why the amount had been amended and the 1st ex-parte Applicant responded that the disparity was as a result of the exclusion of taxes on the final amount which amendment had not been communicated to any of the parties prior to the hearing of the Request for Review. It was therefore averred that the 1st ex-parte Applicant's allegations that it was not given an opportunity to explain the aforementioned disparity is not only false and an inaccurate representation of the hearing that took place before the Respondent but an attempt to justify its contravention of the Act.

40. To the interested party, the Respondent relying on Section 82 of the Act stated that as matter of law, the bid amount read out at the bid opening was to be the final amount and not subject to any corrections, amendments or adjustments. It was further explained that the aforementioned provision was absolute and could not be qualified in any event.

41. According to the interested party, the terms corrections, amendments and adjustments have the same effect, that is to effect change. Therefore, the actions by the 1st ex-parte Applicant of altering the final bid amount at which the tender was awarded fits the description of the acts that are prohibited and defined under Section 82 of the Act. It was disclosed that both the 1st and 2nd ex-parte Applicants have in their pleadings and attachments thereto admitted that the 1st ex-parte Applicant indeed corrected the bid amounts read out at the bid opening which is clearly in contravention of the provisions of section 82 of the Act.

42. It was the interested party's position that the 2nd ex-parte Applicant having voluntarily subjected itself to the public procurement process ought to have been well aware of the provisions of section 82 and that the 1st ex-parte Applicant had acted in contravention of the Act. To it, the 2nd ex-parte Applicant cannot claim that it had been ambushed by the contents of Section 82 and any claims and allegations that proper notice ought to have been given are not only unfounded but an attempt to disregard the law on account of a Party that ignored the provisions of the Act. The interested party asserted that the Respondent did not act in excess of its powers when finding that the 1st ex-parte Applicant had acted contrary to the provisions of Section 82 of the Act.

43. In its view, the Respondent being a quasi- judicial body has authority to determine the matters before it including reviewing the evaluation report and bid documents of the interested Party and the 2nd ex-parte Applicant and any other matter arising from the facts and pleadings presented before it. Further, the Respondent has jurisdiction to seek any clarifications and or bring up any issues which in its opinion are key to the particular dispute before it. In any case, the breach of Section 82 of the Act was raised and argued by the 1st ex-parte Applicant during the proceedings that took place before the Respondent. The interested party contended that it is quite shocking to say the least that the 2nd ex-parte Applicant would term the contravention of a statutory provision as an '*irrelevant consideration'* in an attempt to brush off the fact that the 1st ex-parte Applicant acted in contravention to the provisions of Section 82 of the Act.

44. The said interested party averred that on or around 8/02/17 together with its advocates they attended the delivery of the ruling at the Respondent's offices. From the ruling, it emerged that the 1st ex-parte Applicant's Preliminary Objection had been dismissed for lack of merit. Further, upon the review of the bid documents of the 2nd ex-parte Applicant submitted to the Respondent ,it was stated and appreciated that although the 2nd ex-parte had been awarded the tender, it had not qualified for the said tender as purported by the 1st ex-parte Applicant. It was averred that the Respondent in its ruling in favour of the Interested Party founded its decision on the breach of Section 82 and other relevant consideration based on the review and analysis of the 2nd ex-parte Applicant's bid documents as outlined in the decision read on 8/02/17.

45. In the interested party's view, the aforementioned ruling is lawful and based on accurate legal provisions applicable to the events surrounding the Application for Review and based on the various documents filed including the 2nd ex-parte Applicant's and the Interested Party's bid documents availed to the Respondent for evaluation therefore Respondent did not exceed its mandate in delivering the same.

46. The interested party therefore asserted that the Applications lacked merit and prayed that the same be dismissed with costs.

Determination

47. I considered the issues raised in these applications.

48. The first issue for determination is whether the Respondent had jurisdiction to entertain the request for review. It was contended that the Respondent wrongly interpreted the provisions of the ***Public Procurement and Asset Disposal Act*** to give itself jurisdiction over the subject tender when it has no such jurisdiction in light of the provisions of section 4(2)(f) of the Act which states expressly that procurements under a multilateral agreements are procurements "to which the Act does not apply". Section 4 of the said Act provides as follows:

> ***(1) This Act applies to all State organs and public entities with respect to —***
>
> ***(a) procurement planning;***
>
> ***(b) procurement processing;***

(c) inventory and asset management;

(d) disposal of assets; and

(e) contract management.

(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies —

(a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an employee, but this shall not apply to persons who are under a contract of service;

(b) the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration;

(c) acquiring of services provided by government or government department;

(d) acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as

shares purchased by cooperative societies, state corporations or other public entities;

(e) procurement and disposal of assets under Public Private Partnership Act, 2013; and No. 15 of 2013.

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

(3) For greater certainty, all public procurement are procurements with respect to the application of this Act.

49. In my view, section 4(2)(f) cannot be considered in isolation to Article 227 of the Constitution which provides that:

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

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

a. categories of preference in the allocation of contracts;

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

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

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

50. Therefore any public procurement or asset disposal must be undertaken in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In my view the framers of the

Constitution were alive to the fact that public procurement necessarily involves an element of taxation and hence amounts to a burden to the tax payer. Similarly public asset disposal involves diminution of the proceeds of taxation. It is therefore necessary that in both instances the taxpayer be made aware of how his taxes are being spent and how the assets procured with his taxes are being disposed of. For a public entity to procure a financial facility whose repayment is shrouded in mystery and bind the public with its repayment when the process did not comply with the principles under Article 227 of the Constitution would be clearly contrary to the spirit of the Constitution.

51. It is therefore my view that only in exceptional circumstances should a provision of an enactment be interpreted in a manner that excludes public scrutiny since Article 227 of the Constitution embraces all instances where a State organ or any other public entity is contracting for goods or services. To hold that Parliament can through its delegated power enact a law whose effect would be to decide which entities are subject to Article 227 of the Constitution without justification from the Constitution would amount to scuttling the letter and spirit of the said Article.

52. In my view a purposeful reading of section 4(2)(f) of the ***PPAAD Act*** must necessarily lead to the conclusion that for a procurement to be exempted thereunder, one of the parties must be the Government of Kenya while the other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. I also agree at the rationale for such provision is clear must be to avoid the imposition of Kenyan law on another Government and that such procurement can only be governed by the terms of their bilateral or multilateral agreement, which agreements are of course subject to Parliamentary scrutiny. This exception would be justified under Article 2(5) of the Constitution which provides that the general rules of international law shall form part of the law of Kenya.

53. It is clearly not the Government of Kenya. That section 6(1) of the ***PPAAD Act*** does not deprive the Respondent of jurisdiction was appreciated in **Republic vs. Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & Another [2016] eKLR** where this Court found that:

> **"The question however, is whether there was a conflict between the provisions of the Act and the conditions imposed by the donors. In my view, even assuming there was such a conflict, section 6(1) does not deprive the Board of the jurisdiction to entertain a matter that falls within its jurisdiction. What section 6(1) provides is 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."**

54. In my view unless the provisions of the ***PPAAD Act*** allow for circumstances under which its application is restricted and subject to the Constitution, parties to a tender agreement cannot contract outside the Act since the said Act is a legislation enacted pursuant to the provisions of the Constitution. To paraphrase **Chelashaw vs. Attorney General & Another [2005] 1 EA 33**, rules and laws made under Constitutional powers are superior and stand above those made under say a statute and they should be given more regard and force.

55. It follows that the subject tender was not excepted under section 4(2)(f) hence the Respondent had jurisdiction to entertain the dispute arising therefrom.

56. The applicants contended that they were not accorded sufficient time and material to respond to the issues which the Board relied upon in nullifying the 1st applicant's award. In this case the application for review was based on the following grounds:-

> **1. THAT the Procuring Entity (1st *Ex-parte* applicant herein) has breached the provisions of Section 86 of the Public Procurement and Asset Disposal Act, 2015;**
>
> **2. THAT the Procuring Entity (1st *Ex-parte* applicant herein) has breached the provisions of Sections 79 of the Act; and**

3. THAT in view of the foregoing, the Procuring Entity (1st *Ex-parte* applicant herein) has ipso facto breached the provisions of Section 3 of the Act and Article 227 (1) of the Constitution.

57. In its decision dated 8th February 2017, the Respondent expressed itself as hereunder:-

> **"Turning into the merits of the Request for Review, the Applicant's tender was inter-alia declared non-responsive at the preliminary evaluation stage because the Applicant did not among other things inte-ralia submit audited financial statements for the year 2013. The Board has looked at the Applicant's tender document and finds that indeed the Applicant did not do so. Mr. Kiragu, Advocate for the Applicant conceded this much. This ground alone is therefore sufficient to dispose of this issue and the Board can do no more than to uphold the procuring entity's decision."**

58. Having upheld the procuring entity's decision, the Respondent proceeded as hereunder:

> **"This is however not the end of the matter. When this request for review came up for hearing and upon allowing all the parties to address the Board on the issue and form of tender and price, it transpired that whereas the successful bidder submitted a tender price of USD 807,106.54 in its form of tender, it was awarded the tender at the sum of USD 695,781.50. This correction of error was repeated for other bidders namely SGS (K) from USD 6,239,050.00 to USD 6.375.850.00 and the National Oilwel Varco Downhole Eurasia Limited (Bidder 5) which was adjusted from the total read-out price of Kshs. 200,140,132.00 to Kshs 134,490,489.00. Another element that transpired during the hearing is the qualification of the successful bidder."**

59. However in these proceedings, the Respondent confirmed that upon examination of the evaluation report and the 2nd ex-parte Applicant's tender documents the Respondent noted that the Successful Bidders had not qualified for the Tender. In addition to the foregoing, the Respondent also discovered that the 2nd ex-parte Applicant in its statement on general qualification and experience had not reached the requisite years of experience as all the projects undertaken had been in the position of a sub-contractor. Accordingly, guided by the Constitution, the Act, the Regulations and the documents submitted by the parties involved, the Board, in its ruling delivered on 8th February, 2017 allowed the request for review by the Applicant.

60. In my view the Respondent having found that it could, based on the grounds raised by the interested party herein, **do no more than to uphold the procuring entity's decision**, could not take up an issue on its own motion and base its decision thereon without affording the parties an opportunity to address the same.

61. Section 4(3) of the ***Fair Administrative Action Act*** provides as follows:

> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision***
>
> > ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
> >
> > ***(b) an opportunity to be heard and to make representations in that regard;***
> >
> > ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
> >
> > ***(d) a statement of reasons pursuant to section 6;***

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

62. However what amounts to ***adequate notice of the nature and reasons for the proposed administrative action*** and the nature of the information, material and evidence that ought to be disclosed must necessarily depend upon the circumstances of the case. In this case section 97(1) of the repealed Act provides that:

> ***"the review board shall complete its review within 30 days after receiving the request for review."***

63. In this case, the applicants averred that the Request for Review was filed on 18th January 2017, the same came up for hearing on three (3) occasions, that is, 31st January, 3rd and 7th February 2017, though it was heard on last occasion. The Respondent only raised this issue when the PE's Counsel was making his submissions in reply to the Interested Party's submissions.

64. It is trite that a tribunal determining the rights of parties ought not to raise a matter for the first time in its judgement when the parties before it were never afforded an opportunity to address the issue. This was the position adopted in **Barasa Wanagwe vs. Jafetha Kimokotiani & 7 Others Civil Appeal No. 23 of 1986** it where the Court of Appeal held that:

> **"Counsel for the appellant tells the Court correctly that the Judge raised the particular point for the first time in his judgement and so no submissions were made. The exact position was not raised in the pleadings. The defences will have to be amended to include a specific reference to section 6(2)(b) of the Land Control Board to ensure that the issue whether the consent is necessary or not, is considered...We think that it was improper for the Judge to decide that issue of law without giving counsel for the appellant an opportunity to exhibit the title and documents and make submissions on the scope of section 6(2)(b)."**

65. In **Republic vs. Registrar of Companies Ex parte Charles Kariuki Githongo [2001] eKLR**, it was held that:

> **"Natural justice requires that persons who might be affected by administrative acts, decisions or proceedings be given adequate notice of what is proposed… failure to give such a person prior notice was tantamount to a denial of an opportunity to be heard on that matter. One such case is the case of Republic Vs Liverpool Corporation Ex-Parte Liverpool Taxi Fleet Operators Association where it was held on the particular facts that existing licencees should have been given prior notice of an opportunity to be heard against policy decision to increase licences, as well as opportunity to argue against individual applications for new licences. He goes on to state later that seldom will the absence of prior notice leave a person with an adequate opportunity of preparing his own case or his answers."**

66. In **Geothermal Development Company Limited vs. Attorney General & 3 others [2013] eKLR**, it was held that:

> **"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See O'Donoghue v South Eastern Health Board [2005] 4 IR 217)…"**

67. I have hereinabove set out the substance of the interested party's case before the Board. Those grounds were dismissed by the Board on the ground that they were unmerited. The Board then proceeded to allow the Request on grounds other than those raised by the interested party some of which it discovered from the documents such as the qualification of the 2nd applicant. Such a finding being adverse to the 2nd applicant in my view necessarily required that the 2nd applicant be afforded an opportunity to address the same. Whereas it was clearly a relevant factor, no determination could be made without the 2nd applicant being heard thereon.

68. I have considered the Board's own view as to the matters which were before it. Although the Board in the exercise of its statutory powers is entitled to consider the legality and constitutionality of the decision made by the Procuring Entity and make appropriate orders, where its decision hinges not on the issue that was directly before it, it ought to afford the parties an opportunity of dealing with the same. It may well be that had the parties addressed the issue the Board may well have arrived at the same decision. However, as was held by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*."** [Emphasis mine].

69. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

> **"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

70. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

71. Whereas there is no doubt that if the Board reasonably found that the criteria adopted by the Procuring Entity would not achieve the principles under Article 227 of the Constitution, it could as well exercise its powers under section 98 of the Act, where the ground upon which the decision is to be based was not one of the grounds for the review, it would be unfair to the parties to raise the issue for the first time in the judgement and ground the decision upon it without affording an opportunity to the parties especially the applicants to address themselves to the same. This was the position adopted in **R vs. The Public Procurement Administrative Review Board ex parte Kenya Medical Supply Agency, Crown Agents, Deutsche Gesellschaft Fur Technishe Zusammenarbeit and John Snow Inc. [2010] eKLR**, where it was held that:

> **"I am aware that in cases of this nature, the court would be required to ascertain what was the question submitted for the determination by the Board, and it would of necessity enquire what were its terms of reference, as well as what was its jurisdiction.**
>
> **…There is no doubt in my mind that the Board exceeded its jurisdiction; it overstepped its mandate by dealing with issues that were not pleaded before it and in doing so, it reached the wrong conclusion. I find that its decision was therefore ultra vires. To find otherwise would be tantamount to negating the whole essence of the Act, which was enacted for the specific purposes of inter alia, promoting competition and to ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency and accountability in those procedures; and finally to increase public confidence in those procedures."**

72. I associate myself with the opinion of the Court of Appeal decision in **Law Society of Kenya v Centre for Human Rights and Democracy & 13 Others [2013] eKLR** that:

> **"If it is proved that the tribunal, person or authority has deviated from the established and set beacons or pathway or legal criteria as delineated and demarcated for it and has run wild and amok, and at worst has gone on a frolic of its own, become an unruly horse and engaged in caprice, malice, witch-hunting and a wild goose chase running helter- skelter, it is the duty of the High Court through its supervisory jurisdiction to pull the leash and firmly point the delineated legal path that the tribunal, person or authority is enjoined by law to tread and to follow.**
>
> **The supervisory jurisdiction of the High Court is the leash and bridle that affirm and ensures that all tribunals, persons or authority are subject to the Constitution, rule of law, natural justice and good governance. It ensures that there is no trampling and aberration of the fundamental rights of the citizen. The supervisory jurisdiction is an in-built internal check and balance within the judicial system. It is the king pin upon which the cog and wheels of justice revolve and without it, untrammeled exercise of discretion reigns supreme – this is not what the people of Kenya intended when they promulgated the 2010 Constitution. The people of Kenya intended to have a country governed by the Constitution and the rule of law, not an unchecked exercise of judicial and quasi-judicial power by any person or authority.**
>
> **If it is proved that in the vetting of any individual Judge or magistrate the Vetting Board has exceeded the legal parameters and criteria set out for the exercise of its jurisdiction, the leash of the supervisory jurisdiction of the High Court must be activated and invoked…"**

73. **Nyamu, J** (as he then was) in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, expressed himself as follows:

> **"Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the**

Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant. Adjudication of disputes is a constitutional mandate of the Courts and the Court cannot abdicate from it."

74. Therefore all **factors** must be considered by the Board and in particular the need to afford the parties a fair hearing and the decision ought not to be based simply on expediency.

75. It is on the basis of the foregoing that I issued the orders herein.

76. These reasons were ready on 11th August, 2017 but due to inadvertence on the part of the Court the notice was not issued then.

Given at Nairobi this 17th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Olando for the 1st applicant and holding brief for Miss Babu for the 2nd applicant

CA Ooko