



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 284 OF 2015

**IN THE MATTER OF AN APPLICATION BY OJSC POWER MACHINES LIMITED,
TRANSCENTURY LIMITED, AND CIVICON LIMITED (ACTING JOINTLY AS A
CONSORTIUM/JOINT VENTURE THAT SUBMITTED A BID IN TENDER NO. KGN-GRD-09-
2015) FOR JUDICIAL REVIEW PROCEEDINGS PURSUANT TO ORDER 53 OF THE CIVIL
PROCEDURE RULES 2010**

= AND =

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

= AND =

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2005 AND THE
REGULATIONS THEREUNDER**

= AND =

**IN THE MATTER OF TENDER NO. KGN-GRD-09-2015 – LEASING OF 50MW WELLHEADS
GEOTHERMAL POWER GENERATION UNITS AT OLKARIA GEOTHERMAL FIELD ON
BUILD, LEASE, OPERATE AND MAINTAIN BASIS**

= AND =

**IN THE MATTER OF THE DECISION OF THE PUBLIC PROCUREMENT
ADMINISTRATIVE REVIEW BOARD MADE ON 21ST AUGUST 2015 IN REQUEST FOR
REVIEW NO. 38 OF 2015**

=BETWEEN =

**OJSC POWER MACHINES LIMITED, TRANSCENTURY LIMITED,
AND CIVICON LIMITED**

**(ACTING JOINTLY AS A CONSORTIUM/JOINT VENTURE THAT
SUBMITTED A BID IN**

TENDER NO. KGN-GRD-09-2015).....
.....APPLICANT

=VERSUS=

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....
RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY LIMITED (KENGEN).....1ST
INTERESTED PARTY

RENTCO EAST AFRICA LIMITED, LANTECH & TOSHIBA.....2ND INTERESTED
PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd September, 2015, the *ex parte* applicants herein, **OJSC Power Machines Limited, Trancentury Limited, and Civicon Limited (Acting Jointly as A Consortium/Joint Venture)**, seek the following orders:

1. **THAT** an order of Certiorari do issue to remove to this Honourable Court for the purposes of being quashed the decision of the Respondent dated 21st August 2015 in Review Application No. 38 of 2015 of 22nd July 2015 with regard to Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis.
2. **THAT** an Order of Prohibition do issue restraining the 1st Interested Party from entering into any contract with the 2nd Interested Party over and/or concerning Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis.
3. **THAT** an Order of Mandamus do issue to compel the 1st Interested Party to enter and execute a contract with the Applicant over and/or concerning Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis.
4. **THAT** this Honourable Court be pleased to issue such further and other reliefs as it may deem just and expedient to grant in the circumstances of this Application.
5. **THAT** the costs for and incidental to this Application be provided for.

Ex Parte Applicants' Case

2. According to the applicants, on the invitation of the 1st Interested Party, the Applicant submitted a bid in response to Tender No. KGN-GRD-09-2015 for Leasing of 50MW Wellheads Geothermal Power Generation Units at Olkaria Geothermal Field on Build, Lease, Operate and Maintain Basis (hereinafter referred to as "the Tender"). The Request for Proposals provided for a staged evaluation process, to include, a first stage evaluation to check for responsiveness, then an evaluation of the technical and commercial proposals and a second stage evaluation of the financial proposal. The Request for Proposal provided that only firms with proven technology would have their guaranteed output and availability factor passed to the financial evaluation stage. The Applicant passed the first stage evaluation and its bid was passed to the second stage, that is, evaluation of financial proposal and upon evaluation of the

tenders, the 1st Interested Party awarded the tender to the 2nd Interested Party and by a notification letter dated 16th July 2015, the 1st Interested Party notified the Applicant that it was not successful in the Tender as it was supposedly not the lowest evaluated.

3. Being dissatisfied with the award made by the 1st Interested Party to the 2nd Interested Party, the Applicant filed Request for Review Application No. 38 of 2015 of 22nd July 2015 and upon hearing the Applicant's Request for Review Application No. 38 of 2015 of 22nd July 2015, the Respondent delivered a decision dated 21st August 2015 in which it dismissed the Applicant's Review Application and confirmed the award of the tender to the 2nd Interested Party. It was this decision that triggered these proceedings.

4. According to the Applicant, being a Request for Proposals, evaluation of the Tender was subject to sections 82 of the **Public Procurement and Disposal Act** (hereinafter referred to as "the Act") which required the Respondent:

- a. **To examine the proposals in accordance with the Request for Proposals.**
- b. **To evaluate each technical proposal to determine if it was responsive and if it was, to assign a score thereto in accordance with the procedures and criteria set out in the Request for Proposals.**
- c. **For each bid determined to be technically responsive, to evaluate and assign a score to the financial proposal in accordance with the procedures and criteria set out in the Request for Proposals.**
- d. **If the request for proposals provided for additional methods of evaluation, the 1st Interested Party would be required to conduct such methods in accordance with the procedures and criteria set out in the Request for Proposals.**

5. According to the Applicant, under section 82(5) of the Act, the successful tender would be the responsive proposal with the highest score determined by the 1st Interested Party by combining, the scores assigned to the technical and financial proposals and the results of any additional methods of evaluation in the Request for Proposals. However, in contravention to section 82 of the Act, the 1st Interested Party failed to demonstrate the scoring mechanism applied to evaluate the proposals at the technical and financial evaluations stage, or to give the final aggregated scores for each Bidder to support its decision to award the tender to the winning Bidder, or to otherwise demonstrate its compliance with section 82 of the Act. It was the Applicant's case that the Respondent's decision making process was flawed, in that whereas the Applicant in its Request for Review dated 22nd July 2015 and in the Replying Affidavit sworn on 7th August 2015 in reply to the 1st Interested Party's Response to the Request for Review, as well as in its written and oral submissions, challenged the failure by the 1st Interested Party to evaluate the tenders as required under section 82 of the Act, citing the introduction or extraneous evaluation criteria and the absence of scoring of bids as required under the Act, the Respondent failed to take this into consideration, or otherwise to make any substantive findings in this regard, instead simply taking the erroneous, unreasonable and irrational stance that the matters were not specifically pleaded in the Request for Review.

6. It was contended that the Respondent's decision dated 21st August 2015 acknowledged in several parts that the Applicant had raised for determination, the issue that the 1st Interested Party had not assigned scores at each stage of the evaluation as required under section 82 of the Act, but having so observed, proceeded to make findings on section 66 of the Act, but completely failed to address or make any substantive finding on the 1st Interested Party's failure to score the tenders as required under section 82 of the Act. Whereas the Respondent went to great lengths to set out the evaluation results under the headings "*Tender Processing (Bid Evaluation)*" and "*Financial Evaluation*", which indeed demonstrated that the 1st Interested Party's had not complied with section 82 of the Act in its evaluation of the tenders, it thereafter proceeded to misdirect itself on glaring factual matters before it and the applicable law, thus rendering the Respondent's decision grossly unreasonable as to render it irrational.

7. To the Applicant, the Respondent therefore acted unreasonably, irrationally, irregularly and illegally in failing to give effect to and/or otherwise waiving or ignoring section 82 of the Act, which sets out the manner for evaluation of Requests for Proposals hence denied the Applicant the benefit of a finding on merit, thus did not subject the Applicant to a fair process before it, contrary to Articles 47 and 50 of the Constitution. It was therefore the Applicant's case that by failing to determine matters legitimately brought before it for its determination, the Respondent failed to exercise the jurisdiction conferred upon it by the Act, thereby acting illegally, irregularly, irrationally and contrary to its function under section 9(a) of the Act, to ensure that the procurement procedures established under the Act were complied with contrary to the Applicant's legitimate expectation that the 1st Interested Party would apply the criteria for evaluation as advised in the Request for Proposals document and as required under the law. This expectation was breached by the 1st Interested Party and sanctioned by the Respondent in allowing evaluation of the tenders based on extraneous criteria, namely highest revenue generated for the 1st Interested Party.

8. The Applicant's case was that by failing to determine matters legitimately brought before it for its determination, the Respondent subjected the Applicant to unfairness and made obvious errors on the face of the record. The Applicant therefore concluded that the evaluation of the tenders was haphazard, unfair and raised suspicion as to the legitimacy and/or bona fides of the 1st Interested Party's evaluation process and the resulting award of the tender to the 2nd Interested Party, as the 1st Interested Party failed to score the technical and financial proposals as required by law. To the Applicant, the Respondent has abdicated the statutory authority granted to it pursuant to section 98 of the Act, which confers wide powers to the Respondent including annulling anything done by the Procuring Entity (the 1st Interested Party herein) in the procurement proceedings, or indeed annulling the procurement proceedings in their entirety; giving directions to the Procuring Entity with respect to anything to be done or redone; or substituting its decision for any decision of the Procuring Entity. It was therefore contended that the Respondent under section 98 of the Act, in conducting a review, erred in fact and in law in failing to review not only the allegations made in the Request for Review before it, but also to review the entire procurement process with regard to Tender No. KGN-GRD-09-2015 to see that it complied with the prescribed procedures and to ensure that the objects of the Act are fulfilled.

9. The Applicant disclosed that under section 1.0, Volume I of the Request for Proposal the 1st Interested Party indicated that it was looking for a leasing firm (individual or consortium) to lease a minimum of 50MW Wellheads units and operate and maintain the equipment for a period of 15 years in Olkaria at the lowest rental fee and that it intended to generate revenue and profit from the difference in the cost of leasing and the revenue from the electricity generated from the leased wellheads at the Feed-In-Tariff (FIT) of 8.8US Cents per KWhr. To the Applicant, the 1st Interested Party therefore expected the bidder's tariffs to be lower than the FIT for the 1st Interested Party to be entitled to the difference between the bidder's tariff and the FIT. The 1st Interested Party further expressly provided under section 4.9, Volume I of the Request for Proposals that the bidder with the lowest tariff would score the highest financial score. The Applicant's quoted tariff on Total Cost per kWh was the lowest at USD 0.06863 compared to the winning Bidder's tariff of USD 0.06885, thus would give the 1st Interested Party the highest differential vis-à-vis the FIT at USD 0.01937 compared to the winning Bidder's Evaluated tariff to FIT differential of USD 0.01915. Conversely, by applying the 1st Interested Party's own formula and requirements of the Request or Proposals that "*Connection Costs to KPLC High Voltage Substation will not be included in the bidder's tariff but isolated for it is recoverable from the off taker*", again the Applicant's Total Cost per kWh on Power Plant Equipment only was the lowest at USD 0.06501 compared to the winning Bidder's 0.06769, giving a differential of USD 0.0230, which the Applicant expressly quoted in its financial proposal.

10. It was the Applicant's position that since the Request for Proposals was clear under **Volume I – Instructions to Bidders, Page 25, Section 4.9 – Financial Proposal** that "*...the bidder with the lowest tariff will score the highest financial score...*" and the Applicant having given a Guaranteed Net Output MW and Availability Factor per the required threshold, at the lowest cost, and the highest revenue, ought to have been declared the successful bidder since the Request for Proposals was clear that the determining

factor would be the lowest cost. However, although the Applicant was the lowest bidder both in terms of Total Cost per kWh as well as for the Wellhead Equipment Cost only per kWh, thus ought to have been declared the successful bidder, the 1st Interested Party awarded the Tender to the 2nd Interested Party on the basis that it would generate the highest revenue from the 2nd Interested Party. Further, in comparison to the 2nd Interested Party, the Applicant's bid offered the highest monthly revenue to the Procuring Entity at USD 822,038/= per the Applicant's financial bid and financial model submitted to the Procuring Entity, much higher than the 2nd Interested Party's offer of USD 785,273.25 per month.

11. It was therefore averred that the Respondent's decision is a contravention of section 2 of the Act which requires *inter alia*, a tendering process that promotes competition and the fair treatment of bidders; promotes the integrity and fairness of the tendering process; increases transparency and accountability of the tendering process; and increases public confidence in the tendering procedures.

12. It was further contended that contrary to the requirements in the Expression on Interest the 2nd Interested Party was incorporated in Kenya on 6th June 2012 thus turned 3 years only 18 days to the closing date for the EOI hence would not have been in a position to demonstrate "*Evidence of financial capability to lease the Wellheads-attach most recent three (3) year audited financial statements*". At the time of the present Tender No. KGN-GRD-09-2015, the 1st Interested Party was well aware of this fact having previously by a letter dated 12th June, 2015, disqualified the 2nd Interested Party with regard to Expression of Interest for Consultancy Services for Rehabilitation of Olkaria 1-45MW, wherein the 2nd Interested Party submitted Audited accounts for years 2011/12, 2012/13, 2013/14 as at March of each year, yet the firm had only been incorporated on 6th June 2012. In view of the foregoing, the 1st Interested Party clearly erred in pre-qualifying the 2nd Interested Party and further concealed material information during the Request for review in a manner calculated to mislead the Respondent to uphold its decision to award the Tender No. KGN-GRD-09-2015 to the 2nd Interested Party.

13. It was submitted that since scoring was an issue being raised by the Applicant, it was therefore incumbent upon the Respondent to inquire into the scoring and weighting performed by the 1st Interested Party, if any, to ascertain whether it complied with the RFP. A finding to that effect was expressly sought by the Applicant hence the Respondent abdicated its duty in failing to apply its mind to the issue. To the Applicant, it is only by disclosing the scores achieved by each party at each stage that the 1st Interested Party could demonstrate that it complied with the RFP. The Respondent therefore erred in failing to require this of the 1st Interested Party and ensuring that the evaluation of tenders was fair and transparent. In support of this submission, the Applicant relied on **Travis Perkins Trading Company Ltd vs. Caerphilly County Borough Council [2014] EWHC 1498 (TCC), [2014] All ER (D) 188** in which the Court expressed itself as follows:

"The Court should have regard to the wording overall to determine what is covered by the wording of the Brief Details to see whether and to what extent the rule has been fulfilled. The Court should not be prescriptive about what is required in terms of the words used by the claimant... In construing or understanding what was intended by the wording used, the Court can and where necessary should have regard to the context or "factual matrix"... in which the Claim has been prepared"

14. It was submitted that where the tender is conducted by a public body there is an implied term that the tender process will be conducted fairly and in good faith and support was sought from **Hughes Aircraft Systems International vs. Air Services Australia [1997] FCA 558**, where the Federal Court of Australia found that the Civil Aviation Authority (CAA) acted in breach of its implied duty to act in good faith and fair dealing by failing to evaluate the tenders in accordance with the request for tender (RFT). The Court held as follows:

"I have found that it was an implied term of the RFT contract that the CAA would conduct its evaluation of the tenders fairly and in a manner that would ensure equal opportunity to the Hughes and Thomson. I have also found that, as a matter of law, a term would be implied

into the RFT in any event that obliged the CAA to deal fairly with the tenderers in performance of the RFT contracts.”

15. Based on **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** it was submitted that judicial review orders are available where the Review Board committed an error of law apparent on the face of its decision and that the Review Board cannot disregard mandatory provisions of the Act and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void. The Court proceeded:

“To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness.”

16. Based on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300-301**, the Applicant was of the view that this is a proper case for the exercise of this Honourable Court’s discretion and prays that the orders sought be granted.

Respondent’s Case

17. The Respondent’s case, however was that on 22nd July, 2015, the Applicant filed a Request for Review before the Respondent challenging the processing of the Tender No. KGN-GRD-09-2015 for proposal for the leasing of 50mw wellheads geothermal power generation units at Olkaria geothermal field on build, lease, operate and maintain basis. Immediately after receiving the Request for Review, the Respondent served a copy on the 1st and 2nd Interested Parties and notified them of the pending Review and the suspension of the procurement process in accordance with Regulation 74 (1) and 74(2) of the ***Public Procurement and Disposal Regulations, 2006*** (hereinafter referred to as “the Regulations”).

18. Respondent after receiving the respective responses and submissions from all the parties on 7th August, 2015 after the *viva voce* highlight of submissions, considered their submissions, determined the application for review and delivered its ruling on 21st August, 2015 by which it struck out the Request for Review by the Applicant therein based on the following findings:

- a. **That that the issue of the Procuring Entity not assigning scores for both the technical and financial proposal was not raised in the Request for Review and the Board cannot therefore consider and determine the same. Nevertheless, the Board considered the results of the tender and evaluation committee and found that the evaluation was as per the terms of the Request for Proposal and that there was no breach of the said terms.**
- b. **That upon the conclusion of the evaluation exercise and the correction of errors, the Procuring Entity’s tender evaluation committee determined that the 2nd Interested Party proposed a net output of 58.42 MW as opposed to the proposal of 50.55 megawatts proposed by the Applicant.**
- c. **That the cost difference arising from the proposed output megawatt would amount to a loss of a colossal amount of public money and would go against the principles of promoting economy and the other principles set out in Article 227 of the Constitution and in Section 2 of the Public Procurement and Disposal Act 2005 which bind the Board.**

- d. **That the capacity factor of 96% was not only part of the parameters set out in the tender document but it was accepted across Board as demonstrated by the Applicant and affirmed by the Respondent in its Request for Review where it applied the criteria.**
- e. **That taking all the above factors into consideration, the Procuring entity's tender evaluation committee tabulated the revenue that was to accrue to the bidders based on the above parameters and determine that the 2nd Interested party would generate and guarantee the Procuring Entity a monthly revenue of USD 785,273.25 as opposed to the Applicant's revenue of USD 686,099.05.**
- f. **That the Board would be reluctant to interfere with an evaluation carried out by an evaluation committee unless it is shown that the said evaluation was not carried out in accordance with the criteria set in the tender document or that there are fundamental and glaring defects in the evaluation report. The Applicant in this Request for Review did not however demonstrate any of the foregoing matters.**
- g. **That the issue of the alleged revenue that was guaranteed to the Procuring Entity namely the monthly sum of USD. 822,038 was not alluded to in any paragraph in the Request for Review. The issue was therefore not pleaded and seemed to contradict the Applicant's earlier submission that revenue/the commercial component was not part of the relevant evaluation criteria for the purposes of this procurement. Besides, the Applicant and its Representative during the highlight of the submissions confirmed that the proposal of 50.55 megawatts as adjusted by the 1st Interested Party was the proper output with a revenue of USD 686,099.05 and not USD.822,038. As alleged.**
- h. **That the combined Technical and evaluation report shows that the figures on revenue was derived from several components which were worked out to minute detail.**
- i. **That the Revenue and Profit objective has been repeated in various parts of the Request for Proposals and the issue of revenue generation was an integral part of the Request for Proposals and the submission that it was not is not therefore correct. This was clearly set out in the Request for Proposal as a key component and it is not an afterthought or extra consideration as presented by the Applicant.**
- j. **That the requirement of at least 50 megawatts was the minimum requirement to enable a bidder to proceed to the next level of evaluation.**
- k. **That the whereas the Applicant stated that a minimum of 50 megawatts was sufficient for the purposes of this tender, the Applicant itself offered a proposed output of 51 megawatts which upon the computation of the arithmetic error was corrected to 50.55.**

19. According to the Respondent, in making its decision, the Board considered only the provisions of the Act, the Regulations, the Tender Documents and the facts presented before it by the Parties and no extraneous issues whatsoever were considered. In any event, the Board is limited to consider only facts that have been expressly pleaded and all parties allowed to respond on the said pleaded facts. It was its case that its decision was made within its mandate, and the specific sections of the law on which the Board's decision was pegged have been expressly pronounced in the Board's decision and that the Applicant did not meet the threshold set in the Act to disturb the finding of the tender evaluation committee or warrant exercise of the discretion of the Board to effect any other prayer beside striking out the application for Review.

20. According to the Respondent, the Applicant has not demonstrated in any way that the decision of the Board was outside the scope of the law governing the Board and that the Board took into account irrelevant consideration, or failed to accord the Applicant a right to be heard in breach of Article 50 of the Constitution. To the contrary the Board expressly considered all the documents and submissions filed by the Applicant and all other parties to the Review in arriving at its decision in upholding the principle of natural justice.

21. To the Respondent, the Applicant has not demonstrated by an iota of truth that the Board was unreasonable in arriving at its decision or that the Board was guilty of unreasonable exercise of power and irrationality in arriving at its decision. The decision by the Board is grounded in law after review of all material conditions placed before it and importantly in line with its mandate to uphold public procurement process while upholding fair competition to all parties in an equitable, transparent, competitive and cost

effective manner. Further, the Applicant has not demonstrated that the Board in arriving at its decision was guilty of any illegality, impropriety of procedure and irrationality to warrant the variance of the order of the Board.

22. If anything the Applicant has sought the prayer for mandamus which prayer is granted only to remedy the defects of justice which is not the case as it has sought to be awarded the contract based on the same evaluation it seeks to cancel which confirms that the Applicant actually affirms the veracity and propriety of the evaluation process and the subsequent affirmation by the Board of the same.

23. It was therefore contended that the Applicant's application was made in bad faith, had no merit and was only calculated to discredit the credibility of the Respondent's mandate and function, while ultimately eroding the public's confidence in procurement procedures and processes and the Court was urged to dismiss the Applicant's Application for Judicial Review.

24. It was submitted on behalf of the Respondent that the Review Board in granting the orders herein remained faithful to its powers and mandate and did not divert from the same contrary to what is alleged herein. Indeed, the Review Board only acted as expressly authorized under section 98 of the Act. Accordingly, the respondent only discharged its mandate and had power to do so.

25. It was submitted that the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies. It is not the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court. Therefore, this being a judicial review case (and not an appeal), this court is not empowered to venture into correcting the decision of the Review Board on the merits (whether wrong or correct). That is the work of the Review Board and not the Court exercising judicial review jurisdiction. In support of this position, the Respondent relied on **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & another [2014] eKLR** as well as **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where Majanja J. quoting with approval the decision of Githua, J in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR**.

26. On the grounds upon which the reliefs are based the Respondent relied on **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43** and **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** and submitted that it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to prove breach of any of the above criteria for that party to succeed in their claim.

27. The Respondent relied on the decision of the Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR**.

28. It was submitted that in order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review application. To the Respondent, this Application is an appeal disguised as a Judicial Review Application and should therefore not be entertained since there is a clear distinction between an appeal and judicial review proceedings. In Judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision.

29. Based on **Municipal Council of Mombasa vs. Republic & Another [2002] eKLR, Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** and **Republic vs. Judicial Service Commission Ex-Parte Pareno [2004] KLR 203 at 219** it was submitted that the applicant had

not demonstrated any breaches of the Law or procedure which would entitle this court to intervene in this matter and grant the orders sought. It had not been demonstrated that the Respondent is in breach of any statutory provision or that they acted in excess or without jurisdiction or breached rules of natural justice envisaged in a particular statute. Thus the application did not meet the basic tenets of judicial review application and should be dismissed with costs and the Respondent prayed so.

1st Interested Party's Case

30. On the part of the 1st interested (hereinafter referred to as “the Procuring Entity”) it was contended that it is the leading electric power generation company in Kenya, producing approximately 80 percent of electricity consumed in the country and that the current total installed capacity in the country is approximately 2,294.82 MW with hydro generation contributing 36% percent of the capacity. It was disclosed that the Government plans to increase the current installed capacity to 5000MW by 2016 (commonly referred to as the 5000MW+40 Month Challenge) in order to meet the anticipated demand of power in the country and well as to meet the energy needs for the Government’s economic blue print, Vision 2030. To that end the 1st Interested Party has a target to generate 844MW as part of the 5000MW out of which 540 MW is to be generated from geothermal sources.

31. It was therefore averred that the tender herein is part of achieving the objective of not only increasing the generation capacity but also to lower the cost of electricity in the country since hydro and thermal are not the preferred sources on energy in that hydro power sources are unreliable and unsustainable since they depend on unpredictable rainfall patterns in the country while thermal sources depend on fuel which increases the operational costs exponentially.

32. To the Procuring Entity, the tender herein relates to generation of a minimum of 50MW wellheads Power Generation Units on a build, operate and maintain basis for a period of 15years and the successful bidder is expected to install the Geothermal Modular/Wellhead power plants which were to be commissioned in 14 months from the date it entered into a contract with the 1st Interested Party hence the delay in implementing the project will affect the projections set above and aggravate the ever rising demand and shortage of energy in the country.

33. The Procuring Entity explained that this project is implemented through the wellhead technology which is part of the Governments’ Least Cost Power Development Plan (the Least Cost Plan). The Least Cost Plan guides relevant actors in the energy sector including the 1st Interested Party on how to meet energy needs of the country at the lowest cost to the economy and the environment and that the wellhead technology is implemented by utilizing geothermal wells that cannot be connected to the conventional power plants due to low pressure (below 5 Bara) and wells outside the conventional power plant perimeter. As part of the Least Cost Plan, the well head technology is attractive in that low costs involved as the technology utilises existing wells which would otherwise not be utilized. Some wells have been idle for periods of over 20 years and secondly, the periods taken to generate power is considerably lower than the other ways of generating power. In its view, a 15 year lease for the project was justified because there would be minimal financial input from 1st Interested Party and it will not appear in the 1st Interested Party’ balance sheet thus not affect its loan covenants.

34. With the above in mind, the Procuring Entity made it clear at page 6 of the Request for Proposal (RFP) that it expected to achieve the following objectives from the project:

- a. Generate additional MW to meet the 5000 MW+ 40- Month challenge.**
- b. Generate revenue and profit from the difference in the cost of leasing and the revenue from the electricity generated from the leased wellheads at the feed- in-Tariff of 8.8US Cents per KWHr.**
- c. Recoup the cost of drilling the geothermal well from this revenue**

35. It was the Procuring Entity case that the cost of drilling geothermal well is enormous - it costs in excess of USD 5 million to drill a well – hence it was important that the project was designed to help in recouping the costs of drilling wells as well as meet the other two objectives set out in the RFP.

36. It was contended that the Procuring Entity approved the Expression of interest for the project and shortlisted the bidders subsequent to which an RFP was sent out to the shortlisted firms on 4th February 2015 with a closing date of 20th April 2015. After carrying out the technical evaluation of the bids, the Applicant, Rent Co East Africa Ltd, Lan Tech & Toshiba (successful bidder and the 2nd Interested Party herein) and Geothermal Development Associates were recommended to proceed to the financial evaluation having satisfied the requirements for technical performance. At the financial evaluation stage, the 2nd Interested Party emerged as the highest ranked firm amongst the three (3) bidders evaluated and it was awarded the tender. However, the applicant being dissatisfied by the decision of the 1st interested Party filed a request for review Application No. 38 of 2015 before the Public Procurement Administrative Review Board (the “Board) and in a decision dated 21st August 2015, the Board upheld the decision of the Tender committee to award the tender to the 2nd Interested Party.

37. To the Procuring Entity, the Applicant has raised a new ground which was not raised before the Board, to wit the contention that the 2nd Interested Party ought to have been disqualified at the Expression of Interest Stage of a different tender altogether. It was the Procuring Entity’s case that it would amount to usurping the statutory functions of the Board if the court were to determine this issue at this juncture. However in answer to the said issue, the Procuring Entity averred that the 2nd Interested Party (successful bidder) is a consortium comprising of three companies, namely: Rentco East Africa limited, Lantech & Toshiba and as a consortium it met the requirement set out above. However, the Board declined to determine the issue raised with regard to the alleged failure to score bids as it was not raised in the Request for Review.

38. It was the contention of the Procuring Entity that Regulation 73 (2) of the Regulations which provides that the request for review shall state the reasons of the complaint including any alleged breach of the Act and the regulations limits the jurisdiction of the Board to matters complained in the Request for Review and in any event, the 1st Interested Party’s response to the issue of the scoring of bids was set out in the Submissions in Reply filed before the Board on 13th August 2015.

39. It was therefore contended that the Applicant’s contention that the Board failed to decide that the 1st Interested Party applied an extraneous evaluation criteria is without basis. The alleged extraneous criteria is that there was allegedly a change of the evaluation criteria from the lowest cost to the one that represented the best commercial return to the 1st Interested Party yet this is not true as there was no such change. The tender had three components of evaluation at the financial stage namely: availability factor, Output MW and low cost. However, the Applicant focused on only one aspect of evaluation; low cost while ignoring the other two components of the tender.

40. It was the Procuring Entity’s case that it provided all the bidders with the exact same geothermal resources from which they were expected to model the most efficient geothermal generation technology to yield the maximum net output (MW) with the highest availability. In view of the fact that the geothermal resource was the same and the tariff is fixed as per the Feed-in Tariff (FiT) policy (fixed at 8.8 cents per KWhr), the varying factors would be guaranteed Net Output in MW, availability factor and bidder’s monthly rental fees. In light of the tender objectives as detailed above, the Procuring Entity intended to undertake the lease with maximum revenue and this was arrived at using the above parameters and guided by Clause 5.5 of the RFP which provided that: “All Proposals that have passed technical evaluation will have their proposed output MW and availability factors compared with the monthly lease rentals. The bidder with the highest availability factor and output MW at the lowest cost will be the successful lessor.”

41. With the aid of the above criterion the 1st Interested Party considered various factors and upon evaluation of the three bids, the Applicant’s bid was found to be unresponsive.

42. It was submitted on behalf of the interested party that the application seeks a merit review as opposed to a process review. To the Procuring Entity the Applicant has also raised a new ground which was not raised before the Board which is improper and does not fall for consideration by this court.

43. To the Procuring Entity, the application therefore seeks to challenge the merits of the Board's decision as opposed to the decision making process which is the proper scope for judicial review. In other words, this court has been called upon to substitute its decision with that of the Board which is outside the scope of this court's jurisdiction. The application should fail on this ground alone. It was its position that a party aggrieved by the decision of the Board has the option of either filing an appeal or filing an application for judicial review and that the option a party takes determines the scope of the jurisdiction of the Court in entertaining the challenge to the decision of the Board. In this case though the Applicant herein chose the judicial review vehicle, it is, in effect is inviting the Court to engage in a merit review of the proceedings before the Board; a jurisdiction a judicial review Court does not have. This Court, it was submitted, is not an appellate court to re-evaluate the evidence presented before the Board and its role is merely supervisory and is limited to ascertaining whether the decision maker acted lawfully. In support of this position the Procuring Entity relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, [2002] eKLR, Republic vs. Judicial Service Commission Ex-Parte Pareno [2004] eKLR, Republic vs. Kenya Revenue Authority Ex-Parte Yaya Towers Limited [2008] eKLR.**

44. It was submitted that as long as the decision maker had jurisdiction to determine the issues in dispute, even if it was wrong, in the absence of any irregularity in the process, this Court should not interfere with the decision in an application for judicial review. In support of this position, the Procuring Entity relied on the case of **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR.**

45. On the new ground raised by the Applicant, it was submitted that the Applicant raised a new ground that the 2nd Interested party should have been disqualified at the Expression of Interest (EOI) Stage for allegedly failing to comply with the requirement on furnishing of audited accounts for 3 years. However, this issue was not raised before the Board. This is a ground that ought to have been raised before the Board where a reasoned decision was made on matters raised before it. It would amount to usurping the Board's role if this court determines the issue. The court was therefore urged to disregard this issue as it falls outside the ambit of judicial review proceedings. The Applicant by this ground is asking the court to review KenGen's decision and not the Board's decision while the subject matter of these proceeding is to investigate the decision of the Board and not KenGen's decision. In support of this position reliance was sought in **Republic vs. Public Procurement Administrative Review Board & another Exparte Intertek International Limited [2013] eKLR.**

46. It was submitted that the Court in judicial review proceedings is called upon to review the decision of an administrative body based on the material presented before that body. There is no provision in law which allows introduction of new grounds when challenging an administrative body's decision.

47. The decision sought to be impugned must be considered in light of the actual material placed before an administrative body in order to ascertain whether it acted as required by law and arrived at the correct decision. In this case, the Applicant has not informed this court why the issue was not raised before the Board. Even if it had been raised before the Board, the Board would not have had jurisdiction to deal with it for not having been raised within 7 days of occurrence of the alleged breach, in line with the provisions of Regulation 73(1) of the Regulations.

48. It was however submitted that notwithstanding the foregoing submissions, the issue has no merit in any event. To the Procuring Entity, the 2nd Interested party as a consortium met the requirement on submitting audited accounts at the EOI stage. The 2nd Interested party (successful bidder) is a consortium comprising of three companies, namely: Rentco East Africa limited (Rentco), Lantech & Toshiba. However the allegations are based on a letter written to Rentco on a previous and different tender in which Rentco participated singly and not as a part of a consortium. The 2nd Interested party participated in the tender herein as consortium with Rentco as one of the members hence the contention is misleading as the Applicant fails to distinguish between bidding singly and as part of a consortium.

49. On the issue of the scoring bid it was submitted that based on **R vs. The Public Procurement Administrative Review Board ex parte Kenya Medical Supply Agency, Crown Agents, Deutsche Gesellschaft Fur TechnisheZusammenarbeit and John Snow Inc.[2010] eKLR** that the issue of scoring of bids was not raised at all in the Request for Review.

50. On the evaluation of the bids, it was submitted that the price was just but one of the requirement of the evaluation of the tender. There were three components of evaluation at the financial stage namely: availability factor, output MW and low cost. Therefore the claim that the Board sanctioned KenGen's application of an extraneous criteria based on revenue generation is without basis. The court was also urged to note that KenGen is bound under section 2(a) of the Act which obligates public entities when engaging in procurement to maximise economy and efficiency.

51. On the prayers sought, it was submitted that certiorari cannot issue since based on **Kenya National Examination Council vs. Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** that the relief is usually issued if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied or for such like reasons. However in this case, the Applicant has not identified any irregularity in the decision making process. Instead what the Applicant is asking the court is to review the merits of the decision of the board.

52. With respect to the order for mandamus, it was submitted that section 68(1) of the Act under which the relief is gives discretion to the procuring entity to enter into a contract with the successful bidder. It does not enjoin an entity to enter into a contract. In other words, there is no statutory duty imposed upon KenGen to enter into a contract with the Applicant. However, based on **Kenya National Examination Council vs. Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others** (supra), **Republic vs. Permanent Secretary Ministry of State for Defence & 2 Others Ex-parte Benken Hygiene Services Limited [2013] eKLR** and **Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another [2015] eKLR**, an order of mandamus cannot be issued where no statutory duty exists or to compel an exercise of discretion.

53. The Procuring Entity therefore submitted that the Applicant has not made a case for the grant of the reliefs sought and the application should fail. It was further prayed that it is in the public interest that the application be dismissed in order for the project to move forward. It is critical that project progresses there being an overwhelming demand for electricity in this country which exceeds the supply. This project seeks to address the deficiency in the supply of electricity in the country. To the Procuring Entity, the Applicant wishes the court to promote its private interest over the interest of the public. In urging the Court to disallow the application, the Procuring Entity relied on the decision in **Public Procurement Administrative Review Board & Another Ex-parte Avante International Technology Inc. [2012] eKLR**.

2nd interested party's Case

54. On the part of the 2nd interested party, it was contended that judicial review process is not concerned with the merits or demerits of the decision but whether the process through which it was arrived at was proper. However, the Applicant is questioning the merits and demerits of the decision which queries cannot be entertained in an application for judicial review. Such issues, it was averred can only be heard and determined in an appeal. Though the Applicant had the time and opportunity to lodge an appeal to challenge the Board's decision on merit, it chose not to and this application must fail.

55. It was the 2nd Interested Party's position that under section 98 of the Act, the Respondent is vested with jurisdiction when moved by a party under section 93 thereof to do the following: annul anything the procuring entity has done in the proceedings including annulling the procurement proceedings, give directions to the procuring entity on action to be taken or redone, substitute the decision of the Board for any of the Procuring Entity and order payment of costs. It was therefore contended that any decision properly reached by the Respondent should not be interfered with as it is the Respondent which has jurisdiction to handle disputes relating to breach of procurement by entities upon the matters raised in the Request for Review and the said decisions can only be interfered by this court if it is demonstrated that

the Respondent did not follow the procedure laid down by statute in arriving at the said decision, that there was breach of principles of natural justice or that the actions were done not in good faith. However, in the instant application, the Applicant has not proved any of the limbs to require this court to interfere with the finding of the Respondent.

56. It was averred that the Request For Proposal (RFP) document gave comprehensive and specific criteria upon which the tenders would be evaluated and that the proposal by the Applicant was found not to meet the parameters set by the 1st Interested Party upon full evaluation and it should not be heard to complain on its own inability to give a competitive proposal.

57. It was further the 2nd Interested Party's case that in any suit or action a party must plead his entire case for effective determination by the respective court or Tribunal. The Applicant did not plead the alleged issues of change of evaluation criterion and non-assignment of scores. A party is bound by its pleadings and having failed to do that in its request for review it will be foolhardy to expect determination from the board on an issue that was never placed before it. The conduct by the Applicant amounts to litigation by installments and ambush which conduct should not be entertained by this court. According to the 2nd Interested Party, the Respondent addressed itself to matters raised in the Request For Review by the Applicant. The Applicant however, raised two issues in their submissions not pleaded in the Request for Review. In its view, a request for review is the equivalent of a statement of claim in a civil action which is meant to define what is the dispute is and a party cannot be allowed to introduce new issues whenever they please. According to it, the Respondent did not act illegally in determining only the matters raised in the Request For Review. It is not the mandate of the Respondent to frame issues for parties and it will be acting outside its jurisdiction to render a decision on an issue not raised *ab initio* as it would prejudice the other parties.

58. The 2nd Interested Party urged this Court to only deal with the scope of the request for a review undertaken by the Respondent and not to deal with the issues not before the Respondent which is precisely what the Applicant is asking this court to do which in turn would be asking this court to act outside its jurisdiction. Since the Applicant did not plead introduction of an extraneous criteria in the evaluation process and that no scores were assigned at each stage of evaluation in their request for a review, these issues cannot therefore be determined by this court. It was averred that the RFP provided for means and the basis of evaluation of the tenders which was adhered to and which forms the basis of the Applicant's prayer for an order for *mandamus* which affirms the sanctity of the evaluation by the 1st Respondent and which was affirmed by the Respondent. In its view, the tribunal did find that there was no change in evaluation criterion and scoring was done accordingly as had been set in the instructions for request for proposal. The allegations by the Applicant are just but red herrings meant to unduly drag this court proceeding. In any event this being an issue touching on the merits of the decision can only be raised in an appeal and not a judicial review application.

59. To the 2nd Interested Party, the Respondent should not be expected to interfere with an evaluation carried out by an evaluation committee unless the said evaluation was not carried out in accordance with the tender document or unless there are fundamental and glaring defects in the evaluation report which is not the case in this matter because the evaluation committee complied with section 82 and no defects have been pointed out by the Applicant with regard to the evaluation report making this application baseless. It was further contended that the Respondent is not involved in the tendering process, and cannot be deemed to have acted irrationally, unreasonably, irregularly and illegally as the Tender Evaluation Committee adhered to the terms of the Request for Proposal as per the tenets of section 82 of the Act. That granted, the Respondent upheld the evaluation process followed by the 1st Interested Party to arrive at the conclusion that the 2nd Interested Party and not the Applicant was the successful bidder. The Applicant cited no breach by the Tender Review Committee neither has it stated any excess of jurisdiction by the Respondent to warrant disturbing the finding of the Respondent, importantly there was no illegality by the Tender Evaluation Committee nor the Respondent, if anything, the Respondent would have acted in excess of its powers in purporting to partake an evaluation of the Tender as that is an express reserve of the 1st Interested Party.

60. In its view, it would not be reasonable for the Respondent to make a decision awarding the tender to the Applicant who would give a lower output in megawatts than the 2nd Interest Party which in turn would lead to the 1st Interested Party obtaining the power deficit from thermal power which would lead to loss of huge amounts of public money and it would be against public interest and unreasonable for the Respondent to entertain the thought let alone condoning it. Awarding the applicant the tender would in effect create a higher risk of injustice not only to the 2nd Respondent but also to the 1st Respondent and the nation at large who are the consumers of electricity generated from the tender.

61. The Applicant was accused of failing to consider the tender document in its entirety and since the powers of the Respondent under section 98 of the Act is discretionary, the Respondent's decision cannot be said to be irrational and unreasonable for exercising a discretion donated by the law by not annulling anything the 1st Interested Party had done.

62. According to the 2nd Interested Party, the Respondent did not breach rules of natural justice as alleged by the Applicant. The Applicant was awarded all the rights under Articles 47 and 50 of the Constitution and was *inter alia*, heard through their advocates and their representative, they were granted leave to put in a statement in support of their Request for Review, and they were given an opportunity to adduce and challenge evidence. This was a clear demonstration of the fact that there was procedural fairness and that the Respondent issued a decision based upon logical proof by parties and the evidence material before it. All issues pleaded were addressed by the Respondent as per the express mandate donated to it under section 9(a) of the Act. Further the said decision met all the parameters of the section 2 of the Act, Article, 10, 25 and 227 of the Constitution.

63. It was averred that it is indeed fallacious for the Applicant to ask this court to compel the Respondent to enter and execute a contract within them whereas in their application they have expressly alluded the evaluation process citing it as "***haphazard and unfair and which raised suspicion as to the legitimacy and/or bona fides of the evaluation process***". It would be expected that the Applicant would be asking for nullification of the evaluation process which is not the case and it is clearer by every paragraph of the application that the Applicant is hypocritical and is looking for selective application of logic and the law. To the 2nd Interested Party, the Applicant failed to demonstrate in any manner that the Respondent's decision making process was tainted with any illegality, irrationality and procedural impropriety or that the Respondent acted outside its mandate or jurisdiction in any manner whatsoever or that the said decision was grossly unreasonable as such in defiance of the law. Further, no bias has been demonstrated by the Applicant or drop of unfairness towards the Applicant to challenge the decision of the Respondent. To the 2nd Interested Party, the Applicant failed to demonstrate that the process by the Board was irrational, unreasonable or was irregular or tainted with illegality but instead chose to throw adjectives around hoping that one might stick without any actual evidence.

64. It was averred that the Expression of Interest was by a consortium of partners which met all the parameters set. However this issue was neither raised with the procuring entity nor before the Board and it is a clear demonstration that the Applicant is just a sore loser who must either have his way or no way at all. Importantly, the Tender Review Committee established that the 2nd Interested Party had met all the parameters set in the Request for Proposal clauses 4 and 5 to enable the same be evaluated and the consortium had demonstrated financial ability to partake the project and the claim by the Applicant has no bearing, is a non-issue, was not pleaded and the Tender Committee established our compliance with all terms and requirements of the Request For Proposal. Beside this court is not clothed with jurisdiction to sit as a Tender Review Committee and cannot disturb its finding on a non-material issued. It was contended that the allegations being made by the Applicant can only be dealt with in an appeal since they deal with the merit of the Respondent's decision. The judicial review prayers sought by the Applicant cannot be the most efficacious remedy in the circumstances. The Applicant on the one hand alleges that the process was flawed but on the other hand it wants the court to compel the procuring entity to award the tender to it.

65. To the 2nd Interested Party, the Applicant did not demonstrate that the Respondent acted outside its jurisdiction, took into account matters it ought not to have taken into account, or failed to take into

account matters it ought to have taken into account nor that it has made a decision that is 'so unreasonable that no reasonable authority could ever come to it'. The Applicant did not demonstrate that the Respondent did not follow the procedure laid down by the Act to arrive at its decision or that it breached the principles of natural justice and that the Respondent did not act in good faith to warrant the court interfering with the decision of the Respondent.

66. To the 2nd Interested Party, an order of Mandamus cannot issue from this court as it would amount to this court sitting as tendering entity or as an appellate court over the decision of the Respondent.

67. I have considered the submissions filed on behalf of the 2nd Interested Party and it is my view that the same are substantially similar to those made by the Respondent and the 1st interested party herein.

Determinations

68. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

69. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285 and *Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60*.

70. This was the position adopted **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J.** quoted with approval the decision of **Githua, J** in **Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** and held as follows:

“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”

71. In matters challenging the decisions of specialized bodies and Tribunals such as the Respondent herein, the position was restated by the Court of Appeal in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** as follows:

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity...S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review board is obviously better equipped than the High Court to handle disputes relating to breach of duty of the procuring entity .it follows that its decision in matters within its jurisdiction should not be lightly interfered with...Having regard to the wide powers of the Review Board we are satisfied that the High court erred in holding that the Review Board was not competent to decide whether or not the 1st respondent’s tender had met the mandatory conditions. The issue whether or not the 1st Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it...In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly...The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction”.

72. It was the Applicant’s case that the Respondent’s decision making process was flawed, in that whereas the Applicant in its Request for Review dated 22nd July 2015 and in the replying affidavit sworn on 7th August 2015 in reply to the 1st Interested Party’s Response to the Request for Review, as well as in its written and oral submissions, challenged the failure by the 1st Interested Party to evaluate the tenders as required under section 82 of the Act, citing the introduction of extraneous evaluation criteria and the absence of scoring of bids as required under the Act, the Respondent failed to take this into consideration, or otherwise to make any substantive findings in this regard, instead simply taking the erroneous, unreasonable and irrational stance that the matters were not specifically pleaded in the Request for Review. It is however clear that the Respondent was alive to this issue. However in its view, the Respondent held that the issue was not specifically pleaded and therefore, it could not determine the same. In fact according to the Respondent, the request was largely if not entirely based on the ground that the Applicant was the lowest bid price, the lowest monthly lease cost and the lowest monthly grid connection cost. The Respondent found that the applicant did not state in any of the paragraphs in its request that no scores were assigned at each stage of evaluation as a basis for seeking annul the award nor was there any specific ground or an allegation that the Procuring Entity had changed the evaluation criteria from the lowest cost to the one that represented the best commercial returns to the Procuring Entity.

73. Having perused the Request for Review as presented before the Respondent, I am not convinced that based on what was filed before it, the Respondent’s decision that this particular issue was not properly before it can be faulted in these proceedings as opposed to a merit review before an appellate Tribunal. As was appreciated in **R vs. The Public Procurement Administrative Review Board ex parte Kenya Medical Supply Agency, Crown Agents, Deutsche Gesellschaft Fur Technische Zusammenarbeit and John Snow Inc. [2010] eKLR**, the Respondent may well have exceeded its jurisdiction were it to attempt to deal with issues which were not specifically placed before it.

74. It was contended that whereas the Respondent went to great lengths to set out the evaluation results under the headings “*Tender Processing (Bid Evaluation)*” and “*Financial Evaluation*”, which indeed

demonstrated that the 1st Interested Party's had not complied with section 82 of the Act in its evaluation of the tenders, it thereafter proceeded to misdirect itself on glaring factual matters before it and the applicable law, thus rendering the Respondent's decision grossly unreasonable as to render it irrational. This contention calls for a determination of what constitutes unreasonableness for the purposes of judicial review. In my view, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In our view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

75. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on *Administrative Law*, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475:**

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

76. In this case what is being challenged is the findings of the Procuring Entity on the evaluation of the results. Whereas the Applicant contends that the Respondent introduced extraneous considerations which were not contained in the bid documents, the Respondent and the Interested Parties held a different view. To them, the alleged extraneous criteria is that there was allegedly a change of the evaluation criteria from the lowest cost to the one that represented the best commercial return to the 1st Interested Party yet this is not true as there was no such change. In their view, the tender had three components of evaluation at the financial stage namely: availability factor, Output MW and low cost. However, the Applicant focused on only one aspect of evaluation; low cost while ignoring the other two components of the tender. That was a finding arising from the construction and interpretation of the bid documents. Whereas that construction may well be unmerited, it does not in my view meet the threshold that warrants interference under judicial review. As rightly submitted, the Respondent was under both constitutional and statutory obligation to ensure that the procurement complied with the principles of promoting economy and the other principles set out in Article 227 of the Constitution and in section 2 of the ***Public Procurement and Disposal Act 2005*** which bind the Board. In **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, the Court held as follows:

“Before dealing with the issues raised it is important for the Court to deal with the scope of the request for a review undertaken by the Respondent under the Act. In our view a review is not an appeal. Section 93(1) of the Act provides:

Subject to the provisions of this Part, any candidate 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 as in such manner as may be prescribed.

“Administrative review” is defined by *Black’s Law Dictionary*, 9th Edition at page 1434 *inter alia* as “review of an administrative proceeding within the agency itself” while *Ballentines Law Dictionary* at page 13 defines “administrative proceeding” as “a proceeding before an administrative agency, as distinguished from a proceeding before a court. Compare judicial proceeding”. What then is expected of the Respondent in exercising its jurisdiction on a request for review? A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker...“Review” is defined in *Black’s Law Dictionary*, 9th Edition at page 1434 *inter alia* as “Consideration, inspection, or reexamination of a subject or thing.” *Ballentines Law Dictionary* on the other hand defines the same word at page 482 *inter alia* as “A reevaluation or reexamination of anything.” Clearly a review is much wider in scope than an appeal.

77. Therefore since the Respondent’s jurisdiction in the exercise of its powers of review are wider, it may well be entitled to consider the legality and constitutionality of the decision made by the Procuring Entity and make appropriate order since as appreciated by the parties herein, section 98 of the Act, confers wide powers to the Respondent including annulling anything done by the Procuring Entity in the procurement proceedings, or indeed annulling the procurement proceedings in their entirety; giving directions to the Procuring Entity with respect to anything to be done or redone; or substituting its decision for any decision of the Procuring Entity. It is therefore my view that if the Respondent 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.

78. To the Applicant, the Respondent therefore acted unreasonably, irrationally, irregularly and illegally in failing to give effect to and/or otherwise waiving or ignoring section 82 of the Act, which sets out the manner for evaluation of Requests for Proposals hence denied the Applicant the benefit of a finding on merit, thus did not subject the Applicant to a fair process before it, contrary to Articles 47 and 50 of the Constitution. In its decision, the Respondent considered the three components of evaluation at the financial stage namely: availability factor, Output MW and low cost and agreed with the Procuring Entity that that the Applicant’s bid was found to be unresponsive and that the most responsive bid was that of the 2nd interested party. That was a finding of fact based on the construction of the bid documents hence could only be overturned on a merit review and not in these kinds of proceedings.

79. It was further contended that contrary to the requirements in the Expression on Interest the 2nd Interested Party was incorporated in Kenya on 6th June 2012 thus turned 3 years only 18 days to the closing date for the EOI hence would not have been in a position to demonstrate “Evidence of financial capability to lease the Wellheads-attach most recent three (3) year audited financial statements”. A perusal of the Request for Review clearly shows that this was not one of the grounds for the Request and the issue was never dealt with by the Respondent. To deal with the same would amount to reviewing the decision of the 1st interest party in an application challenging the Respondent’s decision. To do so would flout the provisions of the **Public Procurement and Disposals Act**. On that score, I associate myself with

the decision of **Korir, J** in **Republic vs. Public Procurement Administrative Review Board & another Exparte Intertek International Limited [2013] eKLR**, where he held:

“In my view, the Applicant before me is trying to get a second bite of the cherry. The Applicant presented its grievances against the procuring entity (KEBS) to the Board. The Board considered those grievances and came up with its decision. The Applicant had an obligation to present all its grievances against KEBS to the Board. This court can only consider the decision of the Board and cannot look at the shortcomings, if any, of the tendering process by KEBS since the Board has already done so.”

80. In my view the applicant cannot under the guise of challenging the decision of the Respondent attack the decision of the Procuring Entity when the same was not the subject of the proceedings before the Respondent. In any case for this Court to find that the 2nd interested party was incorporated in Kenya on 6th June 2012 thus turned 3 years only 18 days to the closing date for the EOI hence would not have been in a position to demonstrate *“Evidence of financial capability to lease the Wellheads-attach most recent three (3) year audited financial statements”*, would necessitate making findings of fact in light of the Respondent and Interested Party’s positions that the 2nd interested was a consortium hence met the necessary conditions. That discourse is however outside the scope of this investigation.

81. Having considered the issues raised herein it is my view that the grounds advanced by the Applicant ought to have been the subject of an appeal as opposed to judicial review. As was appreciated by this Court in **Republic vs. Business Premises Rent Tribunal & 3 Others Ex-Parte Christine Wangari Gachege [2014] eKLR**:

“...In this case it is not in doubt that the decision which is being challenged in these proceedings was the subject of an application for setting aside which decision was disallowed by the Respondent. Whether that decision was right or not the Applicant ought to have appealed against the same instead of challenging the decision in respect of which attempt to set aside had failed. In judicial review proceedings the mere fact that the Tribunal’s decision was based on insufficient evidence, or misconstruing of the evidence which is what the applicant seems to be raising here or that in the course of the proceedings the Tribunal committed an error are not grounds for granting judicial review remedies. In reaching its determination, it must however, be recognized that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327, it was held:

“It has been recognized for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal’s decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgment for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly...And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court’s to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in

what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise...Even if it were alleged that the Commission or authorized officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction...Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of certiorari on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction.”

In *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others*, Civil Application No. 307/2003, Omolo JA stated as follows;

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

82. The Procuring Entity argued that it is in the public interest that the application be dismissed in order for the project to move forward. In its view, it is critical that project progresses there being an overwhelming demand for electricity in this country which exceeds the supply and this project seeks to address the deficiency in the supply of electricity in the country. This Court reiterates its holding in **R vs. Public Procurement Administrative Review Board & Another Ex-parte Avante International Technology Inc. [2012] eKLR** where it was held that:

“...in appropriate circumstances, courts of law and independent tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them...”

83. It is however, trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute. This was the position adopted by the Court in **Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR** where it was held:

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.”

84. Having considered the issues raised herein, it is my view and I so find that the Notice of Motion dated 3rd September, 2015 lacks merit.

Order

85. Consequently, the same fails and is dismissed with costs.

86. Orders accordingly.

Dated at Nairobi this 19th day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Mutava for Mr. Nyachoti for the Applicant

Mr. Nyangoro for Mr. Mogeni for the Applicant

Mr. Munene f the Respondent

Miss Kashindi for Mr. Kiragu for the 1st Interested Party

Mr. Muganda for 2nd Interested Party

Cc Patricia