



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 356 OF 2015

(CONSOLIDATED WITH MISCELLANEOUS APPLICATION NO. 362 OF 2015)

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW.

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION.

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT (CAP. 412A) LAWS OF KENYA.

AND

IN THE MATTER OF: THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.

AND

IN THE MATTER OF: A DECISION BY THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD TO ANNUL TENDER AWARDED TO THE EX-PARTE APPLICANT TO SUPPLY AND DELIVER MOTORIZED NUMBER PLATE HOT STAMPING FOILS.

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

AND

TROPICAL TECHNOLOGY LIMITED..... INTERESTED PARTY

EX PARTE:

MIG INTERNATIONAL LIMITED.....1st EX PARTE APPLICANT

HOFFMAN INTERNATIONAL GmbH.....2nd EX PARTE APPLICANT

JUDGEMENT

Introduction

1. This judgement arises from two applications.

1st Applicant's Case

2. The first applicant herein **MIG International Limited** (hereinafter referred to as "MIG") seeks by way of a Notice of Motion dated 28th October, 2015, the following orders:

1. AN ORDER OF CERTIORARI to remove into this Honourable Court for purposes of the same being quashed the decisions of the 1st Respondent's Board contained in the 1st Respondent's ruling dated 8.10.2015 annulling the tender awarded to the Ex-parte applicant.

2. AN ORDER OF MANDAMUS to compel the 1st Respondent to reinstate the Ex-parte applicant as the winning bidder of tender no. KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil.

3. AN ORDER OF PROHIBITION, prohibiting the 1st and 3rd Respondent from acting upon and or executing the directions made and or given by the 1st Respondent against the ex-parte applicant in the ruling dated 8.10.2015.

4. Costs of this application be provided for.

3. According to MIG, there was an advertisement in the *East African Newspaper* of 31st January, 2015 to 6th February, 2015 by the Kenya Prison Services for tender no. KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil and tender no. KPS/T/10/2015-2016-2017 for supply and delivery of motorized vehicle number plate blanks. Pursuant thereto MIG applied for both tenders but was only successful in getting KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil (hereinafter referred to as "the first tender"). It averred that the reason given for failure to qualify for tender no. KPS/T/10/2015-2016-2017 for supply and delivery of motorized vehicle number plate blanks (hereinafter referred to as "the second tender"), was that it "gave no proof of testing certificate and ISO compliance Certificate" though in respect of the second tender the said documents were found to be in its bundle of documents. On receipt of the letter notifying it of the award of the said first tender, MIG instructed its suppliers to start preparing for what it would be supplying to the procuring entity.

4. However by a letter dated 25th September, 2015 received on the 28th September, 2015 from the 1st respondent (hereinafter referred to as "the Board"), MIG was informed that a request for review had been lodged by the interested party and MIG was required to appear before the Board on the 2nd day of October, 2015 for hearing. However, the only document that was enclosed was the interested party's application for review while the statement in support together with the annexures were missing.

5. MIG averred that it immediately instructed its advocate Messrs Mbuthia Kinyanjui & Co advocates to file a notice of appointment and a preliminary objection, but their efforts to access the entire pleadings filed by the interested party were met with denial from the officers of the Board who informed them that they were only entitled to the application for review together with the statement in support but nothing else. To MIG, the failure to avail documents to them was not only illegal but against rules of natural justice for you can only defend yourself against what you are aware of hence the proceeding were in essence trial by ambush. It was further averred that a closer look at the said application for review filed by the interested party lacked particularization, revolved around matters MIG was not privy to and in essence opted to not include MIG as a party as envisaged in the Act.

6. It was contended that on the 2nd of October, 2015 MIG attended the Board at the agreed time only to be informed that the Board had rescheduled the hearing to the 5th of October, 2015 at 2.30pm. On the rescheduled date the interested party through its counsel made submissions and thereafter the chairman of the Board started interrogating the procuring entity in the tender, as if he was acting for the interested party.

7. It was averred that MIG's lawyers raised the issues regarding not being supplied with the documents filed but nevertheless proceeded to submit based on what had been availed and a ruling date was reserved for 8th of October, 2015 at 4.30pm. On the said ruling date, by which the Board annulled the tender awarded to MIG, MIG's advocate requested for a copy thereof to enable it file the present application, but was informed a copy would be availed the following day. However, the same was only availed ten days thereafter.

8. According to MIG, it was clear from the foregoing the conduct of the Board both before the hearing of the review and after rendering its ruling, was nothing near professional, impartiality and or good faith, an action which aggrieved MIG. According to MIG, the Board arrived at the said decision of 8th October, 2015, without observing the principles of natural justice in that:

(a) It failed to accord it sufficient or any reasonable notice of the proceedings (if any) of the Board before annulling the award.

(b) It failed to accord MIG a fair opportunity to present its case and to enable MIG to correct or contradict any relevant statements and or allegations prejudicial to it.

(c) It failed to avail and or show MIG and or apply any evidence, whether written or oral in support of allegations (if any) made prior to making its decision.

9. MIG averred that the Board acted *ultra-vires* as to the law governing public procurement and disposal as provided under the sections 66, 96, 98 and 100 of the **Public Procurement and Disposal Act** (Cap 412A) Laws of Kenya (hereinafter referred to as "the Act") in arriving at the decision by:-

(a) Granting orders not sought by the parties.

(b) Acting without following the prescribed procedure therein and more so usurping the powers of the procuring entity.

(c) Dictating, arm twisting and generally advancing its agenda through its decision by giving unreasonable time lines and directions with a view of defeating the course of justice and redress available to the MIG.

10. It was further contended that that the Board's actions amounted to abuse of power and was arrived at with improper motive in that:-

(a) The Board acted without exercising substantive fairness.

(b)The Board acted irrationally and without regard to the principles applicable in its decision making process.

11. In MIG's view, the Board's decision and action in light of the material known to it were outrageous and were unwarranted as the same were founded on false allegations, because among other things MIG's price quotation was for both the 120mm *305mm and 220mm*306mm motorized number plates for a period of three years including the escalations and not for just 120mm *305mm as found by it. MIG therefore asserted that the Board in its decision and actions acted in breach of its duty to act in good faith at MIG's interest in that it acted with *mala fide*. Based on legal advice, MIG contended that:

(a)Whereas Courts of law in Kenya are very loath to interfere with decisions of domestic bodies and tribunal including institutions and board and have no desire to run such learning institutions or indeed any other body, they will however interfere to quash decisions of public body or public official when they are moved to do so where it is manifest that the decisions have been made without fairly and justly hearing the person concerned or the other side.

(b) That it is the duty of the Court to curb excesses of officials and bodies which exercise administrative authority.

(c) Any decision made in breach of the rules of natural justice are *ultra-vires*, irregular, null or void *ab initio* and are amenable to Judicial Review Jurisdiction of this Honourable Court and ought to be removed for purposes of being quashed.

12. In rejoinder to the affidavits filed in response to the application, MIG averred, while reiterating the contents of the supporting affidavit that although the notification of hearing was dated 25th September, 2015, the same was communicated as an attachment to an email sent on 29th September 2015. MIG added that the Board did not first determine the Applicant's preliminary objection before proceeding to determine the request for review on the merits and that the objection was determined in the final ruling and this is well captured in the ruling of the board.

13. According to MIG, the Board's decision and orders were an abuse of power, unreasonable, in breach of a duty to act in good faith, in breach of the rules of natural justice, *ultra-vires*, unlawful, arbitrary, and based on extraneous considerations, as outlined below:

a) Annuling the applicant's tender when it was not made a party to the application.

b) The Applicant was not availed with the full set of the review pleadings and the documents annexed thereto.

c) The review application was allowed on grounds which had not been pleaded. The Board ruled that the Applicant's form of tender was not in the format prescribed in the tender document and its bid ought to have been declared as non-responsive. However, the Request for Review did not plead that the Applicant's form of tender was not in the format prescribed and was therefore non responsive.

d) Awarding the tender to Tropical Technology Ltd when it was not the lowest evaluated bidder.

e) The Board misdirected itself on the contents and interpretation of the bids and schedules of prices. The Board misdirected itself that the successful bidders did not set out the respective prices per year for the three years as required by the tender document and their tender document and their form of tender were not in the format prescribed form.

f) The Board relied on documents whose source is suspect and never availed to the parties during the hearing of the review hence no opportunity to interrogate them and their contents.

14. It was averred that MIG's form of tender did set out set out the price for year 1 and made reference to

the attached price schedules which contained prices for year 2 and year 3. However, the Board was accused of having misdirected itself on the bid price of Interested Party and erroneously considered their unit price of USD 4,856.20, yet the total contract price could only be obtained by arithmetically multiplying the unit price by the quantities required over the 3 year period which total amount came to USD 17,406,350.

15. It was based on the foregoing that MIG sought the orders the subject of this judgement.

16. It was submitted on behalf of MIG that the right to a fair hearing entails one, adequate notice, two, supply of documents to be relied on and three an opportunity to ventilate one's case before an impartial body. In the present case a five days' notice was given to MIG to prepare and participate to the proceedings, and though arguments have been advanced that the same was adequate notice, it would have been if all documents were supplied to MIG which in the present case they were not. This, in its view, was a classical case of trial by ambush and on this limb alone the application before court should succeed. In support of this submission, MIG relied on **Diana Kethi Kilonzo & Another v IEBC & 2 Others, Petition No. 359 of 2013**, where it was stated that:

“We agree with the submissions of Counsel for the Respondents that what would constitute a fair hearing and accord with the rules of natural justice will vary and depending on the circumstances of each case. In this regard, the words of Tucker L J in *Russell vs Duke of Norfolk (1940) 1All ER 109*, at 118 relied on by the Respondents are instructive:

“The requirements of natural justice must depend on the circumstances of the case, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth...one essential is that the person concerned should have a reasonable opportunity of presenting his case.’ ”

17. It was further submitted that the question as to whether or not the requirement of a fair hearing is met will depend on the circumstances of each case and reliance was placed on the Court of Appeal decision in **Kenya Revenue Authority vs. Menginya Salim Murgani, Civil Appeal No.108 of 2009** which cited, with approval, the authorities in **Local Government Board vs. Arlidge [1915] A.C. 120, 132-133**, **Selvarajan vs. Race Relations Board [1975] 1 WLR 1686, 1694**, and **R vs. Immigration Appeal Tribunal Ex-Parte Jones [1988] 1 WLR 477, 481** where the following principle was upheld:

“...hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing...Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made.....”

18. According to MIG, there is no question that the rules of natural justice entail a right to be heard and fairly to be supplied with information to enable a reasonable response, a rule is in general applicable to conduct which leads directly to a final act or decision as restated in ***Halsbury's Laws of England***, Fifth Ed, Vol 61, at 639, where, commenting on the right to be heard, it is stated:

“The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or recommendation on which a subsequent decision may be founded.”

19. In MIG's view, in the present case since the orders sought and granted were final in nature, rules of natural justice and more so the right to a fair hearing ought to have been guaranteed.

20. It was further submitted that the Board acted beyond the scope of its mandate and gave orders not

sought by the interested party thus its decision and orders were an abuse of power, unreasonable, in breach of a duty to act in good faith, in breach of the rules of natural justice, *ultra-vires*, unlawful, arbitrary, and based on extraneous considerations. According to MIG, section 98 of the Act, provides for the powers of the board, from the said statutory provision there is no provision for the board to dictate to the procuring entity on what to do on matters not before the board nor is there provision for the board to act as the procuring entity and award tenders not subject of proceedings before the board. It was submitted that the interested party herein in application number 46 of 2015 sought three orders to wit; the award committee's decisions be reversed and the awards be nullified forthwith under section 98(a) of the Act; the tenders be awarded to the Applicant as provided for under section 98(c) of the Act; and costs be awarded to the Applicant. The board in its decision, however made the following orders:

- a) The Applicant's request for review dated 9th September and which was filed with the board on the same day hereby succeeds and is allowed.
- b) The award of the tender for the supply of motorized number plate banks to M/s EHA Hoffman International GMBH is hereby annulled.
- c) The award of tender for the supply and delivery of motorized number plate hot stamping foils to M/s MIG International Ltd for hot stamping foils size 120mm x 305m is hereby annulled.
- d) The decision of the procuring entity failing to award the tender for foil 220mm x 305m and the recommendation that the tender for the supply of the said foil be re-advertised and is hereby annulled.
- e) In exercise of the powers conferred upon the board by the provisions of section 98(c) of the Act, the board hereby substitutes the decision of the procuring entity declaring the Applicant's tenders in tender no. 10 and 11 as unsuccessful and hereby by substitutes the said decision by awarding the Applicant:-
 - i) Tender number KPS/ICB/T/10/2014/2015-2016-2017 for the supply and delivery of motorized vehicle number plate blanks at the price out in the form of tender dated 2nd March, 2015 and the schedule annexed thereto.
 - ii) Tender number KPS/ICB/T/11/2014/2015-2016-2017 for the supply of motorized number plate hot stamping foils size 120mmm x 305mm including foil size 220mm x 305 at the unit prices set out in the Applicants form of tender dated 2nd March, 2015 and the schedule annexed thereto.
- f) The procuring entity is directed to issue letters of award to the Applicant in respect of the two tenders and complete the entire procurement process in accordance with the law within a period of fifteen (15) days from the date of this decision.
- g) In exercise of the powers conferred upon this board by the provisions of section 98 of the Act, the board recommends that the director of the public procurements oversight Authority and the other investigative agencies of the Government to carry out an investigation to establish whether there was any impropriety in the procuring entity's decision to alter the prices submitted by the parties in their tenders and or in adopting prices and awarding the subject tenders to bidders at prices not set out in the form of tenders.
- h) Since each party has been partly successful in the request for review, the board orders that each party shall bear its own costs of this request for review.

21. According to MIG, from the foregoing listed orders of the Board, it is clear that the Board took it upon itself to determine matters not before it and better still created an intuition that the process of the tendering had been compromised and there was need to have the procuring entity investigated. By making such a decision, it was submitted that the Board was not within its mandate as provided under section 98

of the Act since the orders issued by the board (no. (d), (e) (ii) and (g) were an abuse of power, unreasonable, in breach of a duty to act in good faith, in breach of the rules of natural justice, *ultra-vires*, unlawful, arbitrary, and based on extraneous considerations. This was so because, one, there were no different tenders for motorized number plate hot stamping foils size 120mm x 305mm and 220mm x 305mm both were part and parcel of tender number 11 and this is well captured in both the tender documents and the price schedule for goods. Thus by the act of the board of separating and splitting the tender they acted *ultra vires* and unlawfully. That aside, from the figures quoted by the parties as the unit price, the unit price given by MIG was (3.51+5.72+5.72+5.89+5.72=26.56 Euros) against the interested party's of 62.34+114.35+118.08+216.49+118.08+216.49+127.53+233.79+118.8+216.49=1541.49 USD). Thus if the same is computed to the number of units the figure of 363,437.50 Euros would be arrived at in respect of the 1st Applicant per year while a figure of 15,659,650 USD would have be arrived at in respect of the interested party for the units totalling to 70,000. It was hence submitted that the decision was unreasonable and irrational for you cannot annul a tender of the lowest bidder and award the same to the highest bidder for the same would be irrational, unreasonable and is contrary to the provisions of section 66(4) of the Act, reason and would be contrary to public good for the same would subject this country into unnecessary loss of public funds. In support of the submissions MIG relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.**

22. It was submitted that the dictating and or ordering that tender number 11 should be split into two and both awarded to the interested party herein, was unprecedented and unlawful and that the Board usurped the powers of the procuring entity and moved from its ambit of being an arbiter to that of the parties, jury and the judge and it should not be allowed to do so for the same is nothing short of abuse of powers vested in it. In MIG's view, the conduct both during and after the ruling of the 1st Respondent was marred with malice and bad faith for one the ruling was delivered on 8th October, 2015 and fifteen days were given to comply with the same only for the said ruling to be signed and availed ten days later to facilitate execution of an illegality.

23. To MIG, having established that the decision of the 1st Respondent was anchored on financial evaluation nothing more nothing less and having established both by arithmetic computation and the documents filed and relied by the parties it is only fair to conclude that the findings of the Board and the process of arriving at the same was wrong, illogical and unwarranted and should be quashed. It was therefore sought that an order of certiorari should issue removing to this Honourable Court for purposes of the same being quashed the decision of the Board contained in its ruling dated 8th October, 2015 annulling the tender awarded to the MIG. Similarly the Court should grant an order of *mandamus* compelling the Board to reinstate MIG as the winning bidder of tender no. KPS/T/11/2015-2016 for supply and delivery of motorized vehicle number plate hot stamping foil. In support of the submissions, MIG relied on **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others [1997] KLR and Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.**

2nd Applicant's Case

24. The 2nd applicant (hereinafter referred to as "Hoffman") on the other hand filed a Motion dated 28th October, 2016 in which it sought the following orders:

1. An Order of *Certiorari* removing to this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated and delivered on 8th October, 2015 in Review Application No. 46 of 9th September, 2015: Tropical Technology Limited Versus Ministry of Interior & Coordination.

2. An Order of *Mandamus* compelling the 2nd Respondent to award the tender for Supply and Delivery of motorized vehicle number plates blanks in the matter of tender No KPS/T/ICB/10/2015-2016 and Supply and Delivery of motorized vehicle number plates hot

stamping foils in the matter of tender No KPS/T/ICB/11/2015-2016 to the applicant herein.

3. The cost of this application be in favour of the Ex-parte Applicant.

25. According to Hoffman, it responded to the Ministry's tenders advertised on 30th January, 2015 as an open international tender in the print media, on the Kenya Prisons Service website as well as on the IFMIS Tender Portal of the National Treasury website and its bid was found to be responsive by the Ministry's Technical Evaluation Committee and passed the Preliminary Evaluation Stage as provided under Rule 47 of the **Public Procurement and Disposal Regulations 2006** (hereinafter referred to as "the Regulations"), and proceeded to the detailed technical evaluation stage as provided under Rule 49 of the Regulations, whereupon it scored the highest and was thus qualified to proceed to the financial evaluation, which was the final stage in the tender evaluation process and was awarded the subject tender.

26. Thereafter, the Interested Party filed a review application to the Review Board vide Review Application No 28 of 2015 which led to a decision by the Review Board that the Ministry should re-evaluate the tenders afresh. It was averred that the Ministry did re-evaluate the tenders as ordered but the interested party aggrieved by the decision of the Ministry proceeded to file Review Application No 46 of 2015 leading to the Board delivering the impugned decision herein on the 8th October, 2015.

27. According to Hoffman, the Review Board failed to give it a fair hearing before cancelling the award of the tender to it and proceeded in breach of the rules of natural justice by not informing the parties of the issues which they needed to address and by introducing issues which were not part of the Review Application. To Hoffman, the said decision as delivered by the Board is unreasonable, based on extraneous, irrelevant and unlawful considerations, arbitrary, *ultra vires* and in excess of jurisdiction conferred on it by law on the grounds *inter alia* that:

i. The Board took it upon itself to determine whether the Applicant had met the mandatory requirements by submitting a competent Manufacturer's Authorization Letter, an issue which under the law falls within the mandate of Technical Evaluation Committee of the procuring entity to determine and which had in fact been considered and determined by the Ministry's Technical Evaluation Committee.

ii. The Board failed to appreciate that its jurisdiction was limited to determining whether or not the Applicant's bid was subjected to a fair and transparent re-evaluation process as required by the Review Board and the Act.

iii. The Board failed to take into consideration relevant factors, in particular that the Interested Party was not the manufacturer of the tendered goods and that it had misled the Procuring Entity by directing them to the wrong manufacturer.

iv. The Board failed to appreciate that its mandate as set out under the Act, is to ensure accountability and transparency in the tender process and to enhance fair competition in the tender process.

v. The Board in arriving at the impugned decision made grave errors of law in failing to apply mandatory provisions of the Act which led to its awarding the tender to the Interested Party.

vi. In reaching its decision, the 1st Respondent made grave errors of law and fact which took its decision outside of its legitimate jurisdiction and rendered it illegal.

28. It was contended that the Board's actions are *ultra vires*, unlawful, arbitrary, malicious, capricious, based on wrong interpretation of the law, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations, against Hoffman's lawful, legitimate and rightful expectation and a breach of the rules of natural justice.

29. It was further averred that it beats logic that the Board having found that *there was concerted effort by*

*the Procuring Entity to keep away the financial proposals submitted by the successful bidders from the board and when these document were finally submitted to the board, it became obvious that there were glaring errors some of which bordered on fraud in the manner the financial proposals were altered and different set of figure used in carrying out the financial evaluation and that there was altering of the substance of tenders submitted by the bidders to the Procuring Entity, still proceeded to award the tender to the Interested Party. To Hoffman, the decision to award the tender to the Interested Party despite the Review Boards own finding that there were glaring errors some of which bordered on fraud in the manner the financial proposals were altered and different set of figure used was unfair, biased and *ultra vires*. Based on legal advice, it was averred that section 66(4) of the **Public Procurement Review Act 2005** as read together with Regulation 50(3) of the **Public Procurement Regulations** and the tender document enjoined the Review Board to only award a tender upon ascertaining without a shadow of doubt which bid was the lowest and most responsive.*

30. Further, it was contended that it is necessary to only award a tender to the lowest most responsive bidder so as to adhere to Article 227 of the Constitution which enjoins a public body to only procure goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. The Hoffman's position was that due to the alterations to the financial proposals as arrived at by the Review Board, it was not possible to ascertain for a fact which among the bidders was the lowest and most responsive most responsive bidder to merit the award of the tenders as prescribed by section 66(4) Act as read together with Regulation 50(3) of the Regulations. The said decision, it was asserted, equally violated public law principles which enjoined the board to undertake a sufficient enquiry as to the exact extent of the alterations to the financial proposals submitted by all the bidders and to take reasonable steps towards obtaining all information on the extent of alterations to the bidders financial proposals so as to able to make a proper and well informed decision.

31. According to Hoffman, the finding about the alleged altering of the financial proposals with glaring errors some of which bordered on fraud was raised for the first time in the judgement and that the issue was not raised beforehand in order to accord the parties sufficient time and opportunity to respond to the issues in accordance with their right to a fair hearing. It was accordingly contended that Hoffman did not have an opportunity to test and controvert the evidence which the Review Board relied on to arrive at its decision to award the tender to the Interested Party and that had it been accorded an opportunity to test the said evidence the Board might have arrived at a different decision. Its position was that throughout the course of PPARB Case No. 28 of 2015, it was under the impression from the pleadings and the finding by the Review Board that the issue in question was the technical evaluation and as such limited its response to only that issue as pleaded raised.

32. It was averred that whereas the question of whether the re-evaluation of the technical requirements was open for challenge before the Review Board, the question of whether the financial evaluation was equally open for determination was res-judicata as the Review Board created a legitimate expectation that the financial proposals before judgement in PPARB 28 of 2015 were proper. Therefore, Hoffman had a legitimate expectation for the Board to reaffirm its previous finding with regard to the financial evaluation which is a completely distinct process from the technical evaluation process which was faulted by the Review Board.

33. According to Hoffman, the award by the Board to the Interested Party goes against the fabric of Article 227 of the Constitution, section 66(4) of the Act and the tender document which obligates the Procuring Entity to award the tender to the lowest evaluated and responsive bidder. The Board, according to Hoffman, was wrong in inferring that whereas the financial bids by the Interested Party was tampered with, the others were not tampered with when throughout the whole process of the tender it was the Ministry who was in possession of the tender and the finding on record showed the amounts relied on by the Procuring Entity to compute scores by all the bidders were altered by the Ministry.

34. It was its view that the Board's decision to unilaterally frame the issue of altering financial proposals which was not raised or pleaded by any of the parties and to determine the case based on those issues without any of the parties submitting or being heard on those issues was manifestly excessive and contrary to law and as such, the decision to award the tender to the Interested Party went against the

Wednesbury Principle in light of the many glaring errors and fraud the Board identified from the financial proposals such that no reasonable authority could ever have ratified the whole tendering process and the manner with which the bids were handled.

35. Further, in purporting to award the 2 tenders directly to the Interested Party, the Review Board failed to consider factors which included whether the Procuring Entity had the funds appropriated to it sufficient to contract the Interested Party at their quoted prices. The Board was accused of going against the legitimate expectation of the bidders who expected it to be consistent in its findings and to restrict itself to the issues pleaded by the parties and not to ambush the bidders with new issues of alteration of financial proposals.

36. Further, the Review Board took it upon itself to determine whether the Applicant had met the mandatory requirements by submitting a competent Manufacturer's Authorization Letter, an issue which under the law falls within the mandate of Technical Evaluation Committee of the procuring entity to determine.

37. To Hoffman, the Board's actions were *ultra vires*, unlawful, arbitrary, malicious, capricious, based on wrong interpretation of the law, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations, against its lawful, legitimate and rightful expectation and a breach of the rules of fair play hence the justice of the matter calls for the Honourable Court to allow Hoffman's Judicial Review Application as filed herein.

38. It was submitted on behalf of Hoffman that the Board is a statutory body established under section 25 of the **Public Procurement and Disposal Act** with the sole mandate to operate as an administrative Review Board over disputes arising from the public procurement processes. In support of its submissions, Hoffman relied on sections 93 and 98 of the Act which provide as follows:

93. (1) 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.

98. Upon completing a review the Review Board may do any one or more of the following:-

a) Annul anything the procurement entity has done in the procurement proceedings, including annulling the procurement proceedings;

b) Give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;

c) Substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

d) Order the payment of costs as between parties to the review.

39. The importance of these provisions, according to Hoffman, is that under section 93 the Board in considering and determining Request for Review is obliged to establish whether or not the procurement entity has breached any of the provisions of the Act and/or the Regulations made thereunder. In so exercising its jurisdiction, it was submitted that the Board carries out a quasi-judicial function and is as such bound by the rules of Natural Justice. According to Hoffman, the Interested Party filed the subject Request for Review Application with the Board claiming that the Ministry in carrying out the procurement process herein had *inter alia* breached sections 2, 66, 67, 82 and 83 of the Act. However, from the Board's impugned decision, it is clear that the Board instead of determining the issues raised in the Request for Review, elected to introduce its own grounds and issues for the Review Application and proceeded to determine the Review Application on the issues raised by the Board and not the Applicant.

40. According to Hoffman, the Board proceeded to carry out fresh financial evaluation for the bids and

relied on suspect Forms of Tender deliberately procured by the Board for purposes of justifying an award of all the tenders herein to the Interested Party who was not the lowest evaluated bidder. In its view, the Board has no mandate in law to evaluate Financial Bids as it lacks the technical capacity to carry out any such evaluation. Accordingly, the Board acted without jurisdiction in finding that the Applicant's Financial Bid was none responsive, a matter which was in any event not brought before it by any party.

41. It was Hoffman's case that during the hearing of the Review Application before the Board, it came out clearly that the Interested Party had not provided a Manufacturers Authorization for the supply of the items under the tender, which was a mandatory requirement of the Tender Document but the same was only established when the Ministry requested the Interested Party to allow it visit its Manufacturing site in Germany as expressed in its Tender Document. Upon the said request and the visit to Germany, it clearly emerged that the Interested Party had deliberately mislead the Ministry by submitting a document it referred to as a manufacturer's authorization, from a company which did not manufacture the subject items with the result that the Interested Party did not have a Manufacturer's Authorization as required by the Tender Document and the law. Hoffman relied on section 41 of the Act for the position that any person who engages in a fraudulent practice in any procurement proceeding shall be disqualified from entering into a contract for the procurement. It was contended that since the Interested Party deliberately engaged in fraudulent practice by providing a fake manufacturer's authorization, it was disqualified by virtue of the said provision from entering into any contract with the Ministry.

42. However, it was contended by Hoffman that the Board in addressing the above very important issue, deliberately elected to refer to it as an afterthought without considering the fact that the only way the Ministry would have discovered such a fraudulent practice is by visiting the alleged manufacturer's sites which could only be done at the end of the tender evaluation process. Therefore in arriving at the above decision, the 1st Respondent Board failed to take into account the fact that the Interested Party had not provided a manufacturer's authorization certificate as required by law and the same Interested Party had deliberately sought to fraudulently mislead the Ministry on the issue by providing instead a fake/invalid manufacturer's authorization certificate. It was contended that the Board in purporting to award the tender herein to the Interested Party deliberately failed to consider the implication of section 41 *vis a vis* the conduct of the Interested Party which factors were extremely relevant and important for the determination of this matter.

43. In the interested party's view, it was material for the Board to determine whether or not the Ministry can lawfully be compelled to enter into a contract for the supply of the said items with the Interested Party who in fact did not have a manufacturer's authority to guarantee that the said items will be supplied as per the contract. The said issue, it was submitted was so important in this dispute and the decision on the same could not be wished away as the Board attempted to do herein. Therefore in failing to consider such a very important and relevant issue, the 1st Respondent failed to appreciate the consequence its decision would have in the entire procuring process as the same would defeat the objective of the Act as set out in section 2 thereof as bidders would deliberately provide invalid manufacturer's authorization certificates for purposes of winning a tenders.

44. The Board was therefore accused of arriving at its decision herein by taking into consideration irrelevant matters that were not before it. It unduly concentrated on the analysis of the Financial Bids and the Forms of Tender which it confirmed were not available before it during the hearing of the matter despite the Ministry having indicated that the same had been supplied. To Hoffman, the Board alleged that it later received the said Forms of Tender from an anonymous person which forms the Board did not verify with Ministry and/or the *ex-parte* Applicant as the Forms duly submitted by the respective Bidders. Having taken into account such irrelevant consideration while refusing to take into account the relevant consideration as demonstrated above, it was submitted that the Board arrived at a totally erroneous and unlawful decision. It was submitted that it is trite law that a relevant factor must, and an irrelevant factor must not, be taken into account by authorities such as the Board herein in exercising its powers vested in it by law. Actions or decisions of administrative authorities are amenable to being quashed if they are shown to have been based on irrelevant or extraneous considerations, or where it can be proved that relevant consideration were ignored, as in the case now before Court. In this respect Hoffman cited ***Halsbury's Laws of England*** Fourth Edition. Vol. 1(1) to the effect that:

“A discretionary power must be exercised for proper purposes which are consistent with the conferring statute. The exercise of such a power will be quashed where, on a proper construction of the relevant statute, the decision maker has failed to take account of relevant considerations or has taken account irrelevant considerations. In some statutes, some or all of the relevant considerations may be express; where the statute is silent or the express considerations are not exhaustive, the courts will determine whether any particular consideration is relevant or irrelevant to the exercise of the discretion by reference to the implied objects of the statute.”

45. It was submitted that the Board’s mandate is to ensure transparency and accountability in procuring processes as stipulated by section 2 of the Act. To achieve this objective it is mandated under sections 93 and 98 of the Act to hear claims of breaches of the Act from bidders and to annul any action of the procuring entity that breaches the Act and/or that contravenes the objective of the Act and in addressing the same, it must necessarily consider whether or not the procuring entity’s action complained of is one which was done to promote the objective of the Act as expressed under section 2 thereof and/or otherwise. This is a primarily relevant consideration that must be taken into account by the Board and failure to consider the same avails the Board’s decision for quashing by this Court.

46. Hoffman’s contention was that it is hard to comprehend how the Board would lawfully proceed to set aside the awards made by the procuring entity and replace the same with its own award to a bidder whose quote is so high with the result that the Kenyan Taxpayers will loss a whole Kshs. 320,000,000/- as a result of the its erroneous decision.

47. According to Hoffman, section 66 of the Act obligates procuring entities like the Ministry to evaluate tenders strictly in accordance with the provisions of the tender document and the regulations. The subject tender document herein and/or the Regulations did not permit the Ministry to disqualify bidders based on information solicited and obtained from 3rd Parties. In any event if the Board felt that the Forms of Tender as received from a 3rd Party were so important, then it ought to have verified the same with Hoffman before purporting to disqualify its bid on that ground. It was therefore averred that it is unlawful and procedural for the Board to disqualify Hoffman’s bid without affording it an opportunity to respond to the alleged Form of Tender received by the Board from undisclosed sources. In support of this submission Hoffman relied on the decisions of the House of Lords in **Roberts vs. Hopwood & Others [1925] AC 578** and **Secretary of State for Education vs. Tameside Metropolitan Borough Council [1977] AC 1014**, In the latter it held as follows:

“It was for the Secretary of state to decide that. It is not for any court of law to substitute its own opinion for his: but it is for the court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider.”

48. The Court was urged to note that the Board failed to take account of the fact that the said Form of Tender applied in disqualifying Hoffman’s bid was not even copied to the latter who was the lawful bidder and whose rights were to be directly jeopardized by the disqualification of its bid. It was therefore submitted that the Board acted unreasonably in failing to take into consideration the fact that the evidence before it showed that the Interested Party did not have a valid Manufacturer’s Authorization Certificate and that the said bidder had misled the 2nd Respondent in breach of section 41 of the Act.

49. To Hoffman, in ignoring all of the above factors, the Board acted wholly unreasonably and irrationally in the circumstances and its decision was purely erroneous both factually and legally, yet, a public body like the Board has a duty to act reasonably and rationally and Parliament naturally expects of every authority vested with power to act reasonably and within the law in exercising such powers. Acting irrationally and unreasonably and without taking account of relevant factors, it was submitted, renders an authority’s action *ultra vires*, null and void and Hoffman relied on the decision of the Court of Appeal (Gicheru, Omollo and Shah, JJA) in **R v. The Commissioner of Coop. Ex p. Kirinyaga Tea Growers**

Coop. Savings and Credit Society Ltd. [1999]1 EA 245 where the Court expressed itself as follows:

“There is no other apparent reason why he ordered the inquiry. If the Commissioner ordered the inquiry because of the complaint of Kiromo, and as we have said we think that was the most likely reason, then the Commissioner was clearly abusing his statutory powers because he is not allowed to order an inquiry on the application of only one member. We are, accordingly, satisfied that the Commissioner’s exercise of his undoubted powers under Section 61 was unreasonable in the circumstances of this case...It is axiomatic that statutory powers can only be exercised validly, if they are exercised reasonably. No statute ever allows any one on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith. We have said enough, we think, to show that this appeal must be allowed.”

50. Based on Lord Diplock’s decision in Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935 Hoffman stressed that:

“By ‘irrationality’ I mean what can by now succinctly be referred to as ‘Wednesbury’s unreasonableness’... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”

51. It was submitted that for the Board to hold that it is lawful and reasonable for a bidder to mislead a procuring entity on its manufactures authorization certificate with a view of fraudulently securing a tender, is so irrational that no rational tribunal properly considering the facts could make such a finding. Further, to then proceed to purport to carry out a Financial evaluation of bids based on documents received from undisclosed sources and without affording any of the parties an opportunity to comment on those documents (Form of Tender) is an action which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

52. Hoffman’s case was that any power confided by the legislature in any public authority must be exercised in good faith or *bona fides* and where the exercise of power is masked in matters as demonstrated here above, the resulting act will be unlawful and *ultra vires*. It relied on the decision of Wendoh, J in Misc. Civil Application No. 53 of 2010; Zhongman Petroleum & Natural Gas Group Company Ltd VS The Public Procurement and Administrative Review Board and 3 Others [2010] eKLR at page 162 in which the learned Judge held that:

“The Review Board had jurisdiction to enter into inquiry on the request for review. It also had jurisdiction to hear the Preliminary Objection raised by the 1st Interested Party but should have investigated whether the request was lodged on time and whether the alleged breach Reg. 73 was substantive and given reasons for its determination. By failing to consider these relevant issues and failing to give reasons, the Respondent fell into error and breached the rules of natural justice of a fair hearing. Under the provisions of Judicial Review and this Court has the power to intervene and quash the decision of the Board and direct the Board to hear the application on the merits of their request for review. Judicial Review remedies are discretionary in nature. In this case in exercise of the courts discretion, it has taken into account the fact that procurement matters are meant to be determined without undue delay in order to realize the objects of the PPD Act. However, the bodies charged with decision, making like the Review Board are urged always to bear in mind the objects of the Act, the statutory provisions that gives them power and rules of fairness.”

53. It was therefore Hoffman’s case that it had demonstrated sufficient grounds to warrant the issuance of the orders sought herein in that the Board in arriving at the impugned decision herein took into account irrelevant considerations and failed to take into account relevant consideration and as such the Board in so doing arrived at an erroneous decision both legally and factually; the Board lacked the requisite jurisdiction to evaluate tender documents as it purported to do herein since evaluation of tenders is a comparison process and the Financial Evaluation Committee having evaluated the Financial Bids, the

Board cannot lawfully purport to reevaluate the same based on its own self procured documents without calling all the other tenders and similarly subjecting them to a second financial evaluation process; the Board committed an error in applying sections 41 and 96 of the Act and proceeded to render its decision based on the said error of law.

54. It submitted that it is now trite position of the law that an order in the nature of certiorari would only issue where the following grounds are proved;- (a) want or excess of jurisdiction (b) where there is an error of law on the face of the record (c) failure to comply with the rules of natural justice and (d) failure to take into account relevant consideration and taking into account irrelevant consideration (e) the *Wednesbury* principle; and according to it, in this case it has been demonstrated that the Board made its decision *in inter alia* want of jurisdiction, error of law on the face of the record, failure to take into account relevant consideration and taking into account irrelevant consideration, the *Wednesbury* principle and that decision ought to be quashed. It relied on the decision of **Nyamu, J** (as he then was) in High Court at Nairobi, Misc. Civil Appl. No. 689 of 2001; **R vs. The Senior Residen Magistrate's Court Kajiado & Another ex-parte Joyce Wambui** where the learned Judge cited the decision of **Anisminic Ltd -vs- Foreign Compensation Commission [1969] 2 AC 147** and held that:

“The irregularities mentioned above notwithstanding this court cannot countenance nullities under any guise. This court would like to apply the principle enunciated in the landmark case of ANISMINIC v FOREIGN COMPENSATION 1969 2 AC 147 ‘If a tribunal mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question ie One which it was not empowered to inquire and so had no jurisdiction to determine its purported determination” not being a determination within the meaning of the empowering legislation was accordingly a nullity.’

It follows that both the award and the purported entering of judgment in terms of the awards were nullities. This is so because the maximum *ex nihilo nihil fit* applies-“out of nothing comes nothing”. The High Court has a supervisory role over inferior tribunals and courts and it would not be fit to abdicate its supervisory role.”

55. It was therefore submitted that the order of certiorari ought to issue as sought.

56. With respect to *mandamus*, it was submitted, based on Civil Appeal No. 266 of 1996: **Kenya National Examinations Council -vs- R. Ex-parte Geoffrey G. Njoroge & 9 Others**, that the same will issue to compel the performance of a public duty which is imposed on a person or body of persons by statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

57. To Hoffman, based on the foregoing facts and the relevant provisions of the Act and the Regulations made thereunder as above stated, the Application now before Court ought to be allowed as prayed.

2nd Respondent/Ministry's Case

58. According to the Ministry, the State Department for co-ordination of National Government advertised for international open tenders No. KPS/ICB/T/10/2015-2017 for supply and delivery of motorized number plate blanks and tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle number plate hot stamping foils on 4th February 2015. The two tenders were closed and opened on 3rd March 2015 and evaluation was conducted and an evaluation report submitted on 16th April 2015. The Ministerial tender Committee adjudicated on the two tenders on 28th May 2015 and awarded the two tenders as follows:

- 1) Tender No. KPS/ICB/T/10/2015-2017 for supply and delivery of motorized number plate blanks was awarded to EHA Hoffman GmbH International for a period of three years at a grand total of USD 6,953,700.00

2) Tender No. KPS/ICB/T/11/2015-2017 for the supply and delivery of motorized vehicle number plate hot stamping foils was awarded to;

a) M/S Tonnjes C.A.R.D international GmbH for supply and delivery of Hot stamping foil for three years at a grand total of USD 339,184,35

b) M/S EHA Hoffmann international GmbH for supply and delivery of Hot Stamping Foil for a period of three years at a grand total of USD 20,797,000.00

59. One of the bidders, **Ms. Tropical Technology Limited**, the Interested Party herein, appealed the award to the Board which adjudicated the appeal annulled the award on the basis that the Ministry had not carried out visits to the various manufacturing sites as required under the Tender Document and ordered for the said visit and a fresh evaluation of the tender on 17th July 2015. It was averred that the evaluation committee carried out the re-evaluation process from 19th July - 30th August as directed by the Board and submitted a fresh evaluation report on 31st August 2015. Again the Ministerial tender committee adjudicated on the two tenders on 1st September 2015 and awarded the contracts to the lowest evaluated bidders as follows:

i. MS EHA Hoffimann GmbH International was awarded tender No. KPS/ICB/T/10/2015-2017 for supply and delivery of motorized vehicle number plate blanks for a period of three years at a grand total of USD 6,953,700.00

ii. MIG International awarded tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 120mm X 305m for three years at a grand total of USD 1,418,842.00

iii. Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m was found to be overpriced and recommended for re-advertisement

60. Thereafter, letters of Tender Award Notification were sent to the successful and unsuccessful bidders on 3rd September 2015 and were given seven (7) days grace period for appeal of complaints as provided by the Act. On 10th September, 2015, the Interested Party lodged another appeal with the Board challenging the award citing similar grounds and by a ruling delivered by the Board on 8th October, 2015, the Board found that:

i. The award of the tender for supply of motorized vehicle number plate blanks to M/s EHA Hoffmann International GmbH is annulled

ii. The award of the tender for supply of motorized vehicle number plate blanks hot stamping foil to M/s MIG International Ltd is annulled.

iii. The decision of the Procuring Entity failing to award the tender for foil size 220mm x 305m and recommendation that the tender for the said foil be re-advertised is annulled.

61. After annulling the said awards, the Board, according to the Ministry, erroneously and without any reasonable ground awarded the two tenders to **Tropical Technology Ltd**, the Interested Party herein who is not the lowest evaluated bidder as per the provisions of section 66 (4) of the Act.

62. It was the Ministry's contention that in the event the Board's decision delivered on 8th October 2015 to award the two tenders to the interested party while the bidder is not the lowest evaluated bidder is not quashed, the procuring entity, stands to lose USD 3,097,300 in tender No. KPS/ICB/T/10/2014-2017 and USD 15, 987, 508 and USD 31,918,300 in tender No. KPS/ICB/T/11/2014-2017. To the Ministry, the Board's decision to annul its award of Tender No. KPS/ICB/T/10/ 2014- 2017 to Hoffman and award it directly to the Interested Party when the bidder is not the lowest evaluated bidder is unlawful,

unconstitutional and an abuse of powers for the reasons that:

i) Article 47 and more importantly Article 227 of the Constitution emphasize the principle of public interest in matters of procurement as guided by the spirit of Article 227 where the public benefits from a competitive and cost-effective system of procurement that arrives at the best bargain to the public.

ii) **Public Procurement and Disposal Act, 2005** section 30(4) which provides that a procuring entity should not procure standard goods and services at unreasonably inflated prices

iii) Public Procurement and Disposal Act 2005 section 2 which requires procuring entity to maximize economy and efficiency and inspire confidence of the public as regards the utilization of their taxes.

iv) Public Procurement and Disposal 2005 section 26(3)(a) which provides that all procurement shall be within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through annual procurement plan.

v). The procuring entity approved budget for number plates raw material for every financial year of the three years contract is KES 310,000,000 (KES 930,000,000 for three years) while the Board awarded the tender to the Interested Party at a cost of USD 10,051,000 (KES 1,025,202,000) which is not available.

vi) The procuring entity stands to lose USD 3,097,300 which is equivalent to KES 315,924,600 in Tender No. KPS/ICB/T/10/ 2014- 2017 if the Board's decision and orders to award the tender to the Interested Party is upheld.

63. It was the Ministry's case that the Board in its decision to award the tenders to the interested party overlooked the provision in the tender document (price schedule) that provides that in case of discrepancy between unit price and total, the unit price shall prevail and that in all cases, the unit price given by the interested party is far higher than the unit prices given by the lowest responsive evaluated bidders awarded the tenders by the procuring entity.

64. In the Ministry's view, the Board's observation which was the basis of its decision that there was concerted effort by the Ministry to keep away the financial proposals submitted by the successful bidders was unreasonable, irrational, abuse of power, and breach of a duty to act in good faith since the Ministry submitted all documents required by the Board. According to the Ministry, the quoted prices in the bidders' schedule of price and form of tender remained intact as they were written by bidders in the original financial bids, soft copies provided and as they were read out to the bidders in attendance during the opening of the financial bids. It therefore averred that the Board erred in awarding the tender directly to the Interested Party when it is not substantively responsive as it fraudulently presented a letter of manufacturer's authorization from a company which is not a manufacturer of the advertised goods. This material fact was confirmed by Ministry and availed to the Board. It was the Ministry's case that the Interested Party misled the Ministry that MS Grewe GmbH is a managing partner of Christian Muschard (Interested Party Authorized manufacturer) and was in a position to give the Ministry information about the said authorized manufacturer, a material fact refuted by M/s Grewe and information which Interested Party knew was false. Further, a search on company information of Muschard Schildertechnik confirmed that the company activities is registered as trading and sales of hot stamping systems for license plates and license plate blanks in Germany.

65. To the Ministry, the manufacturer's authorization letter in this tender is crucial and constituted mandatory requirement of substantive responsiveness. Presenting fake and fraudulently obtained letter of manufacturer's authorization, in its view, rendered Interested Party's bid not substantively responsive and therefore the Board's decision to award the tender to Interested Party is illegal and unprocedural. According to the Ministry, the mandatory requirement of Manufacturer's authorization letter is included in the tender document to protect public interest in that:

a. Number plate manufacturing is highly place security matter in registration, recognition and control of motor vehicle movement.

b. Giving tender for manufacture and supply of motorized vehicle number plate blanks to a bidder with fake and fraudulent manufacturer's authorization letter would jeopardize national security.

c. The contract for supply and delivery of motorized vehicle number plate blanks require the Government of Kenya to give the manufacturer letter of authorization to develop, originate and register and patent the country's motorized vehicle number plates registration hologram with International Holograms Manufacturers Association.

d. It would be reckless, irresponsible and against public interest for the 2nd Respondent to issue a letter of authorization to develop, originate and register the country's motorized vehicle number plates registration hologram with International Holograms Association to fake manufacturer who has no manufacturing site, cannot be held accountable or guarantee the security of the country's motorized vehicle number plates.

eSigning a contract with a contractor with fake and fraudulent manufacturer's letter negates the whole concept of new generation number plates whose hallmark is high security number plates features.

66. The Ministry therefore averred that the procuring entity and the general public are likely to suffer in getting good quality and value for money if they are subjected to signing a contract fraudulently signed with a firm whose authorized manufacturer is a not manufacturer indeed and therefore the Board erred in awarding the tenders to the interested party as it only offered to supply thirty pieces of the required colours of Hot Stamping foils at a cost of USD 4,856.2 instead of the specified quantities in the price schedule. It asserted that it is the interest of justice and for purposes of saving tax payers money that this application be allowed thereby quashing the Board's decision compelling the Ministry to sign the contract with the interested party.

67. It was further contended that the decision by the Board to directly award tenders to the Interested Party was carried out in excess of its jurisdiction as the power to award tenders is only available to the Lowest Evaluated Bidder which is not the Interested Party herein. In purporting to award the tenders directly to the Interested Party, the Ministry contended that the Board failed to consider factors which included whether or not the Ministry had sufficient funds to contract the Interested Party at their quoted price. The 1st Respondent also failed to appreciate that the approved budget of the subject procurement process is less than the amount which the 1st Respondent wants to compel it to enter in contract with the Interested Party.

68. To the Ministry, the decision of the Board is erroneous and takes into account irrelevant facts which were not before it which facts the parties were not heard on and as such it should be set aside by this Court. To it, in purporting to award all the tenders to the Interested Party including the tender which had been cancelled based on the unreasonable prices obtained from the bidders, the 1st Respondent acted irregularly and in breach of the Act. Further, in making its impugned decision herein the Board failed to take into account the fact that the Interested Party fraudulent misled the 2nd Respondent by providing a fake manufacturing authorization certificate and as was not available for the award of the subject Tender in compliance with the Act.

69. The Ministry therefore urged the Court to allow the application and uphold its award.

70. In its submissions, the Ministry, the procuring entity, supported the applications seeking for an order of certiorari removing to this honourable court for purposes of being quashed the decision of the Board dated and delivered on 8th October 2015, annulling the tender awarded to the applicants and associated itself with the submissions made by the 1st and 2nd applicants and further submitted as herein under.

71. According to the Ministry, the Board's decision to annul its award of tender No. KPS/ICB/T/10/2014-2017 to Hoffman and award it directly to the interested party when the bidder is not the lowest evaluated bidder is unlawful, unconstitutional and abuse of powers. It relied on Articles 47 and 227 of the Constitution and submitted that the principle of public interest in matters of procurement especially where the public benefits from a competitive and cost-effective system of procurement that arrives at the best bargain to the public. It relied on **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR.**

72. According to the Ministry, section 2 of the Act requires that the procuring entity to maximize economy and efficiency and inspire confidence of the public as regards the utilization of their taxes. Section 26(3) of the Act on the other hand provides that all procurement shall be within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through annual procurement plan. It reiterated that Board awarded the tender to the interested party at a cost way above the approved budget hence the Ministry and the general public at large stand to lose USD 3,097,300(KES 315,924,600) in Tender No. KPS/ICB/T/10/2014-2017) should the 1st respondent's decision and orders to award the tender to the interested party is upheld.

73. The Ministry relied on section 66(4) of the Act provides that the successful tender shall be the tender with the lowest evaluated price. By the 1st respondent awarding the tender directly to the interested party who is not the lowest evaluated bidder will be in violation of this section Act. By so doing the 1st respondent acted irrationally. The Ministry relied on **Municipal Council of Mombasa vs. Republic & Another [2002] eKLR** for the holding that 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.”

74. Based on **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, it was submitted that the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading “illegality”. Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** (supra) takes the form of Wednesbury unreasonableness explicated by **Lord Green** and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. According to the Ministry, since section 30(4) of the Act provides that a procuring entity should not procure standard goods and services at unreasonably inflated prices, upholding the Board's decision will be forcing the Ministry to procure goods in exorbitant price thus will be against the law.

75. It was contended that the Board in its decision to award the tenders to the interested party overlooked the provision in the tender document (price schedule) which schedule provides that in case of discrepancy between unit price and total, the unit price shall prevail. In all cases, the unit price given by the interested party is far higher that the unit prices given by the lowest responsive evaluated bidders that it is the applicants herein. To the Ministry, the Board's observation which was the basis of its decision that there was concerted effort by the 2nd respondent to keep away the financial proposals submitted by the successful bidders was unreasonable, irrational, an abuse of power and a breach of a duty in good faith. It

was therefore submitted that the Board erred in awarding the tender directly to the interested party when it is not substantively responsive as it fraudulently presented a letter of manufacturer's authorization from a company which is a manufacturer of the advertised goods.

76. According to the Ministry, the Interested Party had not provided a manufacturer's Authorization for the supply of the items under the Tender, yet this was a mandatory requirement as provided for in the Tender document. It was submitted that at the request of the Board, the Ministry was allowed by the Interested Party to visit the Manufacturing site in Germany and upon the visit the Ministry realized that the Interested Party had deliberately misled the Ministry by submitting a Manufacturer's Authority from a company that did not manufacture the subject items. It therefore became evident that the Interested Party did not have a manufacturer's authorization as required by the Tender document and the law hence its misrepresentation was fraudulent and an act in bad faith. In its submission the Ministry relied on section 41 of the Act which provides that any person who engages in a fraudulent practice in any procurement proceeding shall be disqualified from entering into a contract for the procurement. The Interested Party's act in providing a fake manufacturer's authorization is tantamount to fraudulent practice and as such ought to have been disqualified by virtue of the said section 41 of the Act.

77. It was submitted that the Ministry had initially rendered the Interested Party unsuccessful to the bid due to such overriding factors, however by the Board annulling the decision of the Ministry, they were in total disregard of section 41 of the Act and should have disqualified the Interested party's application for review onset. In the Ministry's submission, the Ministry and the general public at large are likely to suffer getting good quality and value for money if they are subjected to signing of a contract fraudulently signed with a firm whose authorized manufacturer is not a manufacturer indeed.

78. The Ministry in support of its case relied on sections 8 and 9 of the *Law Reform Act, Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, 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, Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited* and *Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012] eKLR.*

79. In the Ministry's view, all the tenets of judicial review had been proved herein and thus urged that the orders be granted as prayed in the interest of justice and for purposes of saving tax payers money by quashing the Board's decision compelling the Ministry to sign the contract with the interested party.

The 1st Respondent/Board's Case

80. According to the Board, on 19th September 2015 the interested party herein filed a Request for Review before the Board in respect of the subject tender. On receipt of the said request, the Board served a copy on the Ministry and notified it of the pending Review in accordance with regulation 74(1) and(2) of the Regulations.

81. On 23rd September, 2015 the interested party filed a Notice of Preliminary objection to the request in accordance with Regulation 77 and on 25th September, 2015, the Board notified the interested party of the scheduled hearing date for the review. On 1st October, 2015 MIG filed a Notice of Preliminary Objection to the request in accordance with the same Regulation 77.

82. It was averred that that upon considering the submissions of the parties and the documents before it, the 1st Respondent identified two issues for determination, namely:

1. Whether or not the Procuring Entity failed to give preference or at all to local entities who include the 3rd Respondent herein as envisaged by section 39(7) of the *Public Procurement and Disposal Act* (2005) as read together with section 2(f) of the act and as earlier directed by the

board:

2. Whether the Procuring Entity failed to apply the financial evaluation and award criteria set out in the tender documents and failed to ensure that the mandatory requirements of tax compliance, pricing and other responsive requirements were complied with by all bidders particularly the successful bidders as set out in the tender documents, the Act, the Regulations and as directed by the Board.

83. According to the Board, it only took into consideration facts that were presented before it and were relevant in deciding the above two issues and its decision was based on its findings:

a. On issue 1, that the decision of the Procuring Entity, the 2nd Respondent herein, could not be faulted and therefore the Procuring Entity complied with the Board's orders and directions on the issue of preference;

b. The submissions by the procuring entity and the counsel for Hoffman were not entirely correct on the issue of the letter dated 24th August 2015 which indicated that the production site referred to by the interested party was M/s Muschard and all the letter did on its body was to indicate the address where the production site and place of meeting was:

c. That if the interested party had indeed given false information as alleged then the only option which was open to the Ministry was to disqualify the interested from the tender process but what the Ministry did instead was to evaluate the interested party's bid and rank it;

d. On the issue of signatures on the request for review and the power of attorney, the board found that the objection taken on that point had no basis;

e. The form of tender for the applicant herein to tender No. 11, dated 28th February, 2015 had the price quoted by MIG was the sum of 363,437 Euros for the years 2015-2015, and there was no indication that the price was for one year, but instead of awarding the tender at the amount indicated in the Form of Tender, the Ministry without any basis awarded the tender to MIG herein at the sum of 1,269,089.45 Euros which was equivalent to USD 1,418,842.00 for the hot stamping foil size 120mmx305m for a period of three years:

f. The interested party gave a total unit price for the supply of foils at the price of USD 4,856.20 per year, but the 1st interested party evaluated the interested party financial proposal using the price of USD 17,406,350 which the 3rd respondent did not tender for;

84. Accordingly, the Board made a decision on 8th October, 2015 and gave the following orders:-

a. The interested party's request for review dated 9th September, 2015 and which was filed with the Board on the same day thereby succeeded and was allowed;

b. The award of the tender for the supply of motorized number plate blanks to Hoffman be thereby annulled;

c. The award of the tender for the supply and delivery of motorized number plate hot stamping foils to MIG herein for hot stamping foils size 120mmx305m be thereby annulled;

d. The decision of the Ministry failing to award the tender for foil 220mm x 305m and the recommendation that the tender for the supply of the said foil be re-advertised and be thereby annulled;

c. In exercise of the powers conferred upon the 1st respondent by the provisions of section 98(c) of the Act, the Board thereby substituted the decision of the Ministry declaring the interested party's

tenders in tender No. 10 and No. 11 as unsuccessful and thereby substituted the said decision by awarding the interested party:-

i. Tender Number KPS/ICB/T/10/2014/2015-2016/2017 for the supply and delivery of motorized vehicle number plate blanks at the price in the form of tender dated 2nd March, 2015 and the schedule annexed thereto;

ii. Tender number KPS/ICB/T/11/2014/2015-2016/2017 for the supply and delivery of motorized number plate hot stamping foils size 120mm x 305m including foil size 220mm x 305m at unit prices set out in the interested party's form of tender dated 2nd March, 2015 and the schedule annexed thereto.

f. The Ministry was directed to issue letters of award to the interested party in respect of the two tenders and complete the entire procurement process in accordance with the law within a period of fifteen days from the date of the decision;

g. In exercise of the powers conferred upon the Board by the provisions of section 98 of the Act, it recommended that the Director-General of the Public Procurement Oversight Authority and the other the other investigative agencies of the government do carry out an investigation to establish whether there was any impropriety in the Ministry's decision to alter the prices submitted by the parties in their tenders and or in adopting prices and awarding the subject tenders to bidders at prices not set out in the form of tenders;

h. Since each party had been partly successful in the request for review, Board orders that each party shall bear its own costs of the request for review.

85. It was the Board's position that its decision was arrived after considering all documents of evidentiary value placed before it by the parties and the submissions of the parties on each of the issues raised in the request for review and the preliminary objections. In view of all the above, it was clear, according to the Board that its decision was rational, reasonable, logical, lawful, impartial, while observing the principles of natural justice and in line with public policy and public interest and the intention of parliament in enacting the Act. The Board therefore asserted that the applicants' allegation that the Board acted to the contrary is baseless and unwarranted; and is a ploy by the applicants to revive a matter that has been legitimately adjudicated in line with the avenue provided by the law.

86. The Court was therefore urged to dismiss the applicants' applications for judicial review as they lacked merit as the Board's decision was nothing short of reasonable, consistent and in line with the exercise of its powers and the provisions of the Act.

87. It was submitted on behalf of the Board that the applicants did not demonstrate that the decision was tainted by an illegality, unreasonableness and failures to act in good faith. To the Board, the applicants are indolent litigants and having not discharged their burden of proof warrants dismissal of the orders they are seeking.

88. The Board denied that it acted in breach of Natural Justice and averred that MIG's contention that it should have been joined as a party and provided with the statement of facts and annexures therein was dealt with by the Board in its ruling on the Preliminary Objection in which ruling the Board clearly afforded the applicants natural justice, an opportunity to be heard. To it, it was upon the applicants to take this opportunity and timely address their issues instead of raising it after all parties had submitted. It was contended that as MIG did not appeal against the ruling on the objection and hearing of the review proceeded, having proceeded with the hearing of the review, MIG is presumed to have been satisfied with the decision and cannot later use the dismissed grounds of objection as a tool to get judicial review orders. In support of this position the Board relied on **OJSC Power Machines Limited, Trancentury Limited & another (Acting jointly as A Consortium/Joint Venture v Public Procurement Administrative Review Board & 2 others [2016] eKLR** where the Court held that:

“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.”

89. On the contention by Hoffman the Board did not give it a fair hearing since it did not inform the parties of the issues which they needed to address and by introducing issues which were not part of the review application, it was contended by the Board that each ground was handled separately and all the counsel on record submitted on each issue hence it is illogical for Hoffman to later make allegation it was not informed of the issues to be dealt with by the Board. Hoffman was heard and his submission was considered in the final determination and therefore its allegation of having not been given natural justice holds no water and it should therefore fail. In any event, this objection was never raised before the Board who would have settled the issue. It should be noted that a judicial review court is a court of last resort and litigants should refrain from bringing up fresh issues that were not initially dealt with by the 1st respondent. The Board in support of its submissions relied on **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** and contended that the parties no doubt were given an opportunity to be heard and their submissions considered.

90. On the issue of *ultra vires*, it was submitted that the Board had the jurisdiction to handle the review before it since its powers emanates from the ***Public Procurement and Disposal Act, 2005*** wherein it is stated thus under section 98 that:

“Upon completing a review the Review Board may do any one or more of the following —

(a) annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;

(b) give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;

(c) substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

(d) order the payment of costs as between parties to the review”.

91. It was submitted that the Board acted within its mandate as hereinabove stipulated and considered only the evidence placed before it and the issues raised by the review application. Therefore the contention that the respondents exceeded its jurisdiction by determining an issue whether the applicant had submitted a competent manufacturers authorization letter the issue which fall within the mandate of the technical evaluation committee, was incorrect as it looked at the decision of the technical evaluation committee and determined whether the same was fair or not and that the Act does not bar the respondent from reviewing the decision of the Technical evaluation committee. Further the Board gave orders that were sought by the parties and followed the prescribed procedure upon complying with reasonable timelines as prescribed under section 97(1) which clearly limit the time which the respondent should handle a review before it by providing that:

“the review board shall complete its review within 30 days after receiving the request for review.”

92. Furthermore, at no point did MIG raise the issue of time before the Board. It was submitted that in arriving at the decision to award the tender to the interested party, the Board looked at the evidence and determined the interested party as the lowest bidder and accordingly awarded tender to it as envisaged by the Act. It was therefore contended that Hoffman had not raised any issue triable in the ambit of

Judicial Review to warrant issuance of the orders sought. Its claim of issue of the interested party alone not being the highest bidder cannot lie before this honourable court as the issue can only lie to an appellate Court pursuant to section 100(2) of the Act which states as follows:

“any party aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the court shall be final”.

93. To the Board, if the prayer for certiorari fails, it would follow that since the order of certiorari and prohibition as sought by the applicants are based on the same grounds the decision should be acted upon since it is a valid order. As the Board has already discharged its mandate by issuing the decision, the same must be executed and unless quashed by this honourable court. Since the decision of the Board can only be executed by the Ministry, it was contended that it is absurd to prohibit the Board from acting upon or executing an order which in the first place would not have executed.

94. On the prayer for *mandamus*, it was submitted that judicial review jurisdiction is limited and that the Board cannot be compelled to reinstate a party as the highest bidder as opposed to compelling the Board to conduct a fresh hearing otherwise it would amount to usurping powers of the Board. To buttress this submission, the Board recited **OJSC Power Machines Limited, Trancentury Limited & Another (Acting jointly as A Consortium/Joint Venture vs. Public Procurement Administrative Review Board & 2 others [2016] eKLR**, wherein the Court cited with approval **Boundary Commission [1983] 2 WLR 458, 475** and held that:

“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.”

95. To the Board, as opposed to judicial review powers, it has a wide discretion in determining the award of a tender and relied on **Kenya National Examinations Council vs Republic [1997] eKLR**. Further, as awarding of tender is a discretionary power of the Board the court should leave such discretion to be exercised by the Board and relied on **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** as cited in **Republic v Public Procurement Administrative Review Board & 2 others ex-parte Suzan General Trading JLT [2014]** and submitted that since awarding tender to a particular party is not specifically provided for in statute, to award a tender to a party or not should thus be left to the discretion of the Board.

96. It was therefore submitted that the applications do not raise any issue that warrants issuance of orders from the limited judicial review jurisdiction as the applicants merely alleged grounds without any proof and 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** the Court was urged to dismiss the application with costs to the respondents.

Interested Party’s Case

97. On the part of the interested party, **Ms. Tropical Technology Limited**, it was explained that the decision the subject of these proceedings was delivered by the Board on 8th October 2015 in **Review Application No. 46 of 2015**, which decision related to two tenders namely; supply and delivery of motorized vehicle number plates blank being tender number **KPS/T/ICB/10/2015-2016** and supply and delivery of motorized vehicle number plate hot stamping foils being tender **No. KPS/T/ICB/11/2015-2016** and that the Interested Party bid for both tenders. It was disclosed that the interested party filed **Review Application No. 46 of 2015** following an earlier Review Application by the interested party

being Review **Application No. 28 of 2015** by which the Board had directed the Ministry to re-evaluate the tenders and certain specific directions were given by the Board which the Ministry was to observe and/or abide by in the re-evaluation. Among the directions that the Board gave to the Ministry included *inter alia*;

(a) The Procuring Entity is directed to carry out a fresh re-evaluation of the tenders submitted to it in respect of the two tenders and complete the entire exercise including the making of awards of the tenders within thirty (30) days from today's date.

(b) That in carrying out re-evaluation, the procuring entity shall take into account the following factors;

(i) The scoring criteria set out in the tender document on technical evaluation as far as the criteria on responsiveness is concerned and use the sample results from the Kenya Bureau of Standards already in its possession on the component on the rest of the results.

(ii) The financial evaluation and award criteria.

(iii) The Procuring Entity shall consider and determine whether any preferences are applicable to any bidder under the Provisions of the Public Procurement and Disposal Act (Preference and Reservations) Regulations 2011 as amended via L.N. NO. 114 of 18th June 2013.

(iv) The tender evaluation committee shall use the award criteria set out in the tender documents while making the eventual tender award recommendations to the tender committee.

(v) The procuring entity shall generally comply with all the criteria set out in the tender documents, the Act and the Regulations made thereunder in re-evaluating the tenders.

98. Aggrieved by the results of the re-evaluation the interested party **Review Application No. 46 of 2015** based on amongst other the grounds that the Ministry failed to comply with both the directions given by the Review Board in Review Application No. 28 of 2015 and the **Public Procurement and Disposal Act** and the Regulations thereunder. Upon consideration of the application, the replies and submissions made by all parties who participated, the Board delivered its decision on 8th October 2015 allowing the Review Application.

99. To the interested party, the decision of 8th October 2015 by the Board was fair, reasonable, rational, *intra vires* the jurisdiction donated by the Act and the Rules and that the said jurisdiction was exercised regularly and rationally in the circumstances for reasons that:

(a) That all the parties represented during the hearing were heard extensively and no party, particularly the applicants were denied the right to be heard and no such protest was made and recorded during the hearing. The allegation, therefore, that there was a breach of the tenets of natural justice is false and misguided.

(b) The applicants confirmed that they were notified of the filing of the Review Application on 28th September 2015 and the hearing proceeded on 5th October 2015, a week later which was more than enough time to prepare for the hearing and that the applicants never raised the issue of not having been supplied with all the documents prior to commencement of the hearing but only raised it after all the other parties had made their submissions.

100. Since the Act requires the Board to hear and determine Review Applications within thirty (30) days of filing, it was averred that the allegations therefore that the applicants were not given sufficient notice,

or that they were denied a fair chance to present their case are all false and unsubstantiated as the Board's decision was based on the evidence before it and nothing more. To the interested party, all the issues that the Review Board dealt with were issues that had been raised by the parties and the Board, under section 98 of the Act, had the jurisdiction to hear and determine the said issues in the manner and with the result that it did. To the Interested Party, no new issues or grounds were introduced by the Board and its right to award the tenders as it did is expressly provided for under section 98 (c) of the Act. In awarding the tenders, it was contended that the Board gave the Ministry a chance to correct the errors it had made but it had failed to do so. The Board also noted the importance of the tenders to the general public and proceeded to award the tenders in the wider public good and interest noting that the Ministry had failed in its obligation to award the tenders according to law.

101 In the interested party's view, the allegation that the Government of Kenya stands to millions unless the orders sought are granted is far-fetched, fictitious, malicious and unsubstantiated and the allegations that the interested party was not the highest bidder in this particular tender and that the quoted price in its tender was for both the **120 mm X 305 mm and 220 X 305 mm** hot stamping foils for three years is false and totally misleading.

102 Based on legal advice, it was averred judicial review remedies of certiorari, *mandamus* and prohibition sought by the applicants are not available to them and that the applicants had miserably failed to meet the threshold for the grant of such orders.

103. It was submitted on behalf of the interested party that both the applications are misconceived, unsustainable and lack any legal or factual basis or at all and that the same should fail with costs.

104. The Interested Party further submitted that the decision making process was fair and reasonable, proportionate and in strict compliance with the Act and the Regulations and the law generally and that the judicial review orders sought are not available to the applicants for reasons *inter alia* that all the parties to the Review application were duly notified of the hearing dates, they were extensively heard and no party, particularly the applicants were denied the right to be heard and no such protest was made and recorded during hearing. Save for the general statements and allegations made by the applicants, it was submitted that there were no specific instances pleaded and evidence given to show that the Review Board breached natural justice. Indeed both applicants confirmed in their affidavits and submissions that they were heard. In support of this submission, the interested party relied on JR Misc Application No. 92 of 2011: **Republic vs. The Public Procurement Administrative Review Board & Another** in which the court held as follows on the principle of natural justice:

“In this case, it is clear that the 1st respondent exercised its power within the law in hearing and reaching its decision. There has been no complaint on the procedures used by the 1st respondent. The annexures to the pleadings before this court show that the applicants, as well as all other parties who had an interest in the procurement proceedings, were represented during the review before the 1st respondent. The 1st respondent cannot therefore be accused of having acted outside its jurisdiction or of having breached the rules of natural justice. Judicial review cannot therefore come to the aid of the applicants on the grounds of illegality or procedural impropriety.”

105. It was noted that section 97 (1) of the Act requires the Board to hear and determine review applications within thirty (30) days of filing while Rule 75 (1) requires the secretary to give reasonable notice of the date fixed for hearing to all parties. In this respect reference was made to **Diana Kethi Kilonzo & Another vs. IEBC & 2 Others, Petition No. 359 of 2013** in which the Court held as follows:

“We agree with the submissions of Counsel for the Respondents that what would constitute a fair hearing and accord with the rules of natural justice will vary and depending on the circumstances of each case. In this regard, the words of Tucher L J in Russell vs. Duke of Norfolk (1940) 1ALL ER 109, at 118 relied on by the Respondents are instructive:

The requirements of natural justice must depend on the circumstances of the case, the

rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth...one essential is that the person concerned should have a reasonable opportunity of presenting his case”

106. According to the interested party in view of the legal requirements in the Act and the circumstances of this case the Board acted fairly and reasonably and there was no breach of natural justice. Contrary to the position advanced by the applicants, the Board’s decision was within the jurisdiction donated by the Act and the Regulations thereunder and that that jurisdiction was regularly and properly exercised and reliance was placed on section 2 of the Act which provides as follows;

The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives;

- (a) To maximize economy and efficiency;***
- (b) To promote competition and ensure that competitors are treated fairly;***
- (c) To promote the integrity and fairness of those procedures;***
- (d) To increase transparency and accountability in those procedures;***
- (e) To increase public confidence in those procedures; and***
- (f) To facilitate the promotion of local industry and economic development.***

107. The powers of the Board, it was submitted, are set out at section 98 of the Act which provides as follows:

Upon completing a review the Review Board may do any one or more of the following;

- (a) Annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;***
- (b) Give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;***
- (c) Substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and***
- (d) Order the payment of costs as between the review.***

108. In the interested party’s view, to ascertain whether a particular act is *ultra vires* or not, the main purpose must first be ascertained, then special powers for effectuating that purpose must be looked for and if the act is neither within the main purposes nor the special powers expressly given by the statute, the inquiry should be made whether the act is incidental to or consequential upon the main purpose. An act, it was submitted, is not *ultra vires* if it is found to be within the main purpose, or within the special powers expressly given by the statute to effectuate the main purpose, or if it is neither within the main purpose nor the special powers expressly given by the statute but is incidental to or consequential upon the main purpose and the act is reasonably done for effectuating mandate.

109. In the interested party’s view, since all the issues that the Board dealt with were issues that had been raised by the parties and the Review Board, under section 98 of the Act, the Board had the jurisdiction to hear and determine the said issues in the manner and with the decision that it reached. To the interested party the contention that the Board evaluated the financial bids thereby going beyond its statutory mandate and jurisdiction was false and unsubstantiated as what the Review Board did was to analyze the

issues raised by the interested party on the discrepancies on the financial bids vis-à-vis financial evaluation results as submitted by the 2nd Respondent. The interested party relied on the holding in **Civil Appeal No. 145 of 2011 Kenya Pipeline Company Ltd vs. Hyosung Ebara & Co. Limited and Others [2012] eKLR.**

110. On the same position, the interested party relied on JR Misc Application No. 92 of 2011: **Republic vs. The Public Procurement Administrative Review Board & Another** and **Amirji Singh vs. The Board of Post Graduate Studies Kenyatta University Civil Application Number 1400 of 1995,** and submitted that the applicant has miserably failed to demonstrate that the Review Board acted without jurisdiction or in excess of jurisdiction.

111. According to the interested party, the allegation that the Board took into consideration irrelevant factors while failing to take into consideration relevant factors namely that the Board failed to take into account the fact that the Interested Party had not provided a manufacturers authorization certificate as required by law and that the Interested party had deliberately sought to fraudulently mislead the 2nd Respondent on the issue, is factually wrong and unsubstantiated. To it, the issue of whether the Applicant had met the mandatory requirement by submitting a competent manufacturer's authorization was raised by the Interested Party at paragraph 11 of its Review Application hence the allegation that the Review Board introduced and took it upon itself to determine this issue is false and unfounded. Similarly, the issue as to whether the Interested Party had mislead the Ministry on the mandatory requirement of manufacturer's authorization was raised by the Ministry in paragraph 3 (iv) of its reply to the Review Application. The Board was therefore seized of this issue and it dealt with it on the evidence before it and in particular that;

(i) In the letter dated 4th August 2015, the Interested Party specifically gave its manufacturer as Grewe Gmbtt & Co. KG and that the Ministry's officers would be received by Mr. Lothar Grewe, the Managing Director. The Review Board found as a fact that the allegation by the Ministry that the Interested Party's manufacturer was M/s Muschar Schilertechik was false and unfounded.

(ii) By its letter's dated 31st August 2015, the Ministry informed the Interested Party that its bids were successful and that they had proceeded to financial evaluation. This letter was done after the alleged discovery of the lack of and/or misinformation of the Interested Party's manufacturer's authorization. The Review Board found that on the basis of the said letter this was an afterthought by the 2nd Respondent and it was estopped from raising this issue.

112. As to what constitutes relevant or irrelevant factors, it was submitted that where statute that vests power prescribes matters to be taken into account in exercising power, the same must be considered for the power to be said to have been properly exercised and that this principle was stated in the case of **Associate Provincial Picture House Limited vs. Wednesbury Corporation** as follows;

“If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion, it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; the authority must disregard those irrelevant collateral matters”

113. To the interested party, the Board considered all the relevant factors and did not consider any irrelevant factor in reaching the decision it did. It was therefore contended that the applicants have miserably failed to demonstrate that they deserve the orders sought in the circumstances of this case. In so submitting the interested party cited JR Misc Application No. 87 of 2014: **Republic vs. Central Bank of Kenya & Another Exparte Horsebridge Networks Systems {E.A} Ltd** and contended that in their applications, the supporting affidavits and the subsequent submissions filed, the applicants have concentrated on challenging or attacking the fairness of the Board's decision as opposed to challenging decision making process which is the real purpose of judicial review proceedings. Its position was however that a judicial review court shall not sit as a court of appeal against the decision of an inferior

body and relied on *Halbury's Law of England* 4th Edition Volume 1 at page 92 and on *Kenya Pipeline case* (Supra) where the court of appeal further clarified this appeal as follows:

“Moreover, where proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is to say it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not ordinarily be granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong on matters of fact or that it misdirects itself in some matter” Court in exercising its judicial review jurisdiction would therefore not issue orders merely on the fact that a tribunal has reached an incorrect decision.

114. The interested party also relied on **JR. Misc. Application No. 477 of 2014: Republic vs. Public Procurement Administrative Review Board & 2 Others** for the position that:

“...the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substitute their own judgment for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question...In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interested party did not comply with its directions issued in the respondent's earlier decision is a matter which would go to the merit rather than the process”.

115. The interested party contended that the Board in reaching the decision it did considered the public interest in the matter before it as read together with the objectives of its creature statute and relied on the position in **Kenya Pipeline Case** (Supra) that:

“Lastly, it is important to appreciate that judicial review orders of *certiorari*, *mandamus* and *prohibition* are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant. This principle is succinctly stated at para 122 Halsbury's Laws of England Edn Vol 1 (1) at p.270 thus:-

“The court has ultimate discretion whether to set aside decision and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully”

In the authority of R.V. Monopolies Commission Ex. P. Argyll PLC {1986} 1 WLR 763 referred to in that passage Sir John Donaldson M.R. said at page 77 para D.

We are sitting as a public law court concerned to review an administrative decision; albeit one which has to be reached by the application of Judicial or quasi-judicial principles. We have to approach our duties with a proper awareness of the needs of public administration”

And stated, that good public administration is concerned, among other things, with speed, particularly in financial matters, and requires a proper consideration of public interest... There cannot be any doubt that there is overwhelming public interest in the public procurement and disposal by public entities under the Act. Indeed the Act states in the

preamble that the procedures established under the Act are for efficient public procurement and that those procedures are intended to achieve the stipulated objectives which include, to maximize economy and efficiency, to increase public confidence in those procedures and to facilitate the promotion of local industry and economic development. Although the Act predates the Kenya Constitution 2010, the objectives of the procedures established under the Act fulfil one of the national values and principle of governance under Article 10(2) (c) of the Constitution...A consideration of the appropriate remedy to a successful applicant in a procurement dispute should of necessity take into account the wider public interest”

116. The interested party therefore asserted the applicants had fallen short of the threshold for the grant of the orders of certiorari and mandamus sought and the motions dated 28th October 2015 should fail with costs. To it, as no appeal had been preferred against the decision of the Review Board, the merits of that decision cannot form the subject of these proceedings. In the circumstances it is only fair, just and in the interest of the wider public good and interest that the decision of the Review Board be implemented without any further delay.

Determinations

117. I have considered the consolidated applications, the affidavits both in support of and in oppositions thereto, the submissions filed in support thereof and the authorities relied thereupon.

118. Before dealing with the specific issues raised in these applications, it is important to revisit, the circumstances under which this Court will exercise its judicial review jurisdiction. Article 165(6) of the Constitution provides as follows:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

119. Therefore judicial review is a constitutional supervision of subordinate courts and public authorities exercising judicial and quasi-judicial functions where there is a challenge to the legal validity of their decision, actions and inactions whether undertaken, threatened or not. It however, does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case, unless the decisions are claimed to be irrational or violate the principle of proportionality. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

120. The rationale for this is that Courts do recognize that generally Tribunals are specialised and in most cases have the technical knowledge of all the matters concerning the dispute between the parties before them hence the Courts ought not to interfere with their decisions on matters of merits. Therefore Tribunals ought to be given the necessary latitude to operate and manoeuvre, as long as they operate within the lawful bounds, to hear and determine the disputes falling within their jurisdiction. This was appreciated in **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others [2012] eKLR** where it was held:

“The Review Board is a specialised tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers

very wide powers on the Review Board. It is clear from the nature of the powers given to the Review Board including annulling, anything done by the procurement 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 by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”

121. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

122. However, it is important to note that Article 47 of the Constitution codifies the right to fair administrative action, a clear indication that the right to fair administrative action is now entrenched in the Constitution and is no longer a mere discretion. In my view, the purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable. That fairness is an ingredient of proper administrative action was appreciated by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court held inter alia that 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. Pursuant to the ***Fair Administrative Action Act, 2015***, a statutory instrument enacted pursuant to Article 47(3) of the Constitution, “administrative action” is defined under section 2 thereof to include:

- (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

123. The same section defines ‘administrator’ as “a person who takes administrative action or who makes an administrative decision.” Section 3 on the other hand provides:

- (1) This Act applies to all state and non-state agencies, including any person***
 - (a) exercising administrative authority;***
 - (b) performing a judicial or quasi-judicial function under the Constitution or any written law; or***
 - (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.***

124. One of the purposes of judicial review is therefore to ensure that the individual receives fair treatment. This power does not, however, encompass the power to determine whether having accorded a fair treatment, the Tribunal reaches, on a matter which it is authorised by law to decide for itself, a conclusion which is correct in the eyes of the Court. See Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.

125. It is therefore clear that the Interested Party's position that the applicants ought not to have questioned the fairness of the Board's decision in these proceedings is no longer tenable.

126. It is clear that the decision that gave rise to these proceedings was as a result of the second challenge to the decision made by the Procuring Entity. The first challenge gave rise to Review Application No. 28 of 2015 which application was, just like the second one, commenced by the interested party herein. In its decision, the Board directed the Procuring Entity to re-evaluate the subject tender taking into account the scoring and award criteria set out in the tender document on technical and financial evaluation as far as the criteria on responsiveness is concerned and to consider and determine whether any preferences were applicable to any bidder under the provisions of the **Public Procurement and Disposal Act (Preference and Reservations) Regulations 2011** as amended via L.N. NO. 114 of 18th June 2013. It is my view therefore that the Board did not restrict the Procuring Entity as to the areas in which the re-evaluation was to be conducted but simply drew the Entity's attention to areas which required special attention.

127. Following the re-evaluation, the interested party was similarly aggrieved and commenced Review Application No. 48 of 2015, the subject of these proceedings. In summary, the grounds upon which the subject application for review was based were that the procuring entity in re-evaluating and awarding the subject tenders disregarded and ignored the Boards' directions and orders issued in Application No. 28 of 2015; that the tenders were awarded in breach of the provisions of the Act and the Regulations; that the procuring entity used other criteria other than those set out in the tender documents; that the procuring entity failed to give preference or at all to local entities who included the interested party as envisaged under section 39(7) as read with section 2(f) of the Act; that the tender committee altered and/or ignored the technical and financial evaluation Committee's Report; and that the interested party was not informed of the outcome of the process.

128. Article 227(1) of the Constitution provides as hereunder:

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.

129. Article 227(1) therefore provides the minimum threshold that any public procurement must meet. Parliament is however empowered to enact legislation to prescribe a framework within which policies relating to procurement and asset disposal are to be implemented and may in so doing provide for categories of preference in the allocation of contracts; the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination; sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and 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. Pursuant to the said power, Parliament enacted **Public Procurement and Disposal Act** (Cap 412A) Laws of Kenya, now repealed by section 182(1) of the **Public Procurement and Asset Disposal Act**, No. 33 of 2015 but whose provisions apply to the subject procurement by virtue of paragraph 1 of the Third Schedule to the repealing Act. Section 2 of the repealed Act provided that:

The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives—

(a) to maximise economy and efficiency;

(b) to promote competition and ensure that competitors are

treated fairly;

(c) to promote the integrity and fairness of those procedures;

(d) to increase transparency and accountability in those

procedures; and

(e) to increase public confidence in those procedures;

(f) to facilitate the promotion of local industry and economic

development.

130. It is however my view that in public procurement and disposal, the starting point is the Constitution. A procurement must therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any legislative consideration which does not espouse these ingredients can only be secondary to the said Constitutional dictates. In my view, cost-effectiveness for example does not infer that the Procuring Entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest. My view is reinforced by the decision in **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** in which the Court held that:

“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.”

131. This was the position adopted by this Court in Nairobi JR No. 513 of 2015 - **Republic –vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited** in which the Court held the view that:

“It is therefore clear that apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest.”

132. In other words the spirit of section 66(4) of the Act which provides that the successful tender shall be the tender with the lowest evaluated price requires that an evaluation be first undertaken and only after the tender passes all the stages of evaluation does the consideration of the lowest tender come into play.

133. What then is the role of the Review Board when determining a request for review? That the Board has wide powers was appreciated in **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others** (supra). This was the position adopted in **Republic vs. Public Procurement Administrative**

Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR, in which the Court expressed itself 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.

134. 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 orders 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.

135. It must however be remembered that the Board’s powers are not unlimited. As was held in *JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others* [2015] eKLR:

“The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside

jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document.”

136. It was similarly appreciated in **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex Parte Olive Telecommunication PVT Limited [2014] eKLR** that:

“Whereas we appreciate that the Board’s latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE.”

137. The Board, in my view while has wide powers of review ought not to make a determination whose effect would amount to a decision totally different from the one which the procuring entity set out to achieve by commencing the tender process.

138. The applicants contended that they were not accorded sufficient time and material to respond to the issues which were raised in the application before the Board. 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.

139. 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.”

140. In this case, MIG averred that by a letter dated 25th September, 2015 received on the 28th September, 2015 from the Board, it was informed that a request for review had been lodged by the interested party and it was required to appear before the Board on the 2nd day of October, 2015 for hearing. However, the only document that was enclosed was the interested party’s application for review while the statement in support together with the annexures were missing. According to the Board, the Request for Review was filed on 19th September 2015 and upon receipt of the said request, the Board served a copy on the

Ministry and notified it of the pending Review in accordance with regulation 74(1) and(2) of the Regulations.

141. Section 96 of the repealed Act provides as follows:

The parties to a review shall be—

(a) the person who requested the review;

(b) the procuring entity;

(c) if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and

(d) such other persons as the Review Board may determine.

142. On the face of the Request for Review, it is clear that there were only two parties to the application and these were the interested party and the procuring entity. Clearly therefore, the Request fell foul of section 96 of the Act. It is however clear that the applicants were made aware of the said application. The law, as I understand it, is that Rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the proceedings. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect, it has been held, ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its calling to do justice by saving the proceedings in issue. See **Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.**

143. In **Boyes vs. Gathure [1969] EA 385,** it was held by **Sir Charles Newbold, P** that:

“Using an incorrect form of procedure which has, in fact, brought the parties before the court and has, in fact, enabled the parties to present their respective cases to the court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed.”

144. It is therefore my view that the mere fact that the interested party did not make the applicants parties to the Request for Review as mandated under the law does not render those proceedings fatally incompetent. The applicants however contend that they were never served with the statements and other materials apart from the application. Rule 74(4) of the Regulations provides as follows:

The Secretary shall, within fourteen days of the filing of the request, notify all other parties to the review of the filing and such parties may, at their own expense, obtain copies of the request for review.

145. MIG averred that their efforts to access the entire pleadings filed by the interested party were met with denial from the officers of the Board who informed them that they were only entitled to the application for review together with the statement in support but nothing else. Whereas, it is true that rule 74(4) only talks of the parties being entitled to *obtain copies of the request for review*, to argue that the said parties are not entitled to the other materials filed by the applicant before the Board amounts to contravention of section 4(3) of the ***Fair Administrative Action Act*** and hence amounts to a violation of the rules of natural justice. This was the position adopted by **Kasanga Mulwa, J** in **Republic vs. Registrar of Companies ex parte Githungo [2001] KLR 299,** where he 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. In my view the refusal by the Board when requested to furnish a party with the material placed before the Board contravenes Article 47 of the Constitution. Accordingly where an

administrative or quasi-judicial body unreasonably delays in furnishing the parties with either the material necessary for the party to adequately defend himself or the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid.

146. It is however my view that a party to whom insufficient or inadequate notice is given ought to raise the issue with the judicial or administrative body concerned and seek for time to adequately prepare. Section 4(4)(d) of the *Fair Administrative Action Act* provides that an opportunity be afforded for a person to request for an adjournment of the proceedings, where necessary to ensure a fair hearing. It is therefore upon the person seeking time to request for adjournment of the proceedings. In these proceedings, there is no indication that the applicants sought for adjournment of the proceedings before the Board. In **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR**, the court held the view that;

“The petitioners have argued that they were not accorded a fair hearing as they did not receive the letters inviting them for the disciplinary hearing, and that they were invited by way of short text messages (SMS). I have considered the letters inviting the petitioners for the hearings. The letters are addressed to the petitioners at addresses to which other letters from the respondent to the petitioners contained in the replying affidavit are addressed. It would perhaps have been prudent for the respondent to obtain a certificate of posting or some other evidence of delivery of the letters, but in the end, I am not satisfied that the petitioners’ claim in this regard has merit, for two reasons. First, I note that the respondent took the further step of inviting the petitioners to the hearings by way of short text messages and telephones. More importantly, I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing.”

147. In **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** this Court expressed itself on the same issue as follows:

“That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so.”

148. Without the proceedings to support the contention that the applicants sought for time, this Court cannot find that in the circumstances of this case, the notice was too short to afford the applicants an opportunity to adequately prepare for their cases. The same position applies to the allegation that the applicants requested for disclosure of the material which were placed at the disposal of the Board by the interested party.

149. It was contended that in arriving at its decision, the Board relied on an issue which was not raised by the interested party in its Request for Review. According to the applicants, the finding about the alleged altering of the financial proposals with glaring errors some of which bordered on fraud was raised for the first time in the judgement and that the issue was not raised beforehand in order to accord the parties sufficient time and opportunity to respond thereto in accordance with their right to a fair hearing. It was accordingly contended that the applicants did not have an opportunity to test and controvert the evidence which the Board relied on to arrive at its decision to award the tender to the Interested Party and that had it been accorded an opportunity to test the said evidence the Board might have arrived at a different decision. 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).”

150. I have hereinabove set out the substance of the interested party’s case before the Board. However, according to the Board, there were substantially only two grounds before it. The first ground was whether or not the Procuring Entity failed to give preference or at all to local entities including the applicant as envisaged by section 39(7) of the Act as read with section 2(f) of the Act as directed by the Review Board. The second ground, according to the Board, was whether the procuring entity failed to apply the financial evaluation and award criteria set out in the tender documents and failed to ensure that the mandatory requirements of Tax Compliance, pricing and other responsive requirements were complied with by all bidders particularly the successful bidders as set out in the tender documents, the Act and the Regulations and as directed by the Review Board. The first ground having been dismissed by the Board, the issue does not fall for determination before this Court as the interested party has not challenged the said findings before this Court.

151. The Board however found that the applicants’ position with respect to the interested party’s manufacturer authorization was incorrect. According to the Board, the letter dated 4th August, 2015 clearly indicated that the production site referred to by the interested party was M/s Muschard and all that the letter did on its body was to duplicate the address where the production site and place of meeting was located. No issue was taken with this finding by the applicants. However, they took an issue with the subsequent finding that the said argument was an afterthought. The Board however justified its said finding on the basis that had the interested party given false information, the only option open to the Procuring Entity would have been to disqualify the interested party rather than to evaluate and rank it. It is therefore clear that even if the second finding was unreasonable, and I don’t find it to be so, the first finding was not faulted and in my view the Board was properly entitled to arrive at such a finding. The mere fact that this Court may form a different opinion based on the evidence is no reason to interfere. With respect to the issue whether the Board had the power to deal with the manufacturer’s authorisation, I associate myself with the decision in **Kenya Pipeline Case** (Supra) where the Court of Appeal expressed itself as follows;

“Lastly the Review Board made a finding that the 1st Respondent did not infact supply a manufacturer’s authorization letter as the one relied on by the 1st Respondent was issued to a different entity and rejected the alternative contention that the manufacturers authorization letter was not necessary...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.”

152. In this respect I associate myself with the decision in **Republic vs. The Public Procurement Administrative Review Board & Another** (supra) where the court held as follows:

“From the foregoing it is clear that the 1st Respondent considered all the issues raised by the applicants before proceeding to dismiss their request for review. In my view the applicants are asking me to look at the 1st Respondents said decision and reach a conclusion that the 1st Respondent erred both in fact and in law when it reached that decision. The question would then be whether this court acting as a judicial review court has powers to interfere with the decision...This court is being asked to determine whether the 1st respondent misapprehended the law as relates to the technical evaluation and award of scores thereunder. In my view, such an enquiry would amount to sitting on appeal over the decision of the 1st respondent. Indeed Parliament was alive to the distinction between judicial review and appeal in procurement proceedings when it provided in Section 100 of the Act that:-

(1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.

(2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final

(3).....

153. I also agree with the decision of **Aganyanya, J** (as he was then was) in **Amirji Singh vs. The Board of Post Graduate Studies Kenyatta University Civil Application Number 1400 of 1995**, (supra) in which he stated that:

“...an application by way of judicial review before the High Court is not intended to {turn} it (this Court) into an appellate one to deal with the merits of the issue before the inferior tribunal...Professor Mumma for the 2nd Respondent rightly pointed out to this court that a party who has chosen judicial review must play within the rules of judicial review. A party should not be allowed to argue an appeal through a judicial review application. The path to the sublime orders of judicial review is narrow and those who opt to take this road must be ready to operate within its limited space.”

154.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 is clear from the proceedings before me that the issue whether there was alteration of the forms of tender was not an issue identified by the Board and that the same was not addressed by the parties before it. What was raised by the interested party was an allegation that the tender committee altered and/or ignored the technical and financial evaluation Committee's Report. This cannot be the same as an allegation that the Procuring Entity altered the tender forms submitted by the parties to the tender which is what the Board based its decision on. 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].

155. 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."

156. 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."

157. 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 found that the Respondent may well have exceeded its jurisdiction were it to attempt to deal with issues which were not specifically placed before it.

158. In arriving at its decision, the Board expressly stated that it was influenced by the fact that the matter relates to the rolling out of new generation number plates and that the process was long overdue. To this I only wish to refer to the decision of 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, in which he 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."

159. 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.

160. The next issue for determination is whether the Board considered irrelevant facts or failed to consider relevant ones. As this Court held in Zachariah Wagonza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR:

“Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration.”

161. It was contended that whereas section 66(4) of the Act provides that the successful tender shall be the tender with the lowest evaluated price, the Board in awarding the tender directly to the interested party who is not the lowest evaluated bidder violated the said section and by so doing acted irrationally. Section 66(4) of the Act provides that:

The successful tender shall be the tender with the lowest evaluated price.

162. It follows that after the evaluation was conducted, the Procuring Entity was still obliged to award the tender to the lowest bidder as long as the said bidder was successfully evaluated. To fail to consider this criteria would amount not only to the failure to consider a relevant factor but to the failure to adhere to the statutory instrument under which the body concerned exercises its authority. In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, the Court while citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

163. Illegality therefore encompasses acting contrary to the provisions of a law or its principles as well as the failure to adhere and observe the legal provisions expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. In this case the failure to take into account the provisions of section 66(4) would clearly amount to an illegality.

164. It was contended that whereas section 98 of the Act, provides for the powers of the Board, there is no provision for the board to dictate to the procuring entity on what to do on matters not before the Board nor is there provision for the Board to act as the procuring entity and award tenders not subject of proceedings before the Board. This argument was with respect to Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m which was found to be overpriced and recommended for re-advertisement. In the Board’s view, since it had directed the Procuring Entry to carry out a fresh re-evaluation it was not open for the Procuring Entity to waive the instant tender. Further since there were several bidders for the said item, if the Procuring Entity found that Hoffman’s bid was overpriced there was no reason why the Entity did not consider the bids submitted by

the other bidders.

165. Whereas this Court cannot fault the reasoning of the Board on this issue, the Court however finds the Board's decision to award the said tender to the interested party irrational. Having found that there were other bids which ought to have been considered, the Board ought not to have stepped into the shoes of the Procuring Entity and made a decision awarding the tender to the interested party without considering the bids by the other bidders. The primary duty of considering the bids in order to determine whether they are in accordance with the tender documents rests on the Procuring Entity and therefore where the Entity has not made a decision thereon, the Board cannot step in and make such a decision. This, in my view is the spirit of the holdings in **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 Others [2015] eKLR** and **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex Parte Olive Telecommunication PVT Limited [2014] eKLR** in which it was variously held that the Board has no power to ignore the express provisions of a tender document and go ahead to award the tender to another bidder, otherwise it crosses its statutory boundaries acts outside jurisdiction. Further, whereas the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the Procuring Entity totally useless. In other words where the Procuring Entity has, in the Board's view, unlawfully or unreasonably declined to exercise its statutory mandate as was alleged in this case, the only option is for the Board to direct the Entity to carry out the same in accordance with the directions of the Board. It follows that the award to the interested party of Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m cannot stand.

Findings

166. Having considered the foregoing, I make the following findings:

1. In finding that the Procuring Entity altered the tender forms when the same was not one of the express grounds of the Request for Review, and without affording the parties an opportunity to address it thereon, the Board violated the rules of natural justice.
2. In failing to consider whether the Procuring Entity had the funds appropriated to it sufficient to contract the Interested Party at their quoted prices, the Board failed to consider a material factor and if the allegation that the decision of the Board amounts to directing the Procuring Entity to contract outside the funds appropriated for the tender is true, the direction may well amount to an illegality.
3. The Board acted in excess of its jurisdiction in awarding Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m to the interested party.

Order

167. In the premises the orders which commend themselves to me and which I hereby make pursuant to section 11 of the ***Fair Administrative Action Act***, No. 4 of 2015 are as follows:

1. The Respondent Board's decision awarding Tender No. KPS/ICB/T/11/2015-2017 for supply and delivery of motorized vehicle hot stamping foils size 220mm X 305m to the interested party is hereby removed to this Court and is quashed and the decision of the Procuring Entity recommending re-advertisement thereof is hereby upheld.
2. The decisions of the Board in respect of the other two Tenders which were awarded to the interested party is hereby quashed and the Board is directed to hear all the parties on the issue of the alteration of the forms and whether the interested party's quoted prices were within the funds appropriated by the Procuring Entity towards the said tender and make a determination thereon. Based on the outcome of the said decision, the Board is at liberty to make appropriate orders under section 98 of the Act.

3. The recommendation by the Board to the Director of the Public Procurement Oversight Authority and other investigative Agencies of the Government to carry out an investigation to establish whether there was any impropriety in the Procuring Entity's decision to alter the prices submitted by the parties in their tenders and or in adopting prices and awarding the subject tenders to bidders at prices not set out in the form of tenders, is hereby quashed.

4. As none of the parties can be said to have wholly succeeded, there will be no order as to costs.

168.Orders accordingly.

Dated at Nairobi this 17th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui with Mr Sankale for the 1st Applicant

Mr Agwara for the 2nd Applicant and holding brief for Mr Munene for the 2nd Respondent

Miss Kamande for Mr Thangei for the 3rd Respondent

Cc Mwangi