



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS (JUDICIAL REVIEW DIVISION)**

**MISCELLANEOUS APPLICATION NO. 116 OF 2016**

**(CONSOLIDATED WITH MISCELLANEOUS APPLICATION NO. 119 OF 2016)**

**REPUBLIC.....APPLICANT**

**AND**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE**

**REVIEW BOARD.....RESPONDENT**

**TODDY CIVIL ENGINEERING**

**COMPANY LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**SINOHYDRO TIANJIN ENGINEERING COMPANY LIMITED**

**J/V MACHIRI LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**COAST WATER SERVICES BOARD.....1<sup>ST</sup> EX-PARTE APPLICANT**

**CHINA HENAN INTERNATIONAL COOPERATION**

**(CHICO) GROUP LIMITED.....2<sup>ND</sup> EX-PARTE APPLICANT**

**JUDGEMENT**

**Introduction**

1. This ruling is the subject of two applications which were consolidated.

**1<sup>st</sup> Applicant's Application**

2. The 1<sup>st</sup> applicant herein, **Coast Water Services Board**, was the procuring entity in the tender, the subject of these proceedings. In these proceedings it will be referred to as “the Entity”. It filed a Notice of Motion dated 18<sup>th</sup> March, 2016 in which it seeks the following orders:

1. **An Order of Certiorari to remove to this Honourable Court for purposes of being quashed,**

the Respondent's entire decision delivered on 1<sup>st</sup> March 2016 (the impugned decision) with respect to Tender No. CWSB/WASSIP-AF//W/1/2014/LOT 3 for supply and Construction of Kakuyuni to Gongoni and Kilifi Pipeline works, Baricho Immediate Works- Lot 3 (the Tender) allowing the 1<sup>st</sup> Interested Party's Request for Review Application No. 6 of 2016 filed on 9<sup>th</sup> February 2016 and directing the Applicant to consequently enter into a contract with the 1<sup>st</sup> Interested Party.

2. An Order of Prohibition restraining the 1<sup>st</sup> Interested Party from entering into any contract with the Applicant over and/or concerning Tender No. CWSB/WASSIP-AF//W/1/2014/LOT 3 for supply and Construction of Kakuyuni to Gongoni and Kilifi Pipeline works, Baricho Immediate Works- Lot 3 and/or otherwise compelling the Applicant to issue a letter of award for the said Tender to the 1<sup>st</sup> Interested Party.
3. Such further or other Orders as this Honourable Court may deem just and fit to grant.
4. THAT the costs of these Judicial Review proceedings be paid by the Respondents and the interested Parties jointly and severally.

3. According to the Entity, it advertised and invited international competitive bids for Tender No. CWSB/WASSIP-AF//W/1/2014/LOT 3 for supply and Construction of Kakuyuni to Gongoni and Kilifi Pipeline works, Baricho Immediate Works- Lot 3 (hereinafter referred to as "the Tender") on its website on 26<sup>th</sup> August 2015 and in local dailies on 27<sup>th</sup> August 2015. The said tender, it was averred was a wholly funded project by a subsidiary of the World Bank, the International Bank for Reconstruction and Development (IBDR) and the International Development Association (IDA) hereinafter referred to as the Donor.

4. It was averred that the Respondent's decision the subject of these Judicial Review proceedings was delivered in Request for Review No. 6 of 2016: **Toddy Civil Engineering Co. Limited –vs- Coast Water Services Board** (hereinafter referred to as "the Request for Review") on 1<sup>st</sup> March 2016.

5. According to the Entity, in evaluating the bids its Tender Evaluation Committee was guided by the Donor's (World Bank) Procurement Guidelines, the Bank's bid evaluation guidelines and tender evaluation criteria expressly contained in the Financing Agreement between the Applicant and the World Bank, the External Consultant's recommendations and evaluation criteria set out in bidding documents provided to all candidates. Further to the said bidding documents, the Entity required that all tenderers tender their bids in accordance with the Tender Bill of Quantities for the works. According to the Entity, it received and opened bids on 27<sup>th</sup> October 2015 at 1205 Hours in its Board Room in the presence of tenderers who chose to attend and its Tender Evaluation Committee evaluated all tendered bids as per the afore listed criteria and prepared a Bid Evaluation Report and recommendations for award of the tender. Based on the Tender Evaluation Committee's recommendation, it awarded the tender to **China Henan International Cooperation (CHICO) Group Limited**, the 2<sup>nd</sup> Applicant herein (hereinafter referred to as "CHICO") and informed all tenderers, including the 1<sup>st</sup> Interested Party herein, **Toddy Civil Engineering Company Limited** (hereinafter referred to as "Toddy"), to whom the Board awarded the tender, vide its letter of 26<sup>th</sup> January 2016 which Toddy admits to have received on 28<sup>th</sup> January 2016.

6. However, Toddy filed the Request for Review on 9<sup>th</sup> February 2016 to which the Entity filed its response and preliminary objections. In addition to filing therefore mentioned documents with the Respondent herein, the Public Procurement Administrative Review Board (hereinafter referred to as "the Board", the Entity also supplied the Board with copies of all documents pertaining to the tender and the Entity's Advocate on record, **Mr. Kenneth Kibara**, prepared and appeared for the Entity in the matter and filed Written Submissions therein. In its decision delivered on 1<sup>st</sup> March 2016 the Board nullified award of the tender to CHICO and awarded the tender to Toddy and directed the Applicant to issue a letter of award to Toddy within 14 days from the date of its decision. Based on legal advice, the Entity averred that:

1) In nullifying the award, the Respondent faulted the Entity's Bid Documents and found that the said Bid Documents were lacking in clarity and that the entity offered bidders an option to quote either using steel or ductile iron.

2) The Respondent disregarded the fact that the Tender was a wholly World Bank Donor funded project wholly funded by the International Development Association (IDA) and that the Applicant was bound to evaluate all bids strictly in accordance with the Financing Agreement and Procurement Guidelines of the World Bank and the Evaluation Guide provided for in the said Financial Agreement and detailed Evaluation Guide provided in the said Financial Agreement.

3) The Board purported to rewrite and amend the Entity's Bid Documents in finding that the Entity's use of the phrase "...bidders have the option to bid for steel pipes and fittings in lieu of ductile iron pipes and fittings...." in its response to Clarification No. 3 amounted to the Entity allowing bidders the choice to use steel instead of the specified Ductile Iron material in their bids.

4) In finding that the Entity acted in breach of section 66(4) of the repealed **Public Procurement and Disposal Act, 2005** (repealed) (hereinafter referred to as "the repealed Act") and holding that Toddy was the Lowest Successful Bidder and awarding the Tender to Toddy, the Respondent failed to take into consideration mandatory evaluation criteria in the Post Qualification Evaluation stage of the Bid Documents of which Toddy was not subjected to and therefore did not meet the mandatory Minimum Qualification Criteria required in the Bid Documents in order to be considered for award of the Tender.

5) In nullifying the award of the Tender to the 2<sup>nd</sup> Interested Party and awarding it to Toddy using criteria not contained in the Applicant's Bid Documents, the Board effectively conducted an evaluation based on criteria not set out in the tender documents and therefore breached the clear and mandatory provisions of section 80(2) of the **Public Procurement and Asset Disposal Act No. 33 of 2015** and section 66(2) of the repealed Act.

6) The Board had no power to make orders that violate the express provisions of the law and World Bank Donor conditions and exceeded the requirements and criteria expressly set out in the Bid Documents.

7) The aforementioned acts by the Board are illegal, unlawful and were undertaken by the Respondent in excess of its jurisdiction.

8) By introducing extraneous evaluation requirements outside of the provision of section 66 of the repealed Act without expressly and clearly faulting the tender documents themselves and using the same as a basis to overturn the award of tender to the 2<sup>nd</sup> Interested Party was grossly unreasonable and irrational.

9) In finding that the Entity acted in breach of section 66(4) of the repealed Act, the Board acted in an arbitrary manner and contradicted its own earlier finding that once an Act is repealed it cease to exist completely and erred in holding that the Applicant acted in breach of section 66(4) of the repealed Act.

10) In faulting the Entity for failing to cite any conflict between the World Bank Donor conditions and provisions of the **Public Procurement and Asset Disposal Act No. 33 of 2015**, Regulations of the **Public Procurement and Disposal Regulations, 2006** and amendments (2013) and evaluation criteria in the Bid Documents, the Board was grossly arbitrary, unreasonable and irrational.

11) The Board failed to appreciate that the Entity, in applying the Tender Evaluation Criteria it so applied, was in fact acting in compliance with the World Bank Donor conditions and provisions of the Act and Regulations thereunder. And that Toddy's contention that it be allowed to bid using Steel instead of Ductile Iron would amount to a conflict with and deviation of Tender Evaluation Criteria provided in the Bid Documents, World Bank Donor conditions and provisions of the Act and Regulations.

12) The Board acted irrationally and unreasonably in finding at page 47 of its decision that the requirement for detailed drawings and design did not apply to all bidders before determination of

the successful tenderer but was to apply to a contractor only after award of tender and execution of contract.

13) Despite finding that the Entity ought to have awarded the tender to the lowest financial bidder, the Board declined to consider other bids lower than that of Toddy and awarded the tender instead to Toddy which was manifestly unfair to all other tenderers and in exercising its discretion, the Board acted in an arbitrary, unreasonable and irrational manner.

14) The Board considered extraneous material outside the Evaluation Criteria provided for in the Bid Documents in faulting the Entity for not awarding the tender to Toddy on the grounds that it had provided a financial bid of Kshs. 371,456,952.60 less than that of the successful bidder, the 2<sup>nd</sup> Interested Party herein.

15) And that the Board therefore essentially rendered the Bid Documents null and void.

16) In awarding the tender contrary to the criteria set out in the tender documents and on the basis of which all the bidders, including the 2<sup>nd</sup> Interested Party has relied on to submit their bids, the Board acted contrary to section 3 of the **Public Procurement and Asset Disposal Act No. 33 of 2015** and section 2 of the repealed Act, which require that the public procurement process treat all competitors equally, fairly and without discrimination.

17) The Board's decision is in violation of Article 47(1) of the Constitution which affirms the right of every person to administrative action that is efficient, lawful, reasonable and procedurally fair.

18) That there is no provision under either the **Public Procurement and Asset Disposal Act No. 33 of 2015** or the repealed Act, which confers upon the Board with jurisdiction to disregard the tender documents and award a tender to an unsuccessful bidder based on criteria not contained in the tender document. Such conduct by the Board constitutes unreasonableness and irrationality.

19) The Board delivered its impugned decision on 1<sup>st</sup> March 2016 but did not immediately provide a typed copy of its said decision to the Entity who was constrained to make written requests for typed copies of the proceedings and decision and its intention to file Judicial Review proceedings against the decision. In fact, it is only due to the Entity's persistence that the Board availed a typed copy of its decision on Tuesday 8<sup>th</sup> March 2016, 8 days after it had delivered the ruling.

20) The Board's actions and delay in supplying the Entity with a typed copy of its decision was illegal and contrary to sections 4(2) and 6 (1) of the **Fair Administrative Action Act, 2015** and section 58 of the **Interpretation and General Provisions Act, Cap 2**.

21) The Board's decision is in conflict with Donor (World Bank) Procurement and Evaluation Guidelines and is in breach of mandatory provisions of the **Public Procurement and Asset Disposal Act No. 33 of 2015** and the repealed Act.

22) In finding that the Entity acted in breach of section 66(4) of the repealed Act and nullifying the award of tender to the 2<sup>nd</sup> Interested Party and awarding the tender to Toddy, the Board ignored World Bank Procurement Guidelines, the Bank's bid evaluation guidelines and tender evaluation criteria expressly contained in the Financing Agreement between the Applicant and the World Bank, the External Consultant's recommendations and in bidding documents provided to all candidates.

23) This blatant disregard of Donor conditions in a wholly donor funded project are a violation of provisions of the **Public Procurement and Asset Disposal Act No. 33 of 2015** and the repealed Act.

24) And the Entity is obliged to involve the Donor in every evaluation stage in the procurement process and consider these Donor conditions before making its final award of tender.

25) The Board's decision was in violation of the Act that has created it and is therefore manifestly illegal for such violation. And the Board's conduct to issue its decision and award the tender to Toddy without subjecting its bid to the strict criteria and conditions set out by the Donor constitute an illegality, unreasonableness and irrationality.

26) Without being subject to the rigorous evaluation criteria to which the 2<sup>nd</sup> Interested Party was subjected to, and indeed all other bidders who qualified at the Pre-Qualification stage, including a Financial Evaluation and Post Qualification stage to test for capacity, the Board has no legal and/or scientific basis upon which to unilaterally determine that Toddy's bid was in fact the lowest responsive bid.

27) In awarding the tender to the untested 1<sup>st</sup> Interested Party, the Board has ignored and negated both the donor procurement conditions and evaluation criteria provided under statute.

28) Pursuant to both mandatory provisions of section 175(6) the **Public Procurement and Asset Disposal Act No. 33 of 2015** and section 100 (3) of the repealed Act and the Board's own directive, the Applicant is obligated by law to issue a letter of award to Toddy within 14 days from 1<sup>st</sup> March 2016. And it is this directive that the Applicant is seeking a review of.

29) Similarly, once 14 days have lapsed from 1<sup>st</sup> March 2016, then the decision seeking to be challenged shall become final pursuant to sections 100(1) and 175 (1) respectively of the Acts.

7. According to the Entity, the orders sought herein are merited and ought to be granted as prayed.
8. It was submitted on behalf of the Entity that the Board was bound by provisions of the **Public Procurement and Disposal Act CAP 412C** (hereinafter referred to as "the repealed Act") in making its considerations and determinations and arriving at its Award in the Request for Review. In support of its case, the Entity relied on Rule No. 1 of the Transitional Provisions in the 3<sup>rd</sup> Schedule of the **Public Procurement and Asset Disposal Act of 2015** (hereinafter referred to as the "the new Act") as read together with section 183 thereof. The said Rule was reproduced as hereunder:

***1 (1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.***

***(2) For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement process."***

9. It was submitted on behalf of the Entity that for the avoidance of doubt, Rule 8 of the Transitional Provisions and Part XV of the New Act, titled as **Administrative Review of Procurement and Disposal Proceedings**, relates to the procedure to be followed by the Board when an aggrieved party applies for review before the Board and that that Part is the procedural law applicable in a review and does not relate to the substantive law to be followed by the Board when hearing the Request for Review and making its decision. However, the Entity is guided by the definition of both procedural law and substantive law obtained from **Black's Law Dictionary 10<sup>th</sup> Edition** according to which, **Procedural Law is "the rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.** In the Entity's view, this is what Part XV of the new Act provides. "**Substantive Law**" on the other hand is defined as "**that part of the law that creates, defines and regulates the rights, duties and powers of parties**".
10. It was the Entity's case that the Board did not have jurisdiction to hear and/or adjudicate the Request for Review and that the Board acted *ultra vires* the powers and mandate granted to it by statute, took into consideration extraneous matters in making its Award and otherwise conducted

- itself in so irrational and unreasonable a manner as to constitute its Award unlawful.
11. According to the Entity, as the Tender was a wholly funded project funded by a subsidiary of the World Bank, the International Bank for Reconstruction and Development (IBDR) and the International Development Association (IDA) hereinafter referred to as the Donor, was subject to the World Bank (donor) guidelines and conditions hence section 6 (1) of the repealed Act ousts the jurisdiction of the Board.
  12. According to the Entity, it was a mandatory term of the Financial Agreement between the Government of the Republic of Kenya and the Donor that procurement of Works be in strict accordance with Agreement and Procurement Guidelines of the World Bank and that the Donor Guidelines make it mandatory for all recipients of World Bank loans to comply with their Procurement Guidelines in contracts for goods, works and non-consulting services. Accordingly, any contract awarded without strict compliance of these Guidelines results in a declaration of *Misprocurement of the contract and cancellation of the World Bank loan to the recipient country*. The Entity submitted that the Financing Agreement further provided a detailed Evaluation Guide for the manner of evaluating all procurement processes and made it clear that “*Major deviations to the commercial requirements and technical specifications are a basis for the rejection of bids*”.
  13. The Entity asserted that the Board has previously held that it does not have jurisdiction in procurement proceedings that are funded by external donors and referred to PRARB No. 3 of 2015 - **Power Technics Limited –vs- Kenya Power & Lighting Co. Ltd** in which the Board found that by a notice in the Advertisement for Tender, all bidders were notified and aware that the tender was subject to World Bank procurement guidelines and not the repealed Act and went on to reject the Applicant’s argument that the tender was subject to any other regulations other than those specified in the bidding documents.
  14. According to the Entity, the Request for Review was filed out of time having been filed 11 days after receiving notification of (non) award. This argument was based on Regulation 73(2) of the ***Public Procurement and Disposal Regulations*** under the repealed Act which provides that a request for review shall be made within seven days of either the occurrence of breach complained of or notification of successful tenderer under sections 67 or 83 of the Act. According to the Entity, the Request for Review was filed on 9<sup>th</sup> February 2016 yet by Toddy’s own admission, they received a notification under section 67 on 28<sup>th</sup> January 2016 hence the Request for Review was filed 11 days after receiving a notification and was, in effect, filed 4 clear days out of time. To the Entity, the Board had no jurisdiction to hear the Request for Review for the aforesaid reason.
  15. It was further submitted that the Board had no jurisdiction to evaluate the tender and award it to another bidder. This, according to the Entity is due to the fact that the Board has no powers to evaluate the tender or bids presented by tenderers, including the bid presented by the Toddy. However, in its Award, the Board considered whether or not the Entity breached provisions of section 66(4) of the repealed Act and nevertheless purported to evaluate Toddy’s financial bid against that of the CHICO and the 2<sup>nd</sup> Interested Party herein, **Sinohydro Tianjin Engineering Company Limited J/V Machiri Limited** (hereinafter referred to as “Machiri”). According to the Entity, the Board made the following finding:

***“The Board has considered the parties arguments on the above matter (financial bids) and notes that the only bidder which quoted a lower price than the Applicant (1<sup>st</sup> Interested Party) was the joint venture of M/s SynohydroTianji Engineering Company Ltd and Machiri Limited at the sum of Kshs. 1,685,288,891 and that upon their being declared as unsuccessful they lodged the Request for Review No. 5 of 2016 but the Request for Review was struck out by the Board on 25<sup>th</sup> February, 2016 on the ground that the lead bidder in that case M/s SynohydroTianji Engineering Company Limited did not take part in the proceedings before the Board.*”**

***The effect of the decision in review number 5 of 2016 is therefore that the procuring entity’s decision declaring M/s SynohydroTianji Engineering Company Ltd and Machiri Limited still stands as unsuccessful and the Board having allowed this Request for Review, the bid submitted by the Applicant (1<sup>st</sup> Interested Party) ranks lower in terms of price than the bid submitted by the successful bidder by a sum of over 371,456,952.60. This figure is***

*quite substantial and by failing to comply with the Provisions of clarification No. 3, the procuring entity failed to promote local industry since steel would be sourced locally and also exposed the Public to a potential loss of Kshs. 371,456,952.60 thereby failing to promote economy.” (emphasis ours)*

16.The Entity relied on section 66 of the repealed Act which provides that:

*(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63 (3).*

*(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.*

*(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—*

*(a) the criteria must, to the extent possible, be objective and quantifiable; and*

*(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.*

*(4) The successful tender shall be the tender with the lowest evaluated price.*

*(5) The procuring entity shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders.*

*(6) The evaluation shall be carried out within such period as may be prescribed.*

17.It was therefore submitted that the Board did not, in the first instance, have any legal capacity to undertake a financial evaluation of any of the bids submitted to it, as the procuring entity. Further in undertaking such unlawful evaluation, the Respondent failed to consider other mandatory requirements and conditions set out in the Tender and under the repealed Act. In support of this position the Entity relied on Nairobi JR No. 513 of 2015 - **Republic –vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited** which cited with approval the decision in Nairobi JR No. 261 of 2015 - **Republic –vs- The Public Procurement And Administrative Review Board & 2 Others ex parte Numerical Machining Complex Limited**.

18.According to the Entity, the Board acted *ultra vires* and its award was therefore unlawful and relied on ***Akamai Creative Limited Case*** (supra), where the Court held that “to the extent that the 1<sup>st</sup> Respondent (Review Board) directed the Applicant to award the tender to the interested party it exceeded its jurisdiction and its decision was unlawful”.

19.It was submitted that the Board in its decision considered only financial value of the bids whilst ignoring all other aspects of the tender process and requirements and similarly the ***Akamai Case*** (supra) was relied on in support.

20.According to the Entity, the Board in its Award, ignored mandatory provisions of the Tender that required bidders intending to bid using an alternate material to provide 2 sets of bids i.e. in the original material (Ductile Iron) and the other preferred material and set aside the Entity’s decision that Toddy’s bid was unsuccessful at the Technical Evaluation stage for submitting a bid using only steel as an alternate material without first providing a bid for Ductile Iron. According to the Entity, in failing to refer the dispute to the donor, and making the impugned decision, the Board deliberately ignored mandatory tender requirements that that all disputes be referred to the donor, through the Procuring Entity for determination.

21.It was the Entity’s position that in its Award, the Board found at page 45 that the tender documents were vague. However, despite finding that the tender documents lacked clarity, the Board went on to interpret the tender documents in favour of Toddy. The Entity relied on Nairobi

**“The Board may have indeed found a shortcoming in the definition of an OEM provided by the PE. We are of the view, that in order to achieve a transparent system of procurement as required under Article 227 of the Constitution, it is important that procuring entities should set out to achieve a certain measure of precision in their language in the tender documents and not leave important matters for speculation and conjecture as was the case in this matter... If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender...the Review the Review Board exceeded its authority by purporting to read its own words in the Tender Document. If the Tender Document was defective, then the only order that was available to the Board was to direct the PE to commence the tender process afresh.”**

22. It was submitted that having found the tender to have been vague, the only reasonable and lawful action for the Board was to refer the tender back to the Entity with directions to amend the tender documents to cure such vagueness. Accordingly, it was unlawful for the Respondent to purport to interpret the tender after finding that the tender document lacked clarity and award the tender to another bidder. It was therefore submitted that the Board’s decision was unreasonable and irrational.
23. It was the Entity’s case that at page 48 of the impugned decision, the Board observed that the procuring entity “*proceeded to award the tender to a bidder who was not the lowest evaluated bidder in terms of price*”. And, using this argument the Respondent went on to set aside the award of tender to CHICO and instead awarded the tender to Toddy while ignoring the fact that apart there were 2 other bidders who had lower financial bids than Toddy’s and these were **Njuca Consolidated Co. Ltd JV China Machinery Industry Constructions Group Inc.** at **Kshs. 1,392,291,688.52** and **Machiri**. Accordingly, the Respondent has deliberately declined to cast its eye upon 2 other bidders whose financial bids are lower still than that of the 1<sup>st</sup> Interested Party. This decision according to the Entity, and based on ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223***, was unreasonable, irrational and therefore unlawful.
24. According to the Entity, the Board failed to distinguish between the 2<sup>nd</sup> interested party, a candidate in the tender and **Machiri Limited**, the entity that filed review no. 5 of 2016 before the Board. In the impugned decision, the Board disqualified the 2<sup>nd</sup> Interested Party’s bid on the grounds that since Review No. 5 of 2016 by Machiri Limited was struck out, then the lower financial bid of **Sinohydro Tianjin Engineering Company Ltd JV Machiri Ltd** (the 2<sup>nd</sup> Interested Party) could not be considered. What is not disclosed by the Respondent in its impugned decision is that Review No. 5 of 2016 was filed by **Machiri Limited**, an entity which did not participate in the tender process which Review was struck out at the preliminary stage for such reasons. The bid by of **Sinohydro Tianjin Engineering Company Ltd JV Machiri Ltd** was therefore never substantively canvassed before the Board. This decision, it was submitted was similarly so unreasonable and irrational as to qualify as being *Wednesbury* unreasonable.
25. In finding that the Technical Drawings, which were a fundamental and mandatory part of the tender for alternative technical solutions, were in fact intended to be provided by the successful tenderer after award of tender, the Board was accused by the Entity of mischievous interpretation of “contractor” to suit Toddy since that requirement applied to all bidders. Further the Board went on to interpret the meaning of the term “Contractor” in a manner contrary to that intended in the Tender Documents and in fact, by deliberately ignoring the tender documents which included a definition of the said term and guidelines on reading the said tender documents.
26. This position according to the Entity, ignored the genesis of the procurement process whereby the Procuring Entity, in partnership with the Donor, engaged **Fichtner Water & Transportation GMBH** as External Consultant Engineers for consulting services relating to the eventual tender and provide technical specifications and designs of the works. It was therefore submitted that the Consultant’s technical specifications and designs Detailed Designs of technical specifications were intended to be used to compare with the Technical Drawings presented by tenderers in their

bids and therefore the Entity was legally bound, to evaluate the bids submitted in strict accordance with Procurement Guidelines provided by the Donor and follow the technical specifications generated by the Consultant. To the Entity, the Board's interpretation of a "Contractor" and time for submission of technical details (specifications and drawings) was so irrational and unreasonable and is contrary to the intentions of the procuring entity in the tender document.

27. It was submitted on behalf of the Entity that the Board irrelevant and extraneous matters in making its award. In the impugned decision to revoke the award of tender to CHICO, the Board found that the Entity "*failed to promote local industry*" a condition that was not part of the mandatory requirements or conditions of the Tender. To the Entity, these were irrelevant considerations and that the Award was therefore unlawful. It relied on the decision in ***Akamai Case*** (supra) where it was held at page 12 where the Court cited with approval the holding in ***Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR*** that:

**"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."**

28. Further support was sought from ***Numerical Machining Complex Limited Case*** (supra) where at page 12 the Court held that:

**"The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law."**

29. To the Entity, the Board's refusal to supply it with typed copies of its proceedings and award at all and/or within a reasonable time was a continued display of the irrationality and unreasonableness with which the Respondent conducted itself in hearing the Request for Review since the Board only made a copy of its typed decision available to the Applicant on Tuesday, 8<sup>th</sup> March 2016, 8 clear days after it delivered its decision after the Applicant making repeated written requests for the same.

30. According to the Entity, it made out a strong case for grant of the Judicial Review Orders of Certiorari to remove to this Honourable Court and quash the Respondent's entire decision delivered on 1<sup>st</sup> March 2016 with respect to Tender No. CWSB/WASSIP-AF//W/1/2014/LOT 3 for supply and Construction of Kakuyuni to Gongoni and Kilifi Pipeline works, Baricho Immediate Works- Lot 3 (the Tender) allowing the 1<sup>st</sup> Interested Party's Request for Review Application No. 6 of 2016 filed on 9<sup>th</sup> February 2016 and directing the Applicant to consequently enter into a contract with the 1<sup>st</sup> Interested Party as well as orders of Prohibition restraining the 1<sup>st</sup> Interested Party from entering into any contract with the 1<sup>st</sup> Ex Parte Applicant over and/or concerning the said Tender. It also argued that the costs of these Judicial Review proceedings ought to be borne by the Respondent and Interested Parties jointly and severally.

## **2<sup>nd</sup> Applicant's Case**

31. On its part, the 2<sup>nd</sup> Applicant herein **China Henan International Cooperation (Chico) Group Limited** filed an application dated in which it sought the following orders:

**1) An Order of Certiorari to remove to this Honourable Court for purposes of being quashed, the Respondent's entire decision delivered on 1<sup>st</sup> March 2016 (the impugned decision) with respect to Tender No. CWSB/WaSSIP-AF/W/1/2014/LOT 3 for the Supply and Construction of Kakuyuni to Gongoni and Kakuyuni to Kilifi Pipeline Works, Baricho Immediate Works – Lot 3 (the Tender) allowing Request for Review**

No. 6 of 2016 filed by Toddy Civil Engineering Co. Limited (2<sup>nd</sup> Interested Party herein) on 9<sup>th</sup> February 2016 and directing Coast Water Services Board (1<sup>st</sup> Interested Party herein) to consequently enter into a contract with the 2<sup>nd</sup> Interested Party herein.

2) An Order of Prohibition restraining the 1<sup>st</sup> Interested Party from issuing a letter of award for the Tender to and from entering into any contract with the 2<sup>nd</sup> Interested Party herein over and/or concerning the Tender.

3) A Declaration that in view of Section 6 and 7 of the Public Procurement and Disposal Act, 2005 as read together with the Financing Agreement in respect of the Tender, the Guidelines for Procurement of Goods, Works, and Non-Consulting Services Under IBRD and IDA Credits & Grants by World Bank Borrowers and the World Bank Evaluation Guidelines for Procurement of Goods and Works, the Respondent does not have jurisdiction to entertain Requests for Review emanating from this Tender.

4) A Declaration that in view of section 6 and 7 of the Public Procurement and Disposal Act, 2005 as read together with the Financing Agreement in respect of the Tender, the Guidelines for Procurement of Goods, Works, and Non-Consulting Services Under IBRD and IDA Credits & Grants by World Bank Borrowers and the World Bank Evaluation Guidelines for Procurement of Goods and Works, the Respondent does not have jurisdiction to award the Tender.

5) Such further or other Orders as this Honourable Court may deem just and fit to grant.

6) Costs of this Application to be awarded to the Applicant.

32. According to CHICO, it was the successful bidder in the Tender having satisfied all the requirements of the Tender as per the advertisement by the Entity and as such was awarded the tender as a successful bidder. However on 9<sup>th</sup> February, 2016, **Toddy Civil Engineering Co. Limited**, filed its Request for Review on 9<sup>th</sup> February, 2016 though it admitted that it received notification of their unsuccessful bid on 28<sup>th</sup> January, 2016. Based on legal advice, CHICO averred that the law governing the instant procurement proceedings requires Requests for Review to be lodged with the Board within 7 days of notification hence the Request for Review No. 6 of 2016 was filed 12 days after notification. It was therefore contended that the Board committed an error of law in entertaining the Request for Review when it had no jurisdiction to entertain a request for Review filed out of time stipulated by statute.

33. CHICO's case was that the Board acted contrary to provisions of law in awarding the Tender to Toddy notwithstanding that the said Toddy had been disqualified at the preliminary evaluation and therefore had not been subjected to detailed examination and post and post-qualification of bids. The Board was therefore accused of having acted contrary to law in converting itself into an evaluation committee and awarding the Tender to a bidder whose price had not been examined and whose bid had not been taken through the post qualification procedure in line with World Bank Procurement Guidelines.

34. According to CHICO, the Tender was based on donor funding by the World Bank and that the financing agreement contained conditions that must be adhered to during the procurement process. It was disclosed that the World Bank Guidelines set out a procedure for handling complaints received from bidders after opening of the bids which procedure is in conflict with the repealed Act. It was CHICO's position that if there is conflict between the provisions of the repealed Act and conditions imposed by the donor, the conditions imposed by the donor prevail over those of the Repealed Act. To CHICO, the Board acted contrary to the law when it disregarded this procedure and proceeded to determine the Request for Review without requisite jurisdiction by awarding the Tender to Toddy in its decision delivered on the 1<sup>st</sup> March, 2016, yet Toddy had not complied with the evaluation criteria set out for the Tender thereby prejudicing CHICO.

35. According to CHICO, in awarding the Tender to Toddy, the Respondent usurped the role of the

- Evaluation Committee of the Entity as well as the role of the World Bank in evaluating an award of the Tender. In awarding of this Tender, the evaluation criteria required that all bids had to undergo Preliminary examination and the bid prices of the successful bidders (after preliminary examination) had to be adjusted to correct any arithmetical errors and any quantifiable non-material deviations or reservations and ranked based on the corrected price. The bidder with the lowest price was then subjected to post qualification evaluation whereby the following areas were examined against the requirements under the bidding document: (i) Adequacy of the technical proposal (ii) Financial Resources (iii) General and Specific Construction Experience (iv) Personnel (v) Equipment. However, it was contended by CHICO that by awarding the Tender to Toddy whose bid price had not been subjected to adjustment for arithmetical errors, ranking and post qualification evaluation, the Respondent committed a procedural impropriety by failing to adhere and observe procedural rules expressly laid down in the World Bank Evaluation Guidelines governing the Tender.
36. CHICO asserted that in directing the Entity to take into account provisions of Regulation 50 of the **Public Procurement and Disposal Regulations**, the Board acted contrary to section 6 of the **Public Procurement and Disposal Act**, and in effect prescribed an evaluation criterion at variance with World Bank Evaluation Guidelines governing the Tender.
  37. CHICO therefore urged the Court to grant the prayers sought in this Judicial Review but explained that it was unable to move this Honourable Court sooner because the Board, despite delivering its decision on 1<sup>st</sup> March, 2016 failed to avail a written copy of its decision to it or its legal counsel till 8<sup>th</sup> March thus resulting in the delay in filing these proceedings.
  38. With respect to Machiri's position in these proceedings, CHICO averred that Machiri was a bidder under the Joint Venture known as **Sinohydro Tianjin Engineering Company Limited J/V Machiri Limited** in tender no. CWSB/WaSSIP-AF/W/1/2014/LOT-3 for supply and construction of Kakuyuni to Gongoni and Kakuyuni to Kilifi pipeline works, Baricho intermediate works-LOT 3 and that **Machiri Limited**, being a member of the Joint Venture, filed a Request for Review on 4<sup>th</sup> February, 2016 which request for review was filed without authority, and to the exclusion of its partner in the Joint Venture, **Sinohydro Tianjin Engineering Company Limited**. As a result, the said Request for Review was struck out by the Board vide its judgment dated 25<sup>th</sup> February, 2016 as it was improperly before the Board.
  39. According to CHICO, in the proceedings before the Board, Machiri admitted that both companies to the Joint Venture namely; **Sinohydro Tianjin Engineering Company Limited** and **Machiri Limited** had donated a Power of Attorney to one **Jia Yangping** of Passport No. P.E0465543 to execute and do all such deeds and things including among others commencement of any action, suits or to defend the two companies in any action. It was further averred that Machiri was joined in the instant proceedings before this Honourable Court by the Entity and has proceeded to file its submissions based on the replying affidavit of **James Macharia**. However, CHICO did not include Machiri in its case. It was therefore contended that Machiri's pleadings before this Honourable Court are irregularly on record since it has not tendered any evidence to show that **James Macharia**, who swore the Affidavit on record, has been appointed to initiate or defend any suit on its behalf. According to CHICO, Machiri's pleadings before this Honourable Court are improperly before Court as they have been filed without authority to file pleadings on its behalf.
  40. It was further contended that the said affidavit was filed late due to the fact that Machiri deliberately refrained from serving CHICO with its affidavit and as a result, Machiri was unaware of the existence of the affidavit until after its counsel started to review submissions filed by Machiri in which submissions, the said Affidavit was referred to. The Court was therefore urged to expunge Machiri's affidavit from the Court record and consequently, disregard its submissions.
  41. It was submitted on behalf of CHICO that the Board committed an error of law in entertaining the Request for Review when it had no jurisdiction to entertain a Request for Review filed out of time stipulated by statute. According to CHICO, Toddy filed its Request for Review on 9<sup>th</sup> February, 2016 though it admitted that it received notification of their unsuccessful bid on 28<sup>th</sup> January, 2016 yet the law governing the instant procurement proceedings requires Requests for Review to be lodged with the Board within 7 days of notification. Consequently, the Request for Review No. 6 of 2016 was filed 12 days after notification.
  42. It was further submitted that the Board acted contrary to provisions of law in awarding the Tender

- to Toddy notwithstanding that the latter had been disqualified at the preliminary evaluation and therefore had not been subjected to detailed examination and post-qualification of bids. This, according to CHICO was contrary to section 66 of the repealed Act which provides that the successful tender shall be the tender with the lowest evaluated price. In awarding the Tender to the 1<sup>st</sup> Interested Party, the Respondent erred in law and in fact by awarding the Tender to a bidder whose price had not been examined and evaluated satisfactorily. Consequently, the Board acted contrary to law in converting itself into an evaluation committee and awarding the Tender to a bidder whose price had not been examined and whose bid had not been taken through the post qualification procedure in line with World Bank's Procurement Guidelines. According to CHICO, the Board acted contrary to provisions of law in awarding the Tender to Toddy on the mistaken basis that Toddy offered the lowest price of 1,943,342,782.40 which is contrary to the law which requires that the successful tender shall be the tender with the lowest evaluated price, and not necessarily the lowest price.
43. It was submitted that the Tender was based on donor funding by World Bank and that the financing agreement contained conditions that must be adhered to during the procurement process and that the World Bank Procurement Guidelines that governed this procurement are to a great extent in conflict with the repealed Act, which governs procurement proceedings by public entities. However, sections 6 and 7 of the repealed Act, whose provision govern this procurement proceedings as well as section 6 of the ***Public Procurement and Asset Disposal Act, 2015*** provides that if there is a conflict between the repealed Act and the conditions imposed by the donor of funds, the conditions shall prevail with respect to a procurement process that uses those funds.
44. According to CHCO, the World Bank Guidelines set out a procedure for handling complaints received from bidders after opening the bids and as this procedure is in conflict with the repealed Act, the Respondent acted contrary to the law when it disregarded this procedure and proceeded to determine the Request for Review without requisite jurisdiction. It was submitted that in awarding the Tender to Toddy, the Board acted contrary to the law and thereby ousted World Bank Procurement Guidelines and evaluation criteria and as a result, awarded the to a bidder who had not complied with the evaluation criteria set out for the Tender thereby prejudicing CHICO.
45. It was submitted that by directing the Entity to issue a letter of award to the Applicant and complete the entire procurement process within a period of fourteen days, the Board was manifestly irrational since it usurped the role and function of the evaluation committee of the Entity as well as the role of the World Bank in reviewing the evaluation process, issuing no objection to the evaluation process and awarding the Tender yet Toddy was disqualified at the preliminary evaluation and therefore had not been subjected to detailed examination and post-qualification of bids. In CHICO's view, if the Board's decision was left to stand, it would mean that the procuring entity's hands as well as those of the World Bank would be tied and the Tender would then be awarded to a party whose bid was not evaluated or who did not qualify under the evaluation criteria set for the Tender.
46. According to CHICCO, by refusing to uphold the procuring entity's argument that designs were required for persons proposing to use steel and that Toddy failed to comply with the Instructions to Bidders number 13.3, there are no drawings and designs which may be utilised to undertake the Tender for pricing purposes. By holding that drawings and designs may be submitted after the award, the Board's decision was irrational and in defiance of logic. It defies logic to quote for and provide price estimates on Bill of Quantities first (without reference to drawings and designs) and then to prepare and submit the drawings and designs for the Tender afterwards. As a matter of fact, drawings and designs are primarily required for pricing purposes and after award for construction purposes.
47. It was further submitted that in awarding of this Tender, the evaluation criteria required that all bids had to undergo preliminary examination. The bid prices of the successful bidders (after preliminary examination) had to be adjusted to correct any arithmetical errors and any quantifiable non-material deviations or reservations and ranked based on the corrected price. The bidder with the lowest price was then subjected to post qualification evaluation whereby the following areas were examined against the requirements under the bidding document: (i) Adequacy of the technical proposal (ii) Financial resources (iii) General and Specific Construction Experience (iv) Personnel and (v) Equipment. However by awarding the Tender to Toddy whose bid price had not

- been subjected adjustment for arithmetical errors, ranking and post qualification evaluation, the Respondent committed a procedural impropriety by failing to adhere and observe procedural rules expressly laid down in a the World Bank Evaluation Guidelines governing the Tender.
48. It was submitted that the Board in directing the Entity to take into account provisions of regulation 50 of the ***Public Procurement and Disposal Regulations*** acted contrary to section 6 of the repealed Act, and in effect prescribed evaluation criteria at variance with World Bank Evaluation Guidelines governing the Tender.
49. CHICO therefore argued that the Board erred both in law and fact by entertaining a Request for Review filed out of time and which it did not have jurisdiction to hear. The Board went on to convert itself into an evaluation committee and awarded the tender to Toddy without considering the facts and the law hence its decision ought to be reversed and to direct the Entity to enter into a contract with CHICO for the provision of services.

### **2<sup>nd</sup> Interested Party's Case**

50. On the part of Machiri, it was averred that it was a bidder in the tender subject matter of the proceedings but its bid was rejected at preliminary stage by the Entity via letter dated 26<sup>th</sup> January 2016. Similarly, Toddy's bid was rejected at the preliminary stage for the same reason as that of Machiri via letter dated 26<sup>th</sup> January 2016.
51. However, Machiri challenged the said decision with the Board through Request for Review Number 5 of 2016 while Toddy challenged the said decision with the Board through Request for Review Number 6 of 2016. On 17<sup>th</sup> February 2016 the Board directed that both Applications be consolidated for hearing and parties to file joint submissions which the said parties did and the matter was heard on 23<sup>rd</sup> February 2016 and respondent indicated it will deliver a joint ruling on 25<sup>th</sup> February 2016. Though both applications raised the same substantive issue for determination, the Board in departure from its earlier position delivered a separate ruling in Application no 5 of 2016 on 25<sup>th</sup> February 2016 in which it declined to determine the issues on merit but instead struck out the application on technicality. On 1<sup>st</sup> March 2016 the Board delivered a ruling in respect of application number 6 of 2016, which is the subject matter of these proceedings.
52. According to Machiri, the main issue in both applications was whether steel was an optional material allowed in the tender document as read together with clarification Number 3 of 30<sup>th</sup> September 2015 or whether it was an alternative material requiring drawing and design. According to Machiri, the Board in the said ruling at page 46 properly held that Steel was an optional material allowed in the tender document as read together with clarification Number 3 of 30<sup>th</sup> September 2015 and that the Entity's decision to reject bids offering steel was unlawful. The effect of this holding decision by the Board, according to Machiri, was that the decision to reject bids solely on grounds that they were based on steel could not stand hence the reasonable fair and legal direction which ought to have followed is for the procuring entity to re-evaluate all bids rejected on that ground. However, the Board proceeded to carry out financials evaluation and awarded the tender to Toddy. In Machiri's view, this holding and action of the Board was clearly without jurisdiction, unreasonable, arbitrary and irrational since:
- a. Its common ground that the bids based on steel was rejected at preliminary stage and was not subject to detailed evaluation by the procuring entity. Once that decision of the PE was set aside, evaluation was to proceed on the rejected bids. Evaluation of bids is clearly a mandate of the procuring entity and the Respondent does not have jurisdiction to carry out any evaluation. In so far as it proceeded to carry out evaluation its action was without jurisdiction.
  - b. It's a further common ground that the bid Toddy Civil Engineering at Kshs 1,943,342,782.40 was higher than that of Machiri at 1,685,288,891.60. Therefore the Board's decision that Toddy's bid was lowest is a decision which no reasonable tribunal applying its mind on the issue could have reached and was is clearly irrational and unreasonable.
  - c. That both bids of the interested parties were rejected at preliminary stage and for the same reasons. Both request for review no 5 and 6 of 2016 raised the same issues in respect of the tender. The holding by the Respondent that the decision of the Entity to reject Machiri's

- bids stands while setting aside that of Toddy for the same reason is clearly irrational and demonstrates bias and its unreasonable.
- d. The Board's decision holding steel was optional material cannot be limited to apply only Toddy to exclusion of other parties whose bids were rejected on the said grounds and who participated in the proceedings. Limitation of such holding only to apply to Toddy is unreasonable and is a clear manifestation of bias.
  - e. The Board in awarding the contract clearly failed to follow the law as restated by this court in its decision in Misc Application No.26 of 2015 in which the Court held that the power of the Board to substitute its decision with that of procuring entity is limited to what the procuring entity was lawfully permitted to undertake both substantively and procedurally.
53. In tandem with respondent power as set out in the Act and provisions of the section 2 of the Act, the only remedy available to the Board once it set aside the Entity's decision to reject the bids offering steel was to order a re-evaluation of those bids. It could not properly take over the role of the Entity to evaluate the bids and subsequently award.
54. In those circumstances Machiri prayed that the Board's decision to award the contract to Toddy be set aside and substituted with the order that the Entity proceeds and re-evaluate the bids based on steel and make an award as appropriate.
55. Machiri therefore prayed that the orders sought herein be granted as prayed.
56. It was submitted on behalf of Machiri that the objection raised by the applicants on the Board's jurisdiction was similarly raised before the Board and dismissed on the ground that by virtue of the provisions of section 167(1), 181 and 183 of the Act (2015 Act) and the provisions of section 8 of the third schedule to the Act, and part XV of the Act which had by then come into effect, a party seeking to file a request for review was at liberty to do so within fourteen (14) days of notification of the outcome of its tender or within fourteen (14) days of becoming aware of any breach of duty by the procuring entity under the provisions of the Act or the regulations. To Machiri, this was the proper position in law and the relevant section to determine time is section 167 of the repealed Act. Although on 7<sup>th</sup> January 2016, the new Act came into operation by repealed the repealed Act, the new Act in schedule 3 provided for transitional provisions. Section 1 of the said schedule provided that "*procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.*" However Section 8 of the said Act provided that "**PARTS III and XV of this Act shall apply, with necessary modifications, with respect to procurement and disposal proceedings commenced before the commencement date of this Act.** It was therefore submitted that though the law applicable for procurement before commencement of the new Act was the repealed Act, for issues provided under Part III and XV of the 2015 Act, the 2015 Act would apply with necessary modifications. Therefore the substantive law governing Review filed after 7<sup>th</sup> January 2016 is Part XV of the repealed Act which provides at section 167(1) thereof as follows:

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

57. According to Machiri, the repealed Act did not provide for time within which a request for review was to be filed. The relevant section 93 left the issue of time to be prescribed in the regulations and this was subsequently provided for in Regulation 73(c) which provides 7 days by virtue of amendment by Legal notice 106 of 2013. However, the **Public Procurement and Asset Disposal Act 2015** Part XV has substantive Section 167(1) providing for time. This section provides for 14 days. Being a substantive provisions of the Act it cannot be modified by regulations as regulations are subsidiary legislation and when in conflict with substantive provisions in the Act they have to give way. It was therefore submitted that from this section it's clear that an applicant has 14 days from date of receipt of notification to file request for review and the Request No 6 of 2016 having been filed within 14 days of notification was filed within time. Accordingly the board had

- jurisdiction to hear and determine the same.
58. On the allegation that the Board's jurisdiction ousted under section 6 of 2005 Act as the tender was being financed under a finance agreement, it was submitted that section 6 of the Act provides for resolution of a conflict between the provisions of the Act and obligations of Republic of Kenya under a treaty or agreement but does not oust the jurisdiction of the Board granted under the Act.
59. On the issue whether steel was an optional material, it was submitted that the issue was addressed by the Board at page 45 to 48 of the ruling and that the holding by the Board was properly within the Boards' jurisdiction and in accordance with the facts before the Board. In so holding, the respondent's clearly acted within its jurisdiction and that part of the holding was clearly supported by the facts before the board.
60. It was however reiterated that the Board's decision to award the contract to Toddy was without jurisdiction, irrational, biased, unreasonable and unlawful and should be quashed since it is a common ground that the bids based on steel were rejected at preliminary stage and were not subjected to detailed evaluation by the Entity. Once that decision of the Entity was set aside, evaluation was to proceed on the rejected bids. Since evaluation of bids is clearly a mandate of the procuring entity, the Board does not have jurisdiction to carry out any evaluation. In so far as it proceeded to carry out evaluation its action was without jurisdiction. This position according to Machiri is supported by section 66 (1) of the repealed Act which states that the Procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63 (3). The Respondent therefore acted outside its jurisdiction by conducting financial evaluation since it had no jurisdiction to evaluate tenders. Machiri relied on **Republic vs. Public Procurement Administrative Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] eKLR**, where the Court held that where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation.
61. It was Machiri's case that since the award is end result of evaluation under Section 66 of the Act as read with regulation 47, 48, 49 and 50, award can only issue to bidder with the lowest evaluated price by virtue of section 66(4) of the repealed Act which provides that "The successful tender shall be the tender with the lowest evaluated price". The said section as read with provisions of regulation 47, 48, 49 and 50 clearly shows the evaluation steps which bids have to be taken through to determine their evaluated price and subsequent ranking to determine the lowest evaluated price. From the said provisions bid price is only one criterion in the evaluation process and lowest bid price is not the same as lowest evaluated price. Therefore award cannot issue without proper and full evaluation of bids. Award can also not issue to a bidder just because its price is lowest as the Board so to do. The Bid by Toddy did not go through the evaluation and could not in manner whatsoever otherwise be determined as having the lowest evaluated price. Without evaluation it could not be a candidate for award. Award in such a case is clearly *ultra vires* and ought to be quashed.
62. It was submitted that award of a contract arises out of a fair transparent evaluation of bids. It's a procedural act. The respondents act of awarding the contract to Toddy allegedly because of the urgency of implementing the subject project which is donor funded is arbitrary and clearly outside its jurisdiction. Further the respondents purported justification for the said award is arbitrary and with no basis in law.
63. It was contended on behalf of Machiri that since it is a common ground that the bid by Toddy at Kshs 1,943,342,782.40 was higher than that of Machiri Ltd at 1,685,288,891.60, the decision of the Board that Toddy's bid was lowest is a decision which no reasonable tribunal applying its mind on the issue could have reached and was is clearly irrational and unreasonable. It is a common ground that the bids of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties were rejected at preliminary stage and for the same reasons. Both request for review no 5 and 6 of 2016 raised the same issues in respect of the tender. The holding by the Respondent that the decision of Entity to reject Machiri's bids stands while setting aside that Toddy for the same reason is clearly irrational. It demonstrates bias and it's unreasonable since the Board's decision holding steel was optional material cannot be limited to apply only to Toddy to exclusion of other parties whose bids were rejected on the said grounds and who participated in the proceedings. Limitation of such holding only to apply to Toddy is unreasonable and is a clear manifestation of bias.
64. In those circumstances Machiri prayed that the Board's decision to award the contract to Toddy be

set aside and substituted with the order that the Entity proceeds and re-evaluate the bids based on steel and make an award as appropriate.

### **Respondent's Case**

65. *On the part of the Board, it was averred that on 9<sup>th</sup> February 2016, the Board received Toddy's Request for Review challenging the award of Tender Number NCSB/Wassip-AF/W/2014 Lot 3 for the supply and construction of the Kakuyuni to Gongoni and Kilifi Pipeworks, Baricho immediate works- Lot 3. When the said Request for Review came up for directions on 17<sup>th</sup> February 2016, the Board directed that it be heard together with Request for Review No. 5 of 2016 filed by Machiri Limited against Coast Water Services Board though each Request for Review would attract a separate decision.*
66. *According to the Board, upon receiving the Requests for Review, the Entity was immediately served and notified of the pending Review as required by the provisions of section 168 of the **Public Procurement and Asset Disposal Act, 2015**. The said Requests for Review were heard on 23<sup>rd</sup> February 2016 wherein the Board considered the said Requests for Review, the Memorandum of Response, the Preliminary Objection by the Entity, the oral and written submissions of the parties as well as the authorities relied on by the parties. It also considered the original tender documents, the evaluation reports and other documents supplied to it by the Entity and upon consideration of the submissions made by the parties and the documents before it, the Respondent identified four issues for determination from the applications for Review namely:*
- a. *Whether the applicant's request for review was filed out of time and whether the Board therefore has jurisdiction to consider the Request for Review.*
  - b. *Whether ASP Company Limited had the locus standi to participate in the proceedings now before the Board as an interested party.*
  - c. *Whether the procuring entity breached the provisions of section 66(2) and (3) of the **Public Procurement and Disposal Act** and clarifications no. 3 by declaring the applicant's tender as non-responsive on account of having presented its bid using steel pipes in its bid documents instead of ductile iron.*
  - d. *Whether the procuring entity breached the provisions of section 66(4) of the Act by failing to award the tender to the applicant which was the lowest bidder in terms of price.*
67. *It was averred that contrary to the Entity's allegation, the Board at page 45 of its decision noted that the lack of clarity in the bid documents is what led to the bidders seeking clarification regarding whether it was permissible for a bidder to bid using steel pipes and fittings in lieu of ductile iron pipes and fittings under item no. 32 of the Bills of Quantities. Further, and contrary to the allegation that the Board purported to rewrite and amend the Entity's Bid documents, the Board only gave effect to the Entity's bid documents and clarification no. 3 contained in the letter dated 30<sup>th</sup> September 2015.*
68. *According to the Board, in making its findings contained in the decision dated 1<sup>st</sup> March 2016, it was within its powers as provided for in section 173 of the **Public Procurement and Asset Disposal Act, 2015**. Contrary to the Entity's allegation, the Respondent at page 33 of its decision found that both parts III and XV of the new Act and the provisions set out under the other sections of the Third Schedule had come into effect and advised bidders to read the provisions of the new and old Act for the purposes of keeping abreast with the applicable law and therefore did not contradict itself. The Respondent at page 29 of its decision noted that it had considered several decided cases on the effect of the repeal of a statute and all the decisions were unanimous that once an Act of Parliament was repealed it ceases to exist completely unless the repealing Act provides otherwise. It was therefore contended that contrary to the Entity's allegation, the Respondent's decision was not arbitrary or unreasonable at all; neither the Entity nor any other party cited any specific provision of the repealed Act, or the regulations made thereunder that it alleged was in conflict with the World Bank donor conditions and the Board at page 47 of its decision noted as much. The Board averred that contrary to CHICO's allegation that the Board acted contrary to the law and without jurisdiction by disregarding the dispute resolution procedure*

stipulated by the World Bank when it determined the Request for Review, the Board was within its powers in entertaining the same. According to the Board, the dispute resolution procedure contemplated in the Bidding documents is in relation to a dispute that arises after a contract has been entered into. In any event, none of the parties pointed out any particular provision in the World Bank guidelines that ousted the jurisdiction of the Board to hear and determine the Request for Review and cannot therefore purport to bring it up in these proceedings.

69. The Board denied that it acted contrary to the provisions of the law in awarding the tender to Toddy. According to the Board, Toddy had not been disqualified at the preliminary evaluation stage as alleged but at the technical stage and was subject to the factors set out at Regulation 50 of the Regulations as directed by the Board at page 50 of its decision. The Board therefore asserted that it acted within its powers as provided by section 98 of the repealed Act 2005. In its view, the applicants herein are actually challenging the merits of its decision albeit disguised as a judicial review application which ought to challenge the procedure of arriving at a decision hence the application is lacking in merit and should therefore be dismissed with costs to the Respondent.
70. It was submitted on behalf of the Board that the **Public Procurement and Asset Disposal Act No. 33 of 2015** came into force on 7<sup>th</sup> January 2016 and that the said Act at section 182(1) repealed the **Public Procurement and Disposal Act of 2005**. Section 1(1) of the repealed Act in the Third Schedule that deals with Transitional Provisions provides:

***“1 (1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.***

***(2) For the purposes of subparagraph (1), procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.”***

71. It was further submitted that section 8 of the Third Schedule, on administrative review etc. for existing proceedings provides as follows:

***Parts III and XV of this Act shall apply, with necessary modifications, with respect to procurement and disposal proceedings commenced before the commencement date of this Act.***

72. According to the Board, the first advertisement in respect of the procurement in question was done on 27<sup>th</sup> August 2015 and as this was before the commencement of the 2015 Act, the applicable law to the procurement in question is the repealed Act. The request for review no. 6 of 2016 that led to the impugned decision herein was filed before the Respondent on 9<sup>th</sup> February 2016 after the new Act had come into force. In the circumstances, Part XV of the 2015 Act was applicable to that request for review which part provides for Administrative Review of Procurement and Disposal Proceedings. According to the Board therefore both the repealed Act and the 2015 Act are applicable hence part XV of the 2015 Act was correctly applied to the request for review no. 6 of 2016 filed before the Board.

73. On the issue whether the Request for Review no. 6 of 2016 was filed outside the seven day period prescribed under regulation 73(2) of the repealed Public Procurement and Disposal Regulations, 2006, it was submitted that that request for review no. 6 was filed before it within the prescribed timeframe of fourteen days and was therefore properly before the Board and it had jurisdiction to hear and determine the same. The Board relied on section 167(1) of the new Act which provides:

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

74. The Board further submitted that section 182(1) of the 2015 Act repealed the Public Procurement and Disposal Act while Section 183 of the 2015 Act provides that the transitional provisions specified in the Third Schedule shall apply. According to the Board, the time for filing a request for review is now prescribed in the substantive provisions of the Act unlike in the repealed Act where the same was provided for under the regulations that had been made thereunder. The period for filing such requests for review is now fourteen days unlike previously when it was seven days. To it, section 8 of the transitional provisions provides that part XV shall apply with necessary modifications, with respect to procurement and disposal proceedings commenced before the commencement date of this Act. It is therefore clear that Part XV of the 2015 Act was intended to apply to procurement and disposal proceedings that had been commenced before the commencement date of the new Act since it provides for necessary modifications.
75. According to the Board, the Entity's interpretation that that Part XV of the new Act is the procedural law applicable in a review and does not relate to the substantive law to be followed by the Review Board when hearing a review and making its decision, is quite absurd. A look at part VII of the repealed Act which provided for administrative review of procurement proceedings and Part XV of the new Act reveals that the provisions are fairly similar save for a few additions in the new Act. It is therefore not correct to state that Part XV of the new Act provides for the procedural law applicable in a review and does not relate to the substantive law to be followed by the Review Board when hearing a review and making its decision.
76. It was the Board's submission that request for review no. 6 of 2016 was filed before it within the required time period of fourteen days and it therefore had the requisite jurisdiction to hear and determine the same.
77. With respect to the contention that section 6(1) of the repealed Act ousts the jurisdiction of the Respondent since the subject tender is a wholly funded project and is subject to the World Bank (donor) guidelines and conditions, the Board relied on section 6(1) of the repealed Act aforesaid.
78. In the Board's view, the operative word in this provision is conflict and there being no provisions of the repealed Act that were cited as being in conflict with the World Bank guidelines and conditions, there was no basis for the Respondent to find that its jurisdiction had been ousted. The Board reiterated that none of the parties to the review pointed out any particular provision in the World Bank guidelines that ousted its jurisdiction to hear and determine the Request for Review and cannot therefore purport to bring it up in these proceedings.
79. On the contention that the Board had no jurisdiction to evaluate the tender and award it to another bidder, it was disclosed that the Board in its decision delivered on 1<sup>st</sup> March 2016 made the following as one of its final orders:

***“In exercise of the powers conferred upon it by the Provisions of the Act and owing to the urgency of implementing the subject project which is donor funded the Board hereby substitutes the decision of the procuring entity and directs that the subject tender be awarded to the applicant at its tender price of Kshs 1,943,343,782.40 subject to the correction of any arithmetical errors and upon taking into account the factors set out under the provisions of regulation 50 of the Public Procurement and Disposal Regulations which are still applicable to this tender.”***

80. It was the Board's position that section 173(c) of the 2015 Act empowers it to substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings. Therefore in making its final orders it was guided by the said provision of the 2015 Act. However, that order was not absolute but was subject to the provisions of Regulation 50 of the ***Public Procurement and Disposal Regulations, 2006*** which provides for financial evaluation of tenders and states that:

***(1) Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.***

***(2) The evaluated price for each bid shall be determined by:-***

- a. *Taking the bid price, as read out at the bid opening*
- b. *Taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;*
- c. *Taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2)a of the Act.*
- d. *Where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;*
- e. *Applying any discounts offered in the tender*
- f. *Applying any margin of preference indicated in the tender documents*

81. The Respondent contended that in making this order it took cognisance of the urgency in implementing the said project and the fact that the applicant in request for review no. 6 of 2016 had not been disqualified at the preliminary evaluation stage as alleged but at the technical stage.

82. Whereas it was alleged that the Board awarded the tender to another party despite finding that the tender documents lacked clarity the Board explained in its decision it found as follows at page 44 to 45:

***“...The main issue which arises for determination under this head is whether it was permissible for a bidder to bid using steel or it was mandatory for all bidders to use ductile iron. The Board finds that a careful reading of the advertisement, the tender document and the Bill of Quantities shows though the advertisement and some portions of the tender documents referred to the use of ductile iron and other ferrous pipes and steel, item no. 32 in the Bills of Quantities indicated that bidders could either bid using steel pipes or ductile iron pipes but the individual items in the Bill of Quantities only gave specifications for ductile iron.*”**

83. In the Board’s view, it was the lack of clarity which led to bidders seeking clarification regarding whether it was permissible for a bidder to bid using steel pipes and fittings in lieu of ductile iron pipes and fittings under item no. 32 of the Bills of Quantities. It was contended that the Board considered the clarification issued by the Entity before making its final orders and did not base its decision solely on the initial tender documents as had been issued. The Respondent found that the clarification issued by the Entity herein clarified to the bidders that it was permissible to bid using steel pipes.

84. As to whether there was unreasonable delay in supplying the Entity with typed copies of the proceedings and decision eight days after it had been delivered, it was submitted by the Board that this was not unreasonable at all and no prejudice was suffered by the applicant as it was able to file judicial review proceedings within time hence nothing turned on this issue. In support of this submission the Board relied on **Republic vs. Public Procurement and Administrative Review Board ex parte Akamai Creative Limited Misc Civil Applic. No. 513 of 2015** where the Court expressed itself as follows:

***“It was contended that the Board’s failure to furnish the applicant with a signed decision until after the expiry of 7 days after the delivery of the decision violated Article 47 of the Constitution. In my view, Article 47 of the Constitution requires that parties to an administrative proceedings be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly where an administrative body unreasonably delays in furnishing the parties with 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. However, since these proceedings were instituted within time nothing of substance turns on the said issue.”***

85. With respect to the sustainability of the orders sought it was submitted that declarations do not fall under the purview of judicial review and as such this court sitting as a judicial review court has no power to grant the same. In support the Board relied on **Sanghani Investment Limited vs.**

**Officer in Charge Nairobi Remand and Allocation Prison 2007 eKLR** wherein the court stated as follows:

**“Section 8 of the Law Reform Act specifically sets out the orders that this court can issue in Judicial Review proceedings. The orders are, mandamus, certiorari and prohibition. A declaration does not fall under the purview of Judicial Review for the simple reason that the court would require viva voce evidence to be adduced for the court to determine the case on the merits before declaring who the owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the Affidavits filed in support of the Application.”**

86.The Board similarly relied on **Republic vs. Cabinet Secretary, Ministry of Interior and Coordination of National Government & 2 Others ex parte Patricia Olga Howson [2013] eKLR** where it was held that:

**“I however agree with the Respondents that the only remedies available in judicial review proceedings under sections 8 and 9 of the Law Reform Act are certiorari, prohibition and mandamus and hence declaratory orders cannot be issued in purely judicial review proceedings.”**

87.With respect to prohibitory orders, it was submitted that the same cannot be granted since contractual matters are not amenable to judicial review given that they fall within the private law realm and reliance was sought from **Maurice Okello vs. Permanent Secretary, Ministry of Lands and Housing [2008] eKLR** in which the court in declining to grant the orders sought stated as follows:

**“The right sought to be enforced is a private contractual right of sale of a house, between two parties. If this court were to intervene, it would be seeking to create a contract, that the Respondent do allocate the house to the applicant. In my view, that would be forcing the Respondent to enter into contract, thus forcing an unwilling party to enter into a contract of sale. This is a matter of contract which is in the private law realm and cannot be subject to judicial review and therefore even if the applicant were qualified to get the house this court would not intervene.”**

88.On the scope and efficacy of an order of prohibition, the Board relied on Kenya **National Examination Council vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**.

89.It was therefore the Board’s position that the applicants have not made out a case for the grant of judicial review orders as sought against it since in its view, the proceedings before the Respondent were regular and it had jurisdiction to adjudicate upon the matters raised in the impugned decision. It relied on the Court of Appeal decision in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others [2012] eKLR** where the learned judges observed that:

**“In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1<sup>st</sup> Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.**

90.The Board also relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 [2002] eKLR** where the Court of Appeal held:

**“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.”**

### **The 1<sup>st</sup> Interested Party’s Case**

91. According to the 1<sup>st</sup> Interested Party, Toddy, it was a bidder in tender No. CWSB/WASSIP-AF/W/1/2014/LOT-3 for supply and construction of Kakuyuni to Gongoni and Kakuyuni to Kilifi pipeline works, Baricho immediate works – Lot 3 but its bid was rejected at the preliminary stage by the Entity through a letter dated 26<sup>th</sup> January 2016. Machiri was also a bidder in the above tender and its bid was rejected at the preliminary stage for the same reasons as that of the 1<sup>st</sup> interested party through a letter dated 26<sup>th</sup> January 2016 which was delivered on 28<sup>th</sup> January 2016. Both of them challenged the decision of the Procuring Entity through request for review number 6 of 2016 and request for review number 5 of 2016 respectively and on 17<sup>th</sup> February, the Public Procurement Administrative Review Board directed that both applications be consolidated for hearing and parties to file joint submissions.
92. Subsequently, the Board delivered a ruling in application number 5 of 2016 on 25<sup>th</sup> February 2016 to the effect *inter alia* that a partner of the 2<sup>nd</sup> Interested party, **Sinohydro Tianjin Engineering Company Limited J/V Machiri Limited**, trading as Machiri Limited had no *locus standi* to commence the request for review as it was not the bidding party. On 1<sup>st</sup> March the Board delivered a ruling in application number 6 of 2016 and awarded the tender to the Toddy.
93. In support of its case, Toddy relied on the affidavit sworn on behalf of the Board by **Henock Kirungu** on 13<sup>th</sup> May 2016 and further associated itself with the Board’s written submissions.
94. According to Toddy, the Board had jurisdiction to hear and determine Application No. 6 of 2016 and relied on the Board’s finding at page 32 of its decision that:

**“...by virtue of the provisions of section 167(1), 181 and 183 of the Act (2015 Act) and the provisions of section 8 of the third schedule to the Act, part XV of the Act has now come into effect and a party seeking to file a request for review is therefore at liberty to do so within fourteen (14) days of notification of the outcome of its tender or within fourteen (14) days of becoming aware of any breach of duty by the procuring entity under the provisions of the Act or the regulations.”**

95. To Toddy, the Board was right and within its Jurisdiction to hold that Steel was an optional material and the Entity could not reject bids based on steel.
96. To Toddy, the order by the Board to award it the contract was not without jurisdiction, was not irrational, biased, unreasonable and unlawful and the said order should not be quashed since the powers of the Board are outlined at section 173 of the 2015 Act under which sub-section c provides that the Board may substitute the decision of the accounting officer of a procuring entity in the procurement or disposal proceedings. It was Toddy’s submission that in making its final orders it was guided by the said provisions of the 2015 Act and more particularly section 173 of the 2015 Act when it specifically awarded the Contract to Toddy since the Board had every right to sit, re-evaluate and award the contract to Toddy.

### **Determinations**

97. *I have considered the issues raised in this application.*
98. *One of the issues raised is whether the Board had jurisdiction to entertain the Request for Review that was filed before it.* Being an issue going to jurisdiction, **Nyarangi, JA** held in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1** that:

**“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

99. Similarly in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 the same Court expressed itself as follows:

**“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”**

100. *Therefore, the Board was obliged to determine the issue whether it had jurisdiction or not, though the decision thereon does not bar this Court from entertaining judicial review proceedings if in fact the Board had no jurisdiction. No tribunal can by its own decision finally decide on the question of existence or extent of the limits of their jurisdiction, such question is always subject to review by the High Court which should not permit the inferior tribunal either to usurp a jurisdiction it does not possess at all or to the extent claimed or refuse to exercise a jurisdiction which it has. See Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another [2006] 1 EA 318.*

101. *In this case, the first ground of lack of jurisdiction was that the Board had entertained the Request for Review out of time. In my view an issue of limitation can be taken at any point in the proceedings and where it is alleged that the Board entertain the request for review outside the period stipulated therefor, this Court is not barred from dealing with the issue as such an issue goes to the jurisdiction of the Board and cannot be treated as a mere technicality. This was the position adopted in Tzamburakis and Another vs. Rodoussakis Civil Appeal No. 5 of 1957 (PC) [1958] EA 400 where it was held that:*

**“No procedural defect can relieve the Court of Appeal of its duty to give effect to the statute on an appeal from a Judgement given to a plaintiff in respect of a time barred cause of action... An abandonment of a plea of limitation cannot relieve the Court from taking notice of it.”**

102. The same position was adopted by the Court of Appeal in Pauline Wanjiru Thuo vs. David Mutegi Njuru Civil Appeal No. 278 of 1998 where it was held that:

**“A preliminary objection based on limitation can be taken for the first time on appeal because it goes to jurisdiction.”**

103. In contending that the Request was made out of time reliance was placed Regulation 73(2) of the *Public Procurement and Disposal Regulations* under the repealed Act which provides that a request for review shall be made within seven days of either the occurrence of breach complained

of or notification of successful tenderer under sections 67 or 83 of the Act. It is not in doubt that the Request for Review was filed on 9<sup>th</sup> February 2016 yet by Toddy's own admission, they received a notification under section 67 on 28<sup>th</sup> January 2016. If the said Regulation was applicable, it would follow the Request for Review was filed 11 days after receiving a notification and was, in effect, filed 4 clear days out of time. However, section 167(1) of the new 2015 Act provides as follows:

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

104. It is therefore clear that section 167(1) of the new Act is subject to Part XV of that Act. The general rule is that a repealing Act takes effect from the date of its operation and, save as provided under the ***Interpretation and General Provisions Act, Cap 2 Laws of Kenya***, the repealed Act ceases to exist. However the repealing Act may provide for a saving or transitional clause in which event specific provisions of the repealed Act may still be applicable to the extent of the said clause.

105. In this case the new 2015 Act in schedule 3 provided for transitional provisions. Section 1 of the said schedule provided that:

***“procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.”***

106. In my view what the said clause preserved were ***procurement proceedings commenced before the commencement date*** of the new 2015 Act. The new Act commenced on 7<sup>th</sup> January, 2016 while the proceedings before the Board were commenced vide a request filed on 9<sup>th</sup> February 2016. In my view the request must therefore be construed pursuant to section 8 of the said Schedule which provides that:

***“Parts III and XV of this Act shall apply, with necessary modifications, with respect to procurement and disposal proceedings commenced before the commencement date of this Act.”***

107. It is therefore my view that with respect to the period for the filing of the request, the applicable provisions in respect of the instant proceedings was section 167(1) of the new 2015 Act. It follows that the request was made within time and the objection on time must fail.

108. *The next issue on jurisdiction* was, according to the Entity, as the Tender was a wholly funded project funded by a subsidiary of the World Bank, the International Bank for Reconstruction and Development (IBDR) and the International Development Association (IDA) (the Donor), was subject to the Donor guidelines and conditions hence section 6(1) of the old Act ousts the jurisdiction of the Board.

109. The Purpose of the repealed Act was provided under section 2 thereof 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 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.*

110. This provision was dealt with by 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 the following terms:

**“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...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.”**

111. What I understand the Judge to have been saying is that the purpose of the repealed Act was substantially for the benefit of the public. It was not meant to satisfy the donors or development partners who may not necessarily be philanthropic in their ventures and some of whom are mainly keen on the returns. Taking into account that some of these facilities accrue interest payable by the public, it is therefore important that the spirit of the repealed Act be adhered so as to achieve integrity, fairness, transparency and accountability of the procurement process in order to achieve maximum benefit to the public. Unless this is assured, the possibility that the public would be subjected to repayment of facilities which benefited individuals would not be ruled out.

112. It is in this light that in my view Parliament enacted section 6(1) of the repealed Act which provides as follows:

***Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.***

113. In other words the provisions of the Act applied to all obligations of the Country whether arising from treaties or other agreements to which the Country is a party and would supersede any provisions contained in the said treaties or agreement save that they would not apply to negotiated grants and loans. In the latter case I agree that if there is a conflict between the repealed Act and the conditions imposed by the donor of funds, the conditions shall prevail with respect to a procurement process that uses those funds.

114. The question however, is whether there was a conflict between the provisions of the Act and the conditions imposed by the donors. In my view, even assuming there was such a conflict, section 6(1) does not deprive the Board of the jurisdiction to entertain a matter that falls within its jurisdiction. What section 6(1) provides is that where there is a conflict between the provisions of the Act and the terms and conditions of the donor in instances of negotiated grants or loans the Board in determining the dispute ought to take into account the fact that those terms and conditions supersede the provisions of the Act.

115. In my view the Board's jurisdiction would only be ousted if the terms and conditions of the

agreement expressly excluded the application of the repealed Act. That brings me to the issue whether the subject tender fell within the realms of a negotiated grants or loans. The Tender in question was guided by the document known as ***Guidelines Procurement of Goods, Works and Non-Consulting Services Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers***. It was expressly stated therein that the Loan Agreement governed the relationship between the Borrower and the Bank and that the Guidelines were applicable to procurement of goods, works, and non-consulting services for the project as provided in the agreement. It is therefore clear that the subject Tender fell within the realm of a negotiated grants or loans. Accordingly in the event of any conflict between the terms of the Act and the Agreement, the latter would prevail

116. Were there any such conflicts? According to the Entity, in failing to refer the dispute to the donor, and making the impugned decision, the Board deliberately ignored mandatory tender requirements that all disputes be referred to the donor, through the Procuring Entity for determination. However, no such clause was referred to by the applicants. From clause 2.43 of the ***Guidelines***, reference to arbitration was in respect of a contract which contract is yet to be signed as the tender is yet to be awarded due to the disputes bedeviling the Tender.
117. The Board in its decision found that neither the Entity nor any other party cited any specific provision of the repealed Act, or the regulations made thereunder that they alleged were in conflict with the World Bank donor conditions. Obviously if this finding was erroneous, the same would only have been properly challenged by way of an appeal. I however agree with the Board that the dispute resolution procedure contemplated in the Bidding documents is in relation to a dispute that arises after a contract has been entered into.
118. It was contended that the Board had no jurisdiction to evaluate the tender and award it to another bidder. This is due to the fact that the Board has no powers to evaluate the tender or bids presented by tenderers, including the bid presented by the Toddy. What then is the role of the Review Board when determining a request for review? That the Board has wide powers was appreciated in **Civil Appeal No. 145 of 2011 - Kenya Pipeline Company Ltd vs. Hyosung Ebara & Co. Limited and Others [2012] eKLR**. 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*, 9<sup>th</sup> 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*, 9<sup>th</sup> 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.

119. 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 section 98 of the repealed 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 repealed Act.

120. I hasten to add however 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.”**

121. 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.”**

122. 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.

123. It was submitted that the Board in its decision considered only financial value of the bids whilst ignoring all other aspects of the tender process and requirements. My view is that in public procurement and disposal, the starting point is Article 227(1) of the Constitution which provides the minimum threshold that any public procurement must meet when it states that:

***When a State organ or any other public entity contracts for goods or services, it shall do so***

*in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.*

124. A procurement must therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder or even in the Tender document, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any other consideration which does not espouse these ingredients can only be secondary to the said Constitutional dictates. In my view, the consideration of the lowest tender as a form of cost-effectiveness 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. It ought to be emphasised that section 66(4) of the repealed Act talks of ***the lowest evaluated price***, as opposed to merely the lowest price. The issue of price must therefore follow an evaluation in accordance with the Tender document.
125. 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.”**

126. 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.”**

127. In other words the spirit of section 66(4) of the repealed 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.
128. According to the Entity, the Board in its Award, ignored mandatory provisions of the Tender that required bidders intending to bid using an alternate material to provide 2 sets of bids i.e. in the original material (Ductile Iron) and the other preferred material and set aside the Entity’s decision that Toddy’s bid was unsuccessful at the Technical Evaluation stage for submitting a bid using only steel as an alternate material without first providing a bid for Ductile Iron. On the part of the Board, it was contended that the lack of clarity led to bidders seeking clarification regarding whether it was permissible for a bidder to bid using steel pipes and fittings in lieu of ductile iron pipes and fittings under item no. 32 of the Bills of Quantities and that the Board considered the clarification issued by the Entity before making its final orders and did not base its decision solely

on the initial tender documents as had been issued and found that the clarification issued by the Entity herein clarified to the bidders that it was permissible to bid using steel pipes.

129. In my view whereas such a finding may well be found by the appellate Tribunal to have been erroneous, it does not necessarily warrant interference in judicial review proceedings. In **Civil Appeal No. 145 of 2011 - Kenya Pipeline Company Ltd vs. Hyosung Ebara & Co. Limited and Others [2012] eKLR** the Court of Appeal expressed itself as follows:

**“Lastly the Review Board made a finding that the 1<sup>st</sup> Respondent did not in fact supply a manufacturer’s authorization letter as the one relied on by the 1<sup>st</sup> Respondent was issued to a different entity and rejected the alternative contention that the manufacturer’s 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 1<sup>st</sup> Respondent’s tender had met the mandatory conditions. The issue whether or not the 1<sup>st</sup> Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.”**

130. In this respect I associate myself with the decision in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728** where the court held as follows:

**“From the foregoing it is clear that the 1<sup>st</sup> 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 1<sup>st</sup> Respondent’s said decision and reach a conclusion that the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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).....***

131. 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 2<sup>nd</sup> 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.”**

132. I would therefore not interfere with the Board’s finding on the use of steel as an alternate

material without first providing a bid for Ductile Iron.

133. It was the Entity's position that in its Award, the Board found at page 45 that the tender documents were vague. However, despite finding that the tender documents lacked clarity, the Board went on to interpret the tender documents in favour of Toddy. It was submitted that having found the tender to have been vague, the only reasonable and lawful action for the Board was to refer the tender back to the Entity with directions to amend the tender documents to cure such vagueness. It is true that in *Akamai Creative Limited* (supra) this Court held that:

**“the Review Board had no powers to declare compliance with a regulation vague. If there was vagueness in the provision such vagueness can only be cured by the necessary amendment and not by ignoring the same...I therefore agree that where the Board finds that a particular clause in the tender document is vague, it is not for the Board to substitute that clause with its own view of what ought to have been contained in the tender document. The best option is for the Board to remit the tender back to the procuring entity with appropriate directions. That was the position adopted by the Court 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 (supra) where it was held that:**

**‘If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender.’**

**Therefore if the Board found that the clause in the tender dealing with the survey on the prevailing market prices was vague, one wonders on what basis it proceeded to award the subject tender to the 2<sup>nd</sup> interested party. Such decision can, as rightly contended by the Applicant, be termed as being Wednesbury irrational as there is not rational basis upon which such a decision could be arrived at.”**

134. *The position here is however not similar to that in Akamai Case. In this case the Board found as I have stated above that its decision was based on the clarification made by the Entity itself. In other words the Board did not on its own motion set out to clarify the ambiguity but relied on the clarification offered by the Entity itself. Whether there was such clarification or not and whether its decision was in accordance therewith is not a matter for judicial review.*

135. *It was contended that According to CHICO, in awarding the Tender to Toddy, the Respondent usurped the role of the Evaluation Committee of the Entity as well as the role of the World Bank in evaluating an award of the Tender. In awarding of this Tender, the evaluation criteria required that all bids had to undergo Preliminary examination and the bid prices of the successful bidders (after preliminary examination) had to be adjusted to correct any arithmetical errors and any quantifiable non-material deviations or reservations and ranked based on the corrected price. The bidder with the lowest price was then subjected to post qualification evaluation whereby the following areas were examined against the requirements under the bidding document: (i) Adequacy of the technical proposal (ii) Financial Resources (iii) General and Specific Construction Experience (iv) Personnel (v) Equipment. However, it was contended by that by awarding the Tender to Toddy whose bid price had not been subjected to adjustment for arithmetical errors, ranking and post qualification evaluation, the Respondent committed a procedural impropriety by failing to adhere and observe procedural rules expressly laid down in the World Bank Evaluation Guidelines governing the Tender.*

136. *That Toddy was disqualified at the preliminary evaluation stage and was not subjected to detailed examination and post-qualification of bids was admitted by Toddy itself. In Nairobi JR No. 513 of 2015 - **Republic –vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited** which cited with approval the decision in Nairobi JR No. 261 of 2015 - **Republic –vs- The Public Procurement And Administrative Review Board & 2 Others ex parte Numerical Machining Complex Limited** it was observed that:*

**“If I understand the Respondents correctly they seem to be relying on the provision of**

section 98(c) which donated to the 1<sup>st</sup> Respondent the power to substitute its decision for that of the procuring entity. However, this provision cannot be read in isolation to the other provisions. In my view the power to substitute the decision of the procuring entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally. Section 66 (2) of the (old) Act made it mandatory for evaluation and comparison of bids using procedures and criteria set out in the Tender Document. This is reiterated under Regulation 16 of the Regulations. As we 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 & Others* (supra):

“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.”

In this case (*JGH Marine A/S Western Marine Services Ltd*) the impugned decision was taken before the Financial Evaluation was undertaken. Regulation 50(1) of the Regulations provides that:

*Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.*

The effect of compelling the Applicant to award the tender to the interested party was to compel the Applicant to ignore the aforesaid provision. The 1<sup>st</sup> Respondent in my view had no power to compel the Applicant to act unlawfully. By so doing it clearly exceeded its jurisdiction. It could only issue such directions and make decisions that the Applicant itself was lawfully permitted to issue or make.

Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law. See *Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090*.

Whereas the powers of the 1<sup>st</sup> Respondent in exercising its powers of review are wide, the same can only be exercised within the framework of an existing request for review. Any attempt to exercise powers outside that ambit would in my view amount to assuming jurisdiction which it does not possess.”

137. In my view, it is unlawful for the Board to adopt a procedure by which the provisions of the Tender documents are bypassed in the award of the tender. Where the Board awards the tender in

disregard of the provisions of the Tender document the Court would not hesitate to quash such a decision since section 66 of the repealed Act provides that the successful tender shall be the tender with the lowest ***evaluated*** price. The Board cannot in such circumstances justify its actions by reference to section 98 of the repealed Act since it ought not to in effect substitute itself for the procuring entity in matters where the Entity has addressed itself on.

138. In this respect I only wish to refer once again to the decision of ***Nyamu, J Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati***, (supra) that Fairness, transparency and accountability being core values of a modern society like Kenya, cannot be sacrificed at the altar the necessity to hasten or expedite the Procurement Procedures and finality. 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.

139. A complaint was raised with respect to the delay in supplying the parties with typed copies of the proceedings and decision. This complaint I must say with respect to the Board is a recurring complaint in many applications. In my view efficiency in procurement processes not only demands speedy determination of the disputes but also encompasses speedy and timely availability of the decisions to the parties so as to enable them decide on their next course of action. It is therefore my view that to unreasonably delay in furnishing proceedings and decisions to the parties amounts to unfair administrative action. This was this Court's view in ***Republic vs. Public Procurement and Administrative Review Board ex parte Akamai Creative Limited Misc Civil Applic. No. 513 of 2015*** where the Court expressed itself as follows:

**“It was contended that the Board’s failure to furnish the applicant with a signed decision until after the expiry of 7 days after the delivery of the decision violated Article 47 of the Constitution. In my view, Article 47 of the Constitution requires that parties to an administrative proceedings be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly where an administrative body unreasonably delays in furnishing the parties with 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. However, since these proceedings were instituted within time nothing of substance turns on the said issue.”**

140. The Board is therefore advised to put into motion the necessary steps to rectify this problem. Where the Court finds that the period between the furnishing of the proceedings and the decision and the last day for filing the request for review was too short to enable the party challenge the decision, the Court may well be entitled to find that such action was meant to deprive the said party of the opportunity to challenge the said decision hence would amount to a violation of the letter and/or spirit of Article 47 of the Constitution as read with section 6 of the ***Fair Administrative Action Act, 2015***. However as the parties hereto have not claimed that they were unduly prejudiced by the said delay nothing turns on this issue in the circumstances of this case.

141. 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.”**

142. It was contended contrary to section 66(4) of the Act, 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.***

143. *It was contended that the Board deliberately declined to cast its eye upon 2 other bidders whose financial bids were lower than that of Toddy. In my view after the evaluation is conducted, the Procuring Entity is still obliged to award the tender to the lowest bidder as long as the said bidder was successfully evaluated. To fail to consider this criterion 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 light of the allegations 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 Toddy without considering the said bids by the 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. In awarding the Tender to Toddy, it is my view and finding that the Board failed to consider relevant matters.*
144. *I also find that if the Tender document stipulated that the Technical Drawings were a fundamental and mandatory part of the tender, to find that the same were to be provided by the successful tenderer after award of tender, amounted to alteration of the Tender document and the Board had no power to do that.*
145. *With respect to the need to promote local industry, one of the purposes of the repealed Act in section 2 is to facilitate the promotion of local industry and economic development. Unless it is contended that the only consideration was promotion of local industry, it is my view that the failure by the Entity to promote local industry may in appropriate circumstances be a relevant consideration in the award of tender and the Board may well be entitled to take it into account.*
146. *With respect to the participation of **Sinohydro Tianjin Engineering Company Limited J/V Machiri Limited** in these proceedings, I agree that technically the party whose request was struck out was **Machiri Limited** and not **Sinohydro Tianjin Engineering Company Limited J/V Machiri Limited** hence there is nothing barring the latter from participating in these proceedings. *In fact that request was struck out on the ground that it was not made by **Sinohydro Tianjin Engineering Company Limited J/V Machiri Limited**.**

**Findings**

147. *Having considered the issues raised herein, it is my view and finding that the Board's decision in awarding the Tender to Toddy was tainted with procedural impropriety in that it amounted to bypassing an important and critical stage in the tender process. Further in arriving at its decision the Board failed to take into account a relevant matter being the lowest evaluated price in the tender. By ignoring the requirement for technical drawings, the Board ignored the Tender document and in effect substituted the Tender document with its own decision yet it had no power or authority to do so.*

**Order**

148. *In the premises the orders which commend themselves to me and which I hereby grant are as follows:*
- 1. An Order of Certiorari is hereby issued removing into this Court for purposes of being quashed, the Respondent's decision delivered on 1<sup>st</sup> March 2016 with respect to Tender No. CWSB/WASSIP-AF//W/1/2014/LOT 3 for supply and Construction of Kakuyuni to Gongoni and Kilifi Pipeline works, Baricho Immediate Works- Lot 3 allowing the 1<sup>st</sup> Interested Party's Request for Review Application No. 6 of 2016 filed on 9<sup>th</sup> February 2016 and directing the Applicant to consequently enter into a contract with the 1<sup>st</sup> Interested Party.**
  - 2. An Order of Prohibition prohibiting the 1<sup>st</sup> Applicant, the Procuring Entity from entering into the contract with the 1<sup>st</sup> Interested Party over and/or concerning Tender No. CWSB/WASSIP-AF//W/1/2014/LOT 3 for supply and Construction of Kakuyuni to Gongoni**

and Kilifi Pipeline works, Baricho Immediate Works- Lot 3 and/or based on the Respondent's said decision.

3. An order directing the 1<sup>st</sup> Applicant, the Procuring Entity, should it still be willing to carry on with the subject Tender to commence the process re-evaluation of the tenders submitted afresh in accordance with the terms of the tender document and the relevant legal provisions.
4. In the circumstances of this case, considering my direction above and as none of the parties can be said to be wholly successful, each party will bear own costs of these proceedings.

149.Orders accordingly.

Dated at Nairobi this 8<sup>th</sup> day of August, 2016

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Muthee for Mr Kibara for the 1<sup>st</sup> Applicant***

***Miss Maina for the Respondent***

***Mr Walubengo for the 1<sup>st</sup> Interested Party***

***Mr Njuguna for the 2<sup>nd</sup> Interested Party***

***Cc Mwangi***