



Vickers Security Services Limited & 2 others v Public Procurement Administrative Review Board; Hatari Security Guards Limited (Interested Party) (Judicial Review E003 & E006 of 2025 (Consolidated)) [2025] KEHC 1648 (KLR) (Judicial Review) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E003 & E006 OF 2025 (CONSOLIDATED)
JM CHIGITI, J
FEBRUARY 21, 2025**

BETWEEN

**VICKERS SECURITY SERVICES LIMITED 1ST APPLICANT
KENYA REVENUE AUTHORITY 2ND APPLICANT
ACCOUNTING OFFICER KENYA REVENUE AUTHORITY ... 3RD APPLICANT**

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

HATARI SECURITY GUARDS LIMITED INTERESTED PARTY

JUDGMENT

1. The parties before this Court in a consent dated 14th February, 2025 agreed to have HCJR No.E003 of 2025 and HCJR No.E006 of 2025 consolidated. They also agreed to have HCJR No.E003 of 2025 as the lead file in the consolidated applications.
2. Although the applications were consolidated I find it prudent to reproduce what each applicant in the respective judicial review applications sought in their substantive motion.
3. In HCJR No.E003 of 2025 the 1st Applicant-Vickers Security Services Limited filed a Notice of Motion application dated 10th January, 2025 seeking the following orders;
 1. That, an order of Certiorari do issue to;



- i. Remove and bring to this Honourable Court for purposes of quashing the decision of the 1st Respondent dated 6th January 2025 in Review Application No. 124/2024.
 - ii. Remove and bring to this Honourable Court for purposes of quashing the decision of the 1st Respondent dated 6th January 2025 cancelling and setting aside the Letter of Notification of Intention to Award dated 2nd December 2024 to the Applicant herein.
 - iii. Remove and bring to this Honourable Court for purposes of quashing the decision of the 1st Respondent dated 6th January 2025 cancelling and setting aside the Letter of Notification of Intention to Award dated 2nd December 2024 to the Interested Party and copied to all the unsuccessful bidders.
 - iv. Remove and bring to this Honourable Court for purposes of quashing the decision of the 1st Respondent dated 6th January 2025 directing the 2nd Respondent to direct the Tender Evaluation Committee to undertake re-evaluation at the financial evaluation stage including carrying out due diligence exercise with respect to the impugned tender within twenty-one (21) days from the date of the decision.
 - v. Remove and bring to this Honourable Court for purposes of quashing the decision of the 1st Respondent dated 6th January 2025 seeking to substitute the decision of the 2ndd Respondent's Evaluation Committee with its own.
2. That an order of Prohibition do issue;
 - i. Prohibiting the 2nd and 3rd Respondents from re-evaluating, conducting fresh due diligence or awarding the Tender and/or signing a contract with any other party other than the Applicant for the Provision of Security and Safety Services (Guarding, Lease of Security Equipment and Alarm Backup Services) for a Period of Three (3) Years pursuant to the decision of the 1st Respondent dated 6th January 2025.
 3. That, an order of Mandamus do issue;
 - i) Directing the 2nd and 3rd Respondents to proceed with the award of the tender to the Applicant dated 2nd December 2024 and to sign a contract for the Provision of Security and Safety Services (Guarding, Lease of Security Equipment and Alarm Backup Services) for a Period of Three (3) Years within fourteen (14) days from the date of this Honourable Court's decision in compliance with the provisions of section 135 of the *Public Procurement and Asset Disposal Act*.
 4. That, costs of the Judicial Review application be awarded to the Ex-Parte Applicant.
4. The 2nd and 3rd Applicants in their motion dated 22nd January 2025 in HCJR No.E006 of 2025 sought the following orders;
 1. An Order of Certiorari to quash the decision and orders of the Respondent communicated in its judgement dated 6th January 2025.
 2. An Order of Mandamus compelling the Respondent to solely consider the grounds raised in the Application for review before it in the event of prayer (1) being granted and The Honourable Court makes a decision by referring the matter back to the Respondent.



3. Without prejudice to prayer (2) above, An Order of Mandamus compelling the Respondent to permit the Ex Parte Applicants to respond to and provide evidence on issues that were not pleaded in the Application for review before it.
4. Costs of the suit be provided for.
5. The Applicants' case is that the 3rd Respondent published an advertisement inviting suppliers to tender for the provision of security and safety services (covering guarding, lease of security equipment, and alarm backup services for a period of three years) under Tender No. KRA/HQS/NCB-002/2024-2025.
6. On 19th September 2024, the 1st Applicant, submitted its bid in accordance with the tender document issued by the 2nd Applicant.
7. The original submission deadline was 19th September, 2024 at 11:00 am, but through an addendum dated 18th September, 2024, the 3rd Respondent extended the deadline to 26th September 2024, with the tender opening taking place the same day.
8. On 26th September 2024, the 2nd Applicant's Tender Opening Committee met with representatives from the twelve bidders, to open the tenders.
9. The 2nd Applicant's Evaluation Committee assessed all twelve tenders in stages: Preliminary Evaluation, Vendor Evaluation, Technical Evaluation, and Financial Evaluation.
10. The Evaluation Committee examined the responsiveness and completeness of all the tenders based on the criteria in Section III - Evaluation and Qualification Criteria of the Tender Document and both the 1st Applicant's bid and the Interested Party's bid passed this stage and moved to the Vendor Evaluation.
11. The tenders were evaluated against the criteria laid out in the Tender Document and again both bids were found to be responsive and advanced to the Technical Evaluation. The Bids also proceeded to the Financial Evaluation stage.
12. At the Financial Evaluation stage, according to Section III - Evaluation and Qualification Criteria, the 1st Applicant's bid was evaluated as the lowest responsive bid, amounting to Kshs. 1,182,024,000.00, compared to the Interested Party's bid.
13. Following this, the 2nd Applicant's Evaluation Committee carried out a due diligence process to verify the 1st Applicant's qualifications and the report from the due diligence, dated 16th October 2024, confirmed that it had met all the mandatory requirements.
14. On 2nd December 2024, the Acting Deputy Commissioner of Supply Chain Management, Mr. Benson Kiruja, prepared a Professional Opinion, which was approved the same day by the 2nd Applicant. On the said date the 2nd Applicant issued letters notifying all bidders of the evaluation outcome.
15. Subsequently on 17th December 2024, the Interested Party submitted a Request for Review, dated 16th December 2024, disputing the award of the tender to 1st Applicant. The challenge was based on the claim that no site visits had been conducted for six out of the 162 stations covered by the tender. These stations included Migori TSO, Bungoma, Lwakhakha, Webuye RRU, Diif, and Buxton.
16. The Respondent on 6th January 2025 ruled in favor of the Interested Party, cancelling and setting aside the Letter of Notification of Intention to Award issued on 2nd December 2024. The decision also directed the 2nd Applicant to instruct the Tender Evaluation Committee to re-evaluate the financial aspects of the tender and conduct a fresh due diligence exercise within 21 days from the decision date.



17. According to the Applicants the Respondent overstepped its bounds by raising and deciding on new issues after the 14-day statutory period for filing a Request for Review, as set out in Section 167(1) of the Public Procurement & Asset Disposal Act. Further that the decisions from the Tender Evaluation Committee that are not challenged within this time frame should be final and binding.
18. It was also its case that Respondent's actions in addressing unpleaded issues were irrational and exceeded its jurisdiction, violating the principles of law under Article 10 and 50(1) of *the Constitution*.
19. It was is the Applicants' case that the Respondent made an unreasonable and irrational finding that its site visit certificates for Hola, Isiolo TSO, and Isiolo Warehouse Stations were deficient because representatives did not sign them yet the certificates were signed and stamped by KRA officials or local government officers, indicating that that the 1st Applicant's representatives did indeed attend the site visits.
20. It was also urged that the three stations mentioned by the Respondent Hola, Isiolo TSO, and Isiolo Warehouse were not even part of the Interested Party's original complaint.
21. On the Mandatory Price Schedule, the issue was not raised in the Request for Review, and if the 1st Applicant had been given the chance to respond, it could have proven that the Price Schedule was duly filled and signed, making its bid responsive.
22. The Applicant also contends that the Respondent acted unreasonably, with procedural impropriety, and violated its right to a fair hearing by deviating from the pleadings presented by the parties and further that it then proceeded to evaluate the tenders using an unknown and unspecified set of criteria, which was not provided for in the Tender document. This according to the Applicants was contrary to Section 80 of the *Public Procurement and Asset Disposal Act* (PPADA), and the Respondent acted beyond its mandate under Section 173 of the PPADA.
23. It is also the Applicant's argument that the requirement for signatures was not mandatory. Further that the Respondent's decision was also contrary to Section 80(2) of the PPADA. Firstly, because it took on the role of the Tender Evaluation Committee, and secondly, because it failed to recognize that the absence of names or signatures in the site visit forms was not a mandatory requirement of the Tender documents.
24. Furthermore, that this omission could have been treated as a minor deviation under Section 79(2) of the PPADA, as such deviations do not materially affect the core requirements of the Tender, including the Item 20 requirement.
25. It is urged that had the Respondent scrutinized all bids impartially, it would have found that even the Interested Party's site visit forms for Taveta and Lamu stations were not signed, nor did they have representative names. These issues were treated as minor deviations for all bidders, including the Interested Party, under Section 79(2) of the PPADA.
26. The 1st Applicant filed written submissions dated 15th February, 2025 and in the submissions the 1st applicant urges that that the question of whether the 1st Applicant's Tender was responsive was an issue of law and that the Respondent had the power to make a determination on the same despite the Interested Party having not pleaded it in the Request for Review. This submission is misconceived.
27. It is its submission that a procuring entity's Evaluation Committee has the statutory duty and obligation to determine whether a tender is responsive or meets the eligibility criteria in the tender documents. Further that the Review Board did not have jurisdiction to raise and determine an issue of responsiveness for the first time in its judgment.



28. The Applicant relies on the case of Republic vs. Public Procurement Administrative Review Board & 2 others Ex parte BABS Security Services Limited [2018]KEHC 9447(KLR) where the court observed that in public procurement, bids that do not meet the minimum requirements outlined in the bid document are considered non-responsive and are rejected. Responsiveness involves compliance with regulatory, formal, technical, pricing, and empowerment criteria.
29. It is the 1st Applicant's case that The Evaluation Committee of a procuring entity is empowered to assess whether a bid meets the mandatory requirements set out in the Tender Document, and thus, whether the bid is responsive.
30. The Applicant distinguishes this case from the Sinopec International Petroleum case and states that in the Sinopec case, the court ruled that a breach of Section 79 of the Public Procurement and Asset Disposal Act (PPA) was an issue of law, and the court could not overlook it.
31. That however, in this case, the Respondent heard the Request for Review on merit and the issue of non-responsiveness due to non-compliance with Mandatory Requirement Nos. 2 and 20 was neither pleaded nor canvassed by the parties. Also, that the Interested Party cannot rely on obiter dicta from the Sinopec case to argue that the Respondent should have raised the non-responsiveness issue on its own motion.
32. The Supreme Court of Kenya in Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others (Election Petition 1 of 2017) it is urged emphasized that a court cannot address issues not raised in the pleadings unless certain conditions are met. Further that these conditions include the relief is logically consequential from the pleaded matters, the failure to plead was not a product of bad faith or tactical maneuvering, neither party suffers prejudice if the relief is granted.
33. The 1st Applicant argues that none of these conditions apply, and the Respondent should not have determined issues that were not pleaded.
34. Further that the Tender document did not mandate the inclusion of representative names on Site Visit Certificates. It is further urged that the Respondent imposed an additional requirement not specified in the Tender, leading to an erroneous decision regarding non-responsiveness.
35. The Applicant also submits that security fees under these provisions are discretionary, that security fees under these provisions are discretionary, as was held by the court in Republic vs. Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another(Ex-Parte Applicant) [2020] KEHC 629 (KLR). It is also its submission that the court's jurisdiction cannot be overridden by regulations.
36. It was also submitted that a party must choose the relief sought and cannot seek alternative remedies. Further that if the court grants an order of Certiorari (to quash the Respondent's decision), an order of Mandamus should follow, compelling the 2nd and 3rd Applicants to award the tender in compliance with Section 135 of the PPA.
37. The 1st Applicant asserts that the issue of tender responsiveness was neither raised nor pleaded in the Request for Review further that the Consolidated Judicial Review Applications do not violate Section 175(2) of the PPA or Regulation 222, and the applications are properly before the court for determination.
38. The 2nd and 3rd Applicants in their written submissions dated 14th February 2025 submit that the 1st interested party's application for review was based on the claim that the 2nd interested party failed to sign



an Occurrence book or site visit registers for specified stations (Migori TSO, Lwakhakha, Bungoma, Webuye RRU, Buxton, and Diif).

39. It is also their submission that issues like the price schedule or failure to sign site visit forms were not raised within the 14-day period, and thus, the Respondent lacked jurisdiction to address them. They rely on Owners of the Motor Vessel “Lilian S” v. Caltex (Kenya) Ltd [1989] KLR 1 to further buttress this position.
40. They also rely on the case of Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, where the court affirmed that jurisdiction flows from *the Constitution* or legislation and cannot be exceeded by the court.

Respondent’s case

41. The Respondent filed replying affidavits in each of the applications. The replying affidavits are dated 10th February 2025 and 20th January 2025 and both sworn by James Kilaka who introduces himself as the Acting Secretary of the Respondent.
42. He depones that on 24th December 2024, the Respondent sent a notice to the Applicants and the Interested Party for an online hearing of the Request for Review indicating that the Request would be heard through an online hearing on 30th December 2024 at 11:00 a.m. The hearing was rescheduled to 2nd January 2025 to allow parties to file and exchange written submissions.
43. When the matter came up for hearing on 2nd January 2025, Applicants and the Interested Party were represented by their respective Advocates. The Respondent gave an opportunity to all the Advocates present to present their respective Client’s case and reserved the Request for Review for determination on /or before 7th January 2025.
44. That subsequent to the online hearing, the Respondent retreated to prepare its Decision which was delivered on 6th January 2025 by sending a copy of the same by email to Advocates appearing for each of the parties in the matter.
45. In its Decision, the Respondent is said to have dismissed the 2nd and 3rd Applicant’s Notice of Preliminary Objection and held that the Request for Review was timeously filed within the timelines stipulated under Section 167(1) of the Act. The Respondent delivered its decision on 5th December 2025.
46. The Respondent considered the following issues for determination which emanated from parties’ cases, documents, pleadings as follows:
 - i. Whether the Board has jurisdiction over the present Request for Review?
 - ii. Whether the Interested Party was properly awarded the subject tender in accordance with the provisions of the Act and the Tender Document?
 - iii. What orders should the Board issue in the circumstance?
47. It is the Respondent’s case that under Section 173 of the Act, it has an obligation to review procurement processes and give directions for an Accounting Officer to do or redo anything where it becomes apparent that a procurement process was not carried out in accordance with the provisions of the Act and this includes correcting instances where unresponsive bids have been declared as the successful bids to the disadvantage of other competing bids.



48. According to the Respondent its Decision, corrected an anomaly where the Ex-parte Applicant's bid had erroneously been deemed responsive to Mandatory Requirement No. 20 of the Tender Document on presenting 162 duly stamped and signed site visit certificates, when in fact some of the site visit certificates in the 1st Applicant's bid were not duly stamped and signed and therefore unresponsive to Mandatory Requirement No. 20.
49. The Respondent urges that it is not true that the Board addressed itself on issues that were not pleaded further that the Respondent never addressed itself on issues outside those raised in the Request for Review the crux of which was the 1st Applicant's bid compliance with Mandatory Requirement No. 20 under the Tender Document.
50. It is also the Respondent's case that whereas the 1st Applicant's non-compliance with Mandatory Requirement No. 2 was not pleaded in the Request for Review, it was one of the anomalies that the Respondent observed in its study of the Confidential Documents. Further that this observation coupled with the 1st Applicant's non-compliance with Mandatory Requirement No.20 speaks of the flaws apparent in the evaluation of its bid.
51. According to the deponent the Respondent observed the rules of natural justice in the exercise of its statutory mandate and powers under Section 28 and Section 173 of the Public Procurement and Asset Disposal Act respectively and ensured that all parties to the Request for Review application were granted an opportunity to be heard on all issues that emerged from parties pleadings, cases, and confidential documents submitted pursuant to section 67 of the Public Procurement and Asset Disposal Act.
52. It is also the respondent's case that the Applicants have failed to demonstrate any elements of illegality, irrationality, procedural impropriety and/or unfairness in the manner in which it considered and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision of 6th January 2025 and in the manner parties to the Request for Review were notified of the completion of the Request for Review application by the Respondent when the Decision dated 6th January 2025 was transmitted to all parties to the Request for Review application via email on 6th January 2025.
53. The Respondent filed written submissions dated 12th February 2025.
54. It is Respondent's submission that its power to review procurement processes is granted by Section 173 of the Public Procurement and Assets Disposal Act (PPADA). This section allows the Respondent to give directions to the accounting officer to rectify any non-compliance with the Act during procurement.
55. On principle of Judicial Review, the respondent relies on the cases of *Pastoli v. Kabale District Local Government Council & Others* [2008] 2 EA 300. Reliance is also placed in the case of *Kenya Pipeline Company Limited v. Hyosung Ebara Company Limited & 2 Others* [2012] eKLR, where the Court is said to have affirmed that the Review Board is a specialized tribunal with wide powers to address procurement-related breaches and is better equipped than the High Court to handle such disputes.
56. The Respondent also relies on the case of *Republic v. Commissioner Of Customs Services Ex-Parte Africa K-Link International Limited* [2012] eKLR, where the court is said to have emphasized that judicial review is not concerned with the merits of the decision but with procedural correctness. It is urged that the applicants failed to substantiate any grounds for certiorari and mandamus, and the Respondent's decision was lawful, reasonable, and properly made.
57. It is submitted that the Constitutionality of any procurement process must be assessed on the touchstone of Article 227(1) of the Constitution of Kenya 2010 which provides that procurement by



state organ or other public entity accords to a system that is fair, equitable, transparent, competitive and cost effective.

58. The Respondent's submission is that in arriving at its decision, the Respondent was required to exercise its powers in accordance with the provisions of inter alia sections 3, 23, 28 and 173 of the Public Procurement and Disposal Act, 2015 (Revised 2022) Chapter 412 C Laws of Kenya and Articles 201 and 227 of *the Constitution*.
59. The Respondent submits that upon applying the relevant law and interrogating the Applicant's bid it was clear that the Applicant's Evaluation Committee erred by failing to declare the 1st applicant's tender as non-responsive. This was a breach of Section 79 of the Act, a glaring issue of law, which the Respondent was mandated to address. Failure to do so would be to aid in the commission of an illegality.
60. It is urged that the purpose of the site visit form in the subject tender was to verify that the bidders visited all the required stations for purposes of the subject tender in accordance with Mandatory Requirement 20 as read with Annex 1 of the Subject Tender. The form provided by the 2nd Applicant in this regard was to enable such verification. In the absence of confirmation that the bidder's representatives visited each station it is impossible to conduct such verification.
61. According to the Respondent Section 79(1) of the Act provides that a tender is responsive if it conforms to all the eligibility and mandatory requirements in the tender documents and that pursuant to Section 79(2) of the Act, a responsive tender cannot be affected by minor deviations that do not materially depart from the requirements set out in the tender documents or errors or oversights that can be corrected without affecting the substance of the tender.
62. The Respondent submits that the 1st Applicant's failure to comply with mandatory requirement 20 as to site visits in Hola, Isiolo TSO and Isiolo Warehouse Stations and mandatory requirement 2 as to a duly filled and signed price schedule for its Nairobi Region, constitutes a material departure from the tender document. This cannot be construed as a minor deviation capable of being waived in line with the provisions of Section 79(2) of the Act.

Interested Party's case

63. The Interested Party filed a Replying Affidavits sworn on 30th January 2025 and 10th February 2025 and both were sworn by Stephen Mwangi who introduces himself as the Managing Director of the Interested Party.
64. According to the Interested Party the constitutionality of any procurement process must be assessed on the touchstone of Article 227(1) of *the Constitution* of Kenya 2010 which provides that procurement by state organ or other public entity accords to 'a system that is fair, equitable, transparent, competitive and cost effective.
65. It is urged that in arriving at its decision, the Respondent was required to exercise its powers in accordance with the provisions of inter alia Sections 3, 23, 28 and 173 of the Public Procurement and Disposal Act, 2015 and Articles 201 and 227 of *the Constitution*.
66. Further that the Respondent, having been mandated to hear disputes emanating from the procurement process, is under a legal obligation to ensure that the process conforms to the principles of public procurement set out under Article 227(1) of *the Constitution* and the Act. This obligation includes the command to the Respondent to address itself on the responsiveness of the Applicant's bid.



67. That an acceptable tender under the Act is any tender, which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. Such requirements are not merely internal prescripts that the procuring entity may disregard at whim.
68. It is the Interested Party's case that in exercising its mandate under Section 28(1)(a) of the Act, the Respondent is under obligation to consider and analyse the evidence presented before it including the confidential document(s) submitted by the procuring entity and the submissions by the parties in order to determine whether the tender process was undertaken in a lawful manner.
69. According to the Interested Party the issue of the responsiveness of the 1st Applicant's tender is a matter of law which falls squarely within the jurisdiction of the Respondent.
70. Similarly, the Interested Party urges that a minor deviation in a tendering process is one that does not affect in a substantial way the scope quality or performance of works as stipulated in the tender document, neither limit substantially, inconsistent with the binding document, the bidder's rights under the proposed contract, if rectified will unfairly affect the competition position of other bidders representing substantially responsive bids.
71. It is urged that the discriminate evaluation of the 1st Applicant's Party's bid by the 2nd and 3rd Applicants is a manifestation of its scheme to violate the provisions of Article 227 of *the Constitution* and prejudice the other bidders to the tender.
72. The Interested Party filed written submissions dated 12th February 2025 and 17th February 2025.
73. In its submissions the Interested Party relies on the case of *Macharia & Another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) where the Supreme Court held that a court's jurisdiction flows from *the Constitution* or legislation or both and as such it cannot act in excess of the jurisdiction conferred therein.
74. Reliance is also placed in the case of *Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co ordination of National Government* (Interested Party); *Ex Parte Applicant CMC Motors Group Limited* [2020] eKLR where the court is said to have emphasised the import of Article 227 of *the Constitution* where the Court observed that Article 227 of *the Constitution* mandates that state procurement must be fair, transparent, competitive, and cost-effective. Further that it forms the basis for assessing the constitutional validity of procurement outcomes.
75. The Interested Party argues that jurisdiction is conferred by law, not pleadings, as established in *Orange Democratic Movement v. Yusuf Ali Mohamed* [2018]eKLR. Further that jurisdiction is derived from Articles 227, Section 28, and Section 167 of the *Public Procurement and Asset Disposal Act*, which empower the Respondent to hear and determine procurement disputes.
76. Further that the concept of responsiveness in tendering is central, as per Section 79(1) of the Act, and the Court of Appeal in *Sinopec International Petroleum Service Corporation v Public Procurement Review Board* (2024) emphasized that non-compliance with mandatory requirements is a legal issue within the Respondent's jurisdiction.
77. The Court is said to have referenced *Barclays Bank of Kenya vs. Pyritic Guards Limited* (2015)eKLR, affirming that a court or tribunal may raise a point of law at any stage, even if not raised by the parties.



78. The Court in *Holman v. Johnson* [1775] 1 Cowp 341 to emphasize that no court will aid an illegal act, stressing that the Respondent, as a quasi-judicial body, must comply with the principle of legality.
79. Reliance was also placed on the case of *Republic v. Public Procurement Administrative Review Board* (2018) eKLR, where it was held that public bodies must act within their legal mandate, and the Respondent cannot enforce illegal procedures.
80. Additionally, the Court in *Birket v. Arcon Business Machines Ltd* (1999)2 ALL ER 429, observed that courts can refuse to enforce illegal contracts, even if the illegality isn't directly pleaded, to uphold public policy.
81. It is the Interested Party's case that the 9th Edition of Black's Law Dictionary defines an unreasonable decision as one that is "so obviously wrong that there can be no difference of opinion among reasonable minds". It also defines irrational decisions as those "not guided by reason or by a fair consideration of the facts". The Interested Party urges, that the Respondent, tasked with reviewing the 1st Applicant's bid under Section 79 of the Act, determined the bid was non-responsive based on mandatory requirements.
82. The Interested Party also relied on the case of *Republic v. National Water Conservation & Pipeline Corporation & 11 others* for the test of reasonableness, affirming that decisions made by a reasonable authority should not be overturned unless they are devoid of justification.
83. It is urged that the Respondent acted within its statutory mandate and procedure under Section 28 of the *Public Procurement and Asset Disposal Act* (the Act). Further that the Respondent did not annul the Evaluation Committee's decision but rather ordered a re-evaluation of the financial stage and due diligence, which is a procedural decision within its mandate.
84. The Interested Party also relies on the case of *Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited* (2019) KEHCC 2976 (KLR), where a minor deviation was defined as one that does not affect the essence of the bid or prejudice other bidders.
85. According to the Interested Party in the case at hand, the non-compliance with mandatory requirements did, in fact, constitute material deviations that could not be waived, as they affected the substantive aspects of the bid and its evaluation.
86. The Interested Party also argues that bidders have a legitimate expectation that the procuring entity will follow its own tender conditions and that a failure to comply with mandatory requirements could lead to unfairness and disrupt the competitive process.
87. The 2nd and 3rd Applicants are accused of awarding the tender to the 1st Applicant despite the failure to meet mandatory tender conditions, including the omission of key documents. This according to the Interested Party was seen as preferential treatment and a violation of procurement law.
88. The 2nd and 3rd Applicants are also accused of failing to provide the court with the full bid document submitted by the 1st Applicant, thus concealing crucial evidence.
89. The Interested Party claims that the Court lacks jurisdiction to entertain the Judicial Review Application because no Request for Review was filed regarding the Interested Party's bid.
90. The Interested Party further submits that Judicial Review is not intended for merit-based review as it should only address the legality and fairness of the decision-making process, not the merits of the decision itself.



91. The Interested Party requests that the court dismiss the Applications with costs, as no Request for Review was filed regarding its bid, and the Applicants did not adhere to the statutory requirements.
92. The Interested Party also argues that the Applicants violated procurement law by not following mandatory tender conditions, not providing crucial documentation, and failing to meet the security deposit requirement. The Interested Party also questions the Court's jurisdiction and requests that the Applications be dismissed with costs.

Analysis and Determination

93. I have considered the case adduced by each party, the evidence and case law relied on by the parties and I find that the following issues form for determination;
 - i. Whether the Consolidated Applications offend the provisions of Section 175(2) of the *Public Procurement and Asset Disposal Act* No.33 of 2015 and Regulation 222 of the Public Procurement and Asset Disposal Regulations 2020 for failure to provide security?
 - ii. Whether the Respondent had the jurisdiction and authority to review the procurement process, including the issue of tender responsiveness, and whether it considered issues that were not raised in the Request for Review or pleaded before it.
 - iii. Whether the Ex-parte Applicant's tender complied with all mandatory requirements of the Tender Document?
 - iv. Whether the Respondent's decision to reject the Ex-parte Applicant's tender and cancel the notification letters was lawful, rational, and based on a proper interpretation of the law, or if the Respondent acted outside its mandate.

Whether the Consolidated Applications offend the provisions of Section 175(2) of the *Public Procurement and Asset Disposal Act* No.33 of 2015 and Regulation 222 of the Public Procurement and Asset Disposal Regulations 2020 for failure to provide security?

94. On the 1st issue the Interested Party urges the Applicants' case is flawed because they failed to comply with statutory requirements, specifically failing to provide the mandatory security deposit, as required by Section 175(2) of the *Public Procurement and Asset Disposal Act* and Regulation 222.
95. The Interested Party argues that the Applicants violated procurement law by not following mandatory tender conditions, not providing crucial documentation, and failing to meet the security deposit requirement. The Interested Party also questions the Court's jurisdiction and requests that the Applications be dismissed with costs.
96. In response the 1st Applicant submits that security fees under these provisions are discretionary, as was held by the court in Republic vs. Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another(Ex-Parte Applicant) [2020] KEHC 629 (KLR).
97. The Court is said to have held that the implementation of Regulation 222 had been suspended in by interim conservatory orders given by Korir J on 27th July 2020 in Roads and Civil Engineering Contractors Association and Energy Sector Contractors Association vs The Attorney General and the Public Procurement Administrative Review Board and Another, Nairobi H.C. Petition No.E226 of 2020.



98. Section 175(2) of the Public Procurement Act provides as follows;

“The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.”

99. Regulation 222 of the Public Procurement and Asset Disposal Regulations 2020 provides as follows;

222. Security fee

The filing of the judicial review application under section 175(2) of the Act shall be accompanied by a refundable security fee valued at 3% of applicant's tender sum subject to a maximum ten million shillings in a mode of payment determined by the High Court.

100. This Court is in agreement with the Applicants' position and that of the Court in Republic vs. Public Procurement Administrative Review Board; Accounting Officer Kenya Revenue Authority & another (Interested Parties) Skaga Limited & another (Ex-Parte Applicant) [2020] KEHC 629 (KLR) that the payment or non-payment of security by an applicant of security fees under the above provisions is a question of fact, and under Regulation 222 Public Procurement & Assets Disposal Regulations of 2020, its manner of enforcement is subject to the discretion of this Court. The same is not mandatory but is within the discretion of the court.

Whether the Respondent had the jurisdiction and authority to review the procurement process, including the issue of tender responsiveness, and whether it considered issues that were not raised in the Request for Review or pleaded before it.

101. According to the Applicants the Respondent overstepped its bounds by raising and deciding on new issues after the 14-day statutory period for filing a Request for Review, as set out in Section 167(1) of the Public Procurement & Asset Disposal Act.

102. In response the Respondent urged that its decision was not ultra vires or irrational as it addressed itself to the issues raised before it, no new issues were raised before the 1st Respondent outside the 14 days statutory timeline contemplated under section 167 of the Act.

103. It was also its case that in exercising its mandate under Section 28(1)(a) of the Act, it was under an obligation to consider and analyse the evidence presented before it including the confidential document(s) submitted by the procuring entity and the submissions by the parties in order to determine whether the tender process was undertaken in a lawful manner.

104. According to the Respondent the Interested Party before this court had requested for a review of the decision of the 2nd and 3rd Applicants to award the subject Tender to the 1st Applicant on the basis that the 1st Applicant had failed to adhere to Mandatory Requirement 20 of the ITT as to site visits in all the stations under Lot 1 of the Subject Tender.

105. It is the Respondent's case that paragraphs 19 and 22 of the Interested Party's Request for Review highlighted the fact that the 1st Applicant failed to conduct site visits in all the required 162 stations.

106. The Interested Party on the other hand argued that jurisdiction is conferred by law, and not pleadings, and that this was established by the Court in Orange Democratic Movement v. Yusuf Ali Mohamed [2018]eKLR. Further that the Respondent's jurisdiction is derived from Articles 227, Section 28, and Section 167 of the *Public Procurement and Asset Disposal Act*, which empower it to hear and determine procurement disputes.



107. The functions and powers of the Respondent have aptly been listed under section 28 of the Public Procurement and Assets Disposal as follows;

28. Functions and powers of the Review Board

- (1) The functions of the Review Board shall be—
 - (a) reviewing, hearing and determining tendering and asset disposal disputes; and
 - (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
- (2) In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.
- (3) The Authority shall provide secretariat and administrative services to the Review Board.

108. It is clear from the above that the Respondent has the jurisdiction to review, hear and determine tendering and asset disposal disputes. The parties do not contest that the Request for Review filed before the Respondent was a dispute in regard to the award of Tender No. KRA/HQS/NCB-002/2024-2025 for the provision of security and safety services (covering guarding, lease of security equipment, and alarm backup services for a period of three years).

109. Would such a dispute be considered as one that falls within the jurisdiction of the Respondent in my opinion yes it is. The Respondent extensively addressed the issue of its jurisdiction at 71-93 and 94-121 of its determination.

110. The Applicants have also urged that the Respondent went ahead to determine issues that were not before it and that had not been raised by the Interested Party. This issue was that the 1st Applicant's bid did not comply with Mandatory Requirement 2 on having a duly filled and signed Price Schedule.

111. The Respondent at paragraph 99 of its Ruling while answering the question as to whether the Interested Party was properly awarded the subject tender in accordance with the provisions of the Act and Tender Document stated as follows;

“Drawing from the above divergent positions, this Board is invited to pronounce itself on the correctness of the evaluation process culminating in the award of Lot 1 of the subject tender to the Interested Party.

112. In my humble opinion this meant that the Board would not only limit itself to what was raised by the Interested Party but would wholly interrogate the evaluation process and also consider the evidence including confidential documents adduced by the parties in order to confirm whether the process culminating to the award was in compliance with the law and with the requirements in the Tender Document.

113. This ground must therefore fail as Section 167(1) provides for the period within which an aggrieved tenderer can lodge a Request for Review before the Respondent it does not preclude the Respondent from undertaking an in depth examination of the process culminating in an award such as the 1st Applicant's award or even from addressing issues that arise from its examination. In any case the issue in contest herein was an issue of compliance with the requirements of the Tender Document this was



an issue that had already been raised by the Interested Party albeit only on the Issue of Mandatory Requirement 20.

114. According to me paragraph 118 of the Board's decision clearly shows that the Board also examined the 1st Applicant's bid against the rest of the Mandatory Requirements and not only in regards to Mandatory Requirement 2 or 20.
115. Having said as much I find that the Respondent had the jurisdiction and authority to review the procurement process, including the issue of tender responsiveness. Further that it is dishonest for the Applicants to claim that it considered issues that were not raised in the Request for Review or pleaded before it.

Whether the Ex-parte Applicant's tender complied with all mandatory requirements of the Tender Document, specifically Mandatory Requirement No. 20 related to the Site Visit Certificates, and whether non-compliance with this requirement rendered the bid non-responsive.

116. The 1st Applicant's bid was scrutinized for compliance with Mandatory Requirement No. 20 of the Tender Document, which required the submission of Site Visit Certificates duly stamped and signed by KRA representatives or Local Government Administrators for all 162 stations listed under the tender.
117. It is undisputed that the 1st Applicant's bid did not fully comply with this requirement, as several Site Visit Certificates lacked the names of the representatives who conducted the site visits, specifically for Hola Station, Isiolo TSO Station, and Isiolo Warehouse Station.
118. Given the importance of this requirement in verifying compliance with the tender specifications, the Respondent correctly found the 1st Applicant's bid to be non-responsive in relation to Mandatory Requirement No. 20. The Court concurs that the non-compliance was not a minor deviation that could be waived under Section 79(2) of the Act but rather a material breach of the tender requirements.
119. This court also notes that the Respondent also observed that the Applicant had failed to comply with Mandatory Requirement 2 under Section III Evaluation and Qualification Criteria which required that for the bid to be responsive the tenderer had to submit a duly filled and signed price schedule.
120. The 1st Applicant submitted a price schedule for Nairobi Region-Security Guards that did not provide the costs with respect to Monthly cost inclusive of Taxes and Total cost inclusive of Taxes per year ,for year 3 and as such the bid was also unresponsive in this regard.
121. Public procurement plays a pivotal role in ensuring transparency, fairness, and accountability in government spending. It is a fundamental aspect of how public funds are allocated for the delivery of goods, services, and works, ultimately shaping the economic and developmental landscape of a nation.
122. In Kenya, public procurement is governed by a robust legal framework that aims to uphold the principles of competition, fairness, and transparency, ensuring that resources are utilized in the best interests of the public. These principles align with the constitutional mandate under Article 47, which guarantees the right to fair administrative action.
123. Competition is central to the effective functioning of public procurement systems. The spirit of competition ensures that contracts are awarded based on merit and value for money, rather than through favoritism or corruption. It provides opportunities for diverse suppliers, fostering innovation, and encouraging efficiency. By encouraging a competitive procurement process, governments can leverage a wider pool of talent and resources, which in turn benefits the quality and cost-effectiveness of services and goods purchased.



124. In Kenya, the *Public Procurement and Asset Disposal Act* (PPADA) is the primary legislative framework governing public procurement, and it outlines the procedures and criteria that promote competition. For instance, the Act requires that procurement decisions must be made through open, competitive methods such as international and national tenders, with limited exceptions for direct procurement or sole-source arrangements under specific circumstances. This ensures that suppliers have a fair chance to compete for government contracts.
125. Certainty in public procurement refers to the predictability and clarity of the rules and procedures governing the awarding of contracts. A well-structured procurement process builds confidence among stakeholders, especially suppliers, who need to understand how decisions are made and what criteria will be used to evaluate their bids.
126. If the court was to allow for parties to continue failing to comply with multiple requirements provided for in tender documents then the same would be unfair to tenders as there would be no certainty on what exactly the rules and procedures of any tender are.
127. Rightly put by the Respondent the Applicants having failed to comply with mandatory requirements of the tender ought to have been disqualified at the Preliminary Stage as failure to do so amounted to a violation of Article 47 which is the cornerstone of administrative justice and fairness in public affairs.
128. This Article guarantees every person the right to an administrative action that is lawful, reasonable, and procedurally fair and it is essential in the context of public procurement, as it ensures that individuals and entities participating in the procurement process are treated fairly and that their rights are protected.
129. Failure to comply with the requirements of a tender process in public procurement can have significant repercussions on the rule of law. The rule of law is based on the principles of fairness, equality, transparency, and accountability, and any deviations from these principles can undermine these core values, leading to a breakdown in public trust and governance.

Whether the Ex-parte Applicant’s application for Judicial Review challenges the merits of the Respondent’s decision, which is beyond the scope of judicial review, or if it has demonstrated illegality, irrationality, or procedural impropriety that warrants the court’s intervention

130. Judicial review jurisdiction, was discussed in the Ugandan case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also, *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral



standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

131. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of *the Constitution*, which provides for the right to fair administrative action, and Section 7 of the *Fair Administrative Action Act* in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
132. In the instant case the Applicants are before this Court seeking for judicial review orders against the Respondent and as has been established by the above case they must first satisfy the court that the decision they intend to quash was made through a process that was irrational, illegal and unreasonable or one with procedural impropriety.
133. It is this court’s finding that the Applicants have failed to establish either of the above as in reaching its determination the Board was within its mandate as envisioned under section 28 of the Public Procurement and any Board sitting under the same circumstances would have reached the same position. It is also this court’s finding that the Applicants were accorded their right to a fair hearing as is envisaged under Article 47 of *the Constitution*.

Disposition.

In light of the above I find that the Applicants Notice of Motion applications dated 10th January, 2025 and 22nd January, 2025 respectively lack merit.

Order;

The applications dated 10th January 2025 and 22nd January 2025 are hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025

.....

J. CHIGITI (SC)

JUDGE

