REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL MISCELLANEOUS APPLICATION NO. 103 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

CONSORTIUM OF GBM PROJECTS LIMITED AND

ERG INSA AT TICARET VE SANAYI A.S.....INTERESTED PARTY

AND

NATIONAL IRRIGATION BOARD.....EX PARTE APPLICANT

JUDGMENT

The Parties

1. The applicant, the National Irrigation Board, is a State Corporation established under section 7 of the Irrigation Act.[1] It is a body corporate with perpetual succession and a common seal. It is in its corporate name capable of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; (c) borrowing or lending money; (d) entering into contracts; and (e) doing such other acts necessary for the proper performance of the functions of the Authority.

2. The applicant's functions pursuant to section 8 of the Irrigation Act[2] include (a) developing and improving irrigation infrastructure for national or public schemes; (b) providing irrigation support services to private medium and smallholder schemes, in consultation and cooperation with county governments and other stakeholders; and, (c) providing technical advisory services to irrigation schemes in design, construction supervision, administration, operation and maintenance under appropriate modalities, including agency contracts, as may be elaborated in regulations to the Act.

3. The Respondent, the Public Procurement Administrative Review Board, is a central independent procurement appeals review board established under section **27** of the Public Procurement and Asset Disposal Act[3] (herein after referred to as the act). Its functions pursuant to section **28** of the act are reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to it by the Act, Regulations or any other written law.

4. The Interested Party, Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S. is a Special Purpose Vehicle Consortium. Its registered offices are at Regal House, 70, London Road, Twickenham, Middlesex TW1 3QS, England. It was the applicant in Request for Review Number **22** of 2019 between itself and the applicant herein regarding the Tender No. NIB/T/018/2016-2017 for Funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation Infrastructure in Kitui, Tana River and Garissa Counties, Republic of Kenya. The Respondent's decision in the said Request for Review is rendered on **21st** March 2019 is under challenge in these judicial review application.

Factual Matrix

5. The factual chronology of the events which triggered these proceedings is essentially common cause or not disputed. My reading of the respective parties' pleadings is that the history of this dispute is uncontroverted. Notably, a preview of the background of the tender the subject of this case shows that it is characterized by four previous disputes before the Respondent which were filed in quick succession. A common feature in the four Requests for Review discussed later is that they all involved the same parties and in all of them, the Respondent annulled the procurement process and issued directions on how to proceed. Another common thread is that in the first three Requests for Review, the Applicant complied with the Respondent's orders, but in the fourth Request for Review, the subject if this judicial review application, the Applicant challenged the decision under section 175 of the Act in these proceedings.

6. On 11th January 2017, the applicant's General Manager/the accounting Officer approved the Request for Prequalification of firms for the construction of the High Grand Falls Dam Project and Associated Infrastructure. This was preceded by a request from User Department, Engineering Services and authority by the Permanent Secretary, State Department of Irrigation, Ministry of Water and Irrigation to procure works and services and the publication of the Expression of Interest on 10th January 2016.

7. The applicant's user department, Engineering Services provided detailed scope of the project description and scope of works, short listing criteria and submission procedures that was to be published in the Expression of Interest advertisement. The prequalification of firms for the works was undertaken competitively through Open International Tender as prescribed in sections 89, 91, 92(a) and 119 of the act. The Expression of Interest advertisement was published in Government of Kenya's e-procurement portal and three daily newspapers of nationwide circulation on 13th January 2017. The deadline for submission of the applications for expression of interest for the works was on 17th February 2017 at 12.00 noon local time.

8. Seven applicants submitted their applications in time, and, that the Evaluation Committee received and opened the applications and undertook the evaluation based on the advertised short listing criteria and prepared their evaluation report and submitted it to the Head of Procurement for review and recommendation pursuant to section 80 (4) and 84 of the act. The Evaluation Committee recommended the shortlisting of six tenderers who met the stated short listing criteria. The applicant's General Manager approved the pre-qualification/ Expression of Interest Report and the short listing of the six applicants on 26th April 2017 and the notification of the pre-qualifications outcome was sent to all the six shortlisted applicants on 28th April 2017.

9. The applicant's User Department, Engineering Services initiated the procurement for the works and services through a procurement request in an internal memo addressed to its General Manager dated 28th September 2017 pursuant to section 45 and 73 of the act and Regulations 9 and 22 of The Public Procurement and disposal regulations, 2006. Subsequently, the request for the procurement of the works and services was approved by the applicant on 7th October 2017. The method of procurement approved by the procuring entity's General Manager was Request for Proposals through restricted tendering. A letter of invitation for submission of proposals was sent to the six shortlisted and approved tenderers on 19th October 2017. Pursuant to section 74 of the act and Regulation 8 (3) (b) (f), a pre-proposal briefing and mandatory site visit was conducted on 8th November 2017.

10. The deadline for submission of the technical and financial proposal for the works and services was on 30th November 2017 at 12.00 local time and only one tenderer submitted its proposal in time, namely, the Interested Party.

11. The applicant states that vide an internal memo addressed to the General Manager dated 17th April 2018, the User Department, and Engineering Services initiated the termination of the procurement proceedings and recommended the termination of the procurement proceedings. The applicant states that the termination was premised on the need to undertake validation exercise of the design for optimization and revise the total area covered in the project and the method of water conveyance. The applicant states that the foregoing was considered as a technological change that prompted the need for immediate termination of the procurement proceedings.

12. In addition, the applicant states that the User Department requested the General Manager as the Accounting Officer to review and approve the termination of the procurement proceedings pursuant to section 63 (1) (a) (ii) of the act due to the need to validate the design for optimization and revise the total area covered in the project and method of water conveyance. The applicant states that based on the documentation, justification and recommendations provided by the User Department, the General Manager approved the termination of the procurement proceedings on 18th April 2018.

13. The applicant further states that based on the documentation, justification and recommendation provided by the User Department, Engineering Services, and subsequent review of the same, the Head of Procurement Function provided considered procurement professional advice pursuant to section 47(2) of the act. It states that the proposed termination of the procurement proceedings was in compliance with section 63 of the act.

14. Further, the applicant states that the professional opinion as submitted to its General Manager and upon consideration and pursuant to section 44 (1) and 63 of the act, the General Manager considered, reviewed and approved the termination pursuant to section 63 (1) (a) (ii) of the act, and on 14th May 2018, the Interested Party was notified of the termination.

15. The applicant states that the Interested Party filed a Request for Review being No. 80 of 2018 and upon hearing the Request for Review, on 4th July 2018, the Respondent directed the applicant to evaluate the Interested Party's tender, conclude the procurement process and make the award within 14 days from the said date. The Respondent extended the tender validity for a period of 45 days to enable the procuring entity to complete the process. The applicant states that on 24th July 2018, it requested and was granted a further period of ten days in order to comply with the said decision.

16. The applicant states that pursuant to the said decision, the Evaluation Committee undertook the evaluation of the technical proposals based on the stated evaluation criteria and submitted a signed and initialed original report to the Head of Procurement Function. The applicant states that the report dated 31st July 2018 was submitted to the Head of Procurement Function on 31st July 2018 for review and recommendation pursuant to section 80 (4) and 84 of the act. The applicant states that based on the technical evaluation criteria, the

evaluation committee reported that the single tenderer did not meet the preliminary evaluation criteria due to failure to provide bid security of 0.5% which was required to be submitted along with the technical bid without which the technical eligibility as well as financial eligibility could be evaluated.

17. The applicant further states that the Interested Party was notified of the tender outcome on 3rd August 2018 but it filed Request for Review number 104 of 2018. Upon hearing the dispute, on 10th September 2018, the Respondent nullified the applicant's decision and directed it to carry out a technical and financial evaluation of the Interested Party's Tender and complete the entire procurement process within 30 days from the date of the said decision. It also extended the tender validity period by sixty days to enable the Procuring Entity to complete the process.

18. The applicant states that pursuant to the said direction, it proceeded to re-evaluate the tender on technical proposals based on the stated evaluation criteria and the Evaluation Committee submitted a technical evaluation report to the Head of the Procurement function on 8th October 2018 pursuant to section 80(4) and 84 of the act. The applicant states that the professional opinion was submitted to the General Manager who reviewed and approved the recommendation of the Head of Procurement disqualifying the bidder pursuant to section 44 (1), 44 (2) and 84 of the act.

19. The applicant further states that on 8th October 2018, the Interested Party was served with the Notification of the Outcome that its bid was unsuccessful after a technical score of 68.5% which was below the set minimum after attaining a technical score of 70% due to failure to show proof of ownership and or capacity to hire equipment in the form of logbooks and or signed agreements (accompanied by copy of logbooks from the lessee) and also a commitment letter to fund all components of the project fully pursuant to appendix ITB Clause 2.7.1 (5 and 7).

20. The applicant states that the Interested Party filed Request for Review Number 155 of 2018 which was heard and allowed and the Respondent directed the applicant to reinstate the Interested Party's Request for proposal back into the evaluation process and re-evaluate it at the technical stage, specifically, clause 2.7.1 (4), section 11, Information to Bidders of the Request for Proposal Document taking into account the Respondent's findings and complete the procurement process within 21 days from the date of the decision. It extended the tender validity period by forty five days to enable the Procuring Entity to complete the process and each party to bear its costs.

21. The applicant states that pursuant to the said decision it commenced the tender evaluation and the appointed committee undertook the evaluation of the technical proposals based on the stated criteria, prepared their technical evaluation report and submitted a signed and initiated original report to the Head of the Procurement Function which was submitted to the Head of the Procurement function for review and recommendations pursuant to section 44 (1) (2) and 84 of the act.

22. The applicant states that on 10th January 2019 it applied for extension of time and the Respondent extended the tender validity period for 81 days from 24th December 2018 and ordered the applicant to pay costs to the Interested Party.

23. Further, the applicant states that on 14th February 2019, the Interested Party was notified that its bid was unsuccessful due to non-responsiveness to section 11; Information to Bidders (ITB) clause 2.7.1 (4) for not providing proof of ownership and or capacity to hire in the form of logbooks and or signed agreements (accompanied by copies of log books from the lessee) together with its submitted Technical proposal. In addition, the applicant states that the Interested Party attained 54.67%, below the minimum technical score pass mark of 70 pursuant to appendix to Information to Bidders clause 2.14 of the procurement proceedings.

24. Dissatisfied with the decision, the Interested Party filed a Request for Review No. 22 of 2019 which was heard and on 21st March 2019 the Respondent ordered the applicant to revert to the Evaluation Report signed on 5th October 2018 and reinstate the Interested Party's Request for proposal document back into the evaluation and re-evaluate it at the Technical Evaluation stage with respect to clause 2.7.1. (4), section 11, Information to Bidders of the Request for Proposal document only, taking into account the findings of the Board in the case and to complete the procurement process including the making of an award within 14 days from the date of the decision.

25. The applicant also states that the Respondent ordered the tender validity period extended for a further period of forty five days from 14th March 2019 and ordered the applicant to pay costs of Ksh, 300,000/= to the applicant within fourteen days from the date of the decision.

26. Further, the applicant states that the letter by PI Makina committed to provide machinery that could not be locally sourced and that the Interested Party's bid documents did not mention how the Interested Party would source the machinery locally and which machinery would be sourced internationally.

Legal foundation of the application.

27. The applicant states that the impugned decision is tainted with bias, illegality, irrationality, lack of logic and is ultra vires the provisions of the act and all the enabling provisions of the law. Further, the applicant states that in the impugned decision and the previous decisions, the Respondent exhibited bias in favour of the Interested Party and against the applicant because:-

*i. **That** the instant dispute has been heard and determined by the applicant four times, namely, Request for Review Applications numbers 80 of 2018, 104 of 2018, 155 of 2018 and 22 of 2019 and that in the said applications different issues were raised and the Respondent in all of them ruled in favour of the Interested Party.*

*ii. **That** the Respondent's decision in number 104 of 2018 contradicted its own decision in number 114 of 2018 yet the two cases raised similar issues.*

*iii. **That** the Respondent's conduct, decision and sentiments expressed in its ruling of 5th February 2019 clearly shows bias in favour of the Interested Party.*

*iv. **That** the Respondent has severally contradicted itself in its rulings. In particular, the applicant states in the impugned ruling that the Respondent was of the view that the Interested Party had shown proof of ownership of equipment by presenting a letter of availability from PI Makina who are a subsidiary of the Interested Party, one of the member companies of the consortium. However, in the same ruling and also in the ruling in No. 155 of 2018, the Respondent observed that the letter of availability was not a requirement in the Information to Bidders of the Request for Proposals in the tender documents.*

*v. **That** the in all its findings and directions, the Respondent appears to have a preferred outcome of the tendering process and the evaluation of the instant tender.*

28. The applicant also states that the impugned decision is biased because the Respondent only held the applicant to strict compliance with the bid requirements when the decision favoured the Interested Party but introduced an alternative criteria in evaluation when a strict evaluation of the Interested Party's documents in accordance with the Information to Bidders to the Request for Proposal would be un favorable to the Interested Party.

29. The applicant also states that in Request for Review Number 155 of 2018, the Respondent held that the applicant was under a legal duty to conduct its technical evaluation of the Interested Party's bid in strict accordance with the bid requirements, but, in the impugned decision, it directed the applicant to consider a letter from PI Makina dated 14th March 2017 as adequate proof of ownership of equipment, plant and machinery and or capacity to hire. The applicant also states that the impugned decision is ultra vires the provisions of the act and previous directions given by the Respondent, and, that, the said directions require the applicant to use a criteria not provided for in the Information to Bidders and the Request for Proposal.

30. The applicant also states that the decision to substitute the criteria for proof of ownership of equipment, plant and machinery being copies of logbooks with other documents which are not listed in the Information to Bidders was a violation of the act and in particular section 80 and Regulation 16(5) as well as the bid requirements, hence, ultra vires.

31. The applicant also states that the decision is illogical since the decision in No. 155 of 2018 and No. 22 of 2019 are contradictory. Further the applicant states that the decision in application number 155 of 2018 extended the tender validity period for a period of 45 days from 9th November 2018, yet the tender expired on 24th December 2018, meaning that the decision could not validate any further evaluation of the tender.

32. The applicant further sates that the Interested Party's bid was non responsive. It also states that the decision to substitute the criteria for proof of ownership of equipment, plant and machinery which was copies of logbook with other documents which were not listed in the Information to Bidders to the Request for Proposal violated section 80 of the Act and Regulation 16(5), hence, it was ultra vires.

33. Further, the applicant states that it was illogical for the Respondent to require the applicant to evaluate the Interested Party using a letter of availability, yet, the Respondent had previously directed the applicant to disregard the said letter. In addition, the applicant states that on 10th January 2019, it applied for extension of time and despite the parties having agreed to record a consent on the said extension, the Respondent ordered the applicant to pay costs of Ksh. 300,000/=.

The Reliefs sought.

34. As a consequence of the foregoing, the applicant seeks the following orders:-

*a. An order of **Certiorari** to quash the decision made by the Public Procurement Administrative Review Board on **21st** March 2019 in Request for Review Number **22** of 2019, Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S. v National Irrigation Board regarding Tender No. NIB/T/018/2016-2017 for funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation in Kitui, Tana River and Garissa Counties, Republic of Kenya.*

b. Any other further orders as this honorable court may deem fi to grant.

c. Costs of the application be provided for.

Respondent's Replying Affidavit.

35. **Hennock K. Kirungu,** the Respondent's Secretary swore the Replying Affidavit dated 6th June 2019. He averred that the on 21st March 2019 the Respondent allowed the Interested Party's Request for Review and directed the applicant to proceed with the procurement process taking into account the Respondent's findings, and directed it to complete the procurement process including making the award within 14 days from the date of the decision.

36. Mr. Kirungu deposed that the Respondent considered the tender documents, the evaluation reports and all the documents supplied to it in arriving at the said decision. He deposed that the Respondent was alive to the facts raised by the parties, the applicable provisions of the law including the governing act and the Constitution. He also averred that the Respondent observed the rules on Natural Justice and exercised its mandate within the ambit of the law.

37. Mr. Kirungu deposed that the subject tender has been before the Respondent previously in Request for Review application numbers 80 of

2018, 104 of 2018, 155 of 2018 and 22 of 2019 and in each Request for Review, the Respondent found that the applicant showed defiance and cunning conduct to the directions and guidance issued by the Respondent and generally the applicant breached procurement law and violated the Interested Party's legitimate expectation. He deposed that the Respondent's decisions in Requests for Review Nos. 80 of 2018, 104 of 2018, 155 of 2018 were never challenged before the High Court, hence, the averments touching on the said cases are unwarranted. Mr. Kirungu further deposed that the Respondent was convinced that the process of carrying out the procurement was marred by glaring omissions, deliberate failure to consider the substance of the interested party's proposal and breaches of the law on the part of the procuring entity against the interested party despite the Respondent directing the applicant on areas to check and improve on scoring on the basis of the Interested Party's document.

38. He averred that the Respondent considered all the relevant, pertinent and material facts and found that the applicant had not only acted in clear disobedience of the orders issued by the Respondent, but it undermined the interested party's right to fair administrative action under Article 47 (1) of the Constitution and failed to undertake the procurement process in a system that observes the procurement principles set out under Article 227(1) of the Constitution. In addition, he deposed that the impugned decision was reasonable, rational, free of bias and lawful, hence, the applicant's application has been made in bad faith.

The Interested Party's Replying Affidavit

39. Michael John Short, the Managing Director and the Head of the Interested Party swore the Replying Affidavit dated 22nd April 2019. He averred that the application is incompetent, abuse of court process and lacks any justifiable reason to warrant the orders sought.

40. He deposed that in December 2015, Tana Athi River Development Authority (TARDA) invited GBM Projects Limited to submit an expression of interest for the High Grand Falls Multi-Purpose Development Project on River Tana. He further deposed that on 8th December 2015, GBM Projects Limited submitted expression of Interest stating that it was in a position to bring the required project funds and technical partners, forming a consortium for the project.

41. Mr. Short deposed that on 21st January 2016, the Managing Director of TARDA responded requesting for a Term Sheet from GBM Projects Limited which it submitted on 22nd January 2016, but it never received any feedback for a whole year.

42. He deposed that on 13th January 2017, the applicant advertised a request for an expression of Interest for the project under a Fund, and Trans Design, Build, Own, Operate and Transfer model. He deposed that GBM Projects Limited formed a consortium with ERG Insaat Ve Sanayi A.S and submitted its proposal. He further averred that the proposals were opened on 17th February 2017 and on 27th April 2017, six applicants, including the Interested Party were notified that they were successful and had been pre-qualified for the project.

43. In addition, Mr. Short deposed that on 19th October 2017, the applicant advertised the Request for Proposals for the project, which included notification, as provided for in Clause 2.1.4 of the Request for Proposals, and a mandatory site visit on 8th November 2017 at which the pre-qualification bidders were to converge at the site. He stated that the Interested Party's representative, Mr. David Kamotho was the only party who attended the site visit with the applicant's staff member, Engineer Liose Kahiga.

44. He further deposed that on 10th November 2017, there was a pre-proposal conference at the applicant's headquarters attended by six representatives of the Interested Party, out of whom five had travelled to Kenya specifically to clarify the matters tendered, and engineers from the applicant led by Engineer Loise Kahiga. Mr. Short averred that during the meeting, he sought clarification on the consequences of the failure of the other pre-qualified bidders to attend the mandatory site visit, as provided in the Request for Proposals, as well as failure to attend the pre-proposal conference. He stated that the applicant's Engineer Loise Kahiga verbally confirmed that since the Interested Party was the only one who had attended the mandatory site visit and the pre-proposal conference, the other bidders would be disqualified from the process. He stated that the applicant expressed and confirmed that the Interested Party was the only pre-qualified bidder who attended the mandatory site visit. He added that the applicant assured the Interested Party that within 21 to 30 days of opening the Tender, the Technical Evaluation would be complete and that the Interested Party would be invited to discuss the financial and funding component of the tender with the responsible authorities of the government of the Republic of Kenya.

45. Mr. Short further averred that the Interested Party submitted its Tender Documents before the deadline on 30th November 2017, and the tender was opened the same day and was signed by the Interested Party's representatives. He averred that on 29th May 2018, the applicant purported to illegally cancel the tender prompting the Interested Party to file Request for Review number 80 of 2018 which was allowed and the applicant's termination letter was nullified. He averred that the Respondent directed the applicant to evaluate the tender and conclude the process within 14 days. He also stated that the tender validity period was extended for a further period of 45 days. Further, he averred that the applicant applied for extension of time which the Interested Party did not oppose and the period was extended by ten days.

46. In addition, Mr. Short averred that by a letter dated 3rd August 2018, the applicant communicated its decision that the applicant's tender was unsuccessful, because it failed the Technical Bid prerequisite evaluation stage due to failure to provide bid security of 0.5% along with the Technical Bid without which the technical eligibility as well as financial eligibility could not be evaluated. Lastly, it was informed under appendix to Bidders 2.9, Bid Security of 0.5% of the amount payable by way of Bank guarantee in favour of National Irrigation Board must be valid for an extra 30 days beyond the bid validity period of 180 days.

47. He deposed that the Respondent allowed its Request for Review and directed the applicant to carry out a technical and financial evaluation and complete the procurement process within 30 days. He also stated that the Respondent extended the tender validity period for 60 days.

48. He deposed that in its decision dated 8th October 2018, the applicant declared the Interested Party's bid unsuccessful for failing to show proof of ownership and or capacity to have equipment in the form of signed agreements or provision of log books, and for failing to provide commitment to fund all components of the project fully. He deposed that the applicant awarded the Interested Party 15 marks under clause

2.7.1 (4) of the set score of 20 thereby denying it 5 marks.

49. Mr. Short deposed that aggrieved by the above decision, the Interested Party filed Request for Revie Number 155 of 2018 which was allowed on 13th November 2018 and the Respondent directed the applicant to reinstate the Interested Party's Request for Proposal back into the valuation process and re-evaluate it at the technical stage, specifically clause 2.7.1 (4) of section 11 of the Information to Bidders taking into account the findings of the Board and complete the process within 21 days. It also extended the tender validity period for 45 days. In addition, he stated that the applicant applied for extension of time which was allowed and extended for 14 days and the applicant was ordered to pay costs of Ksh. 250,000/=.

50. He further averred that by a letter dated 14th February 2019, the applicant again decided the Interested Party's tender was unsuccessful for failing in the evaluation of technical proposal for being non responsive to clause 2.7.1 (4) and 2.7.1.(6). He stated the Interested Party was awarded 54.67 below the pass mark of 70. In addition, he stated that the reasons advanced were unlawful, irrational, biased and illogical, hence it filed Request for Review which was allowed on 21st March 2019 and the tender validity period was extended for a further 45 days and the applicant was ordered to pay costs Ksh. 300,0000/= which decision is under challenge in these proceedings.

51. He averred that the applicant has not demonstrated that the Respondent acted in excess or lack of jurisdiction, erred in law or breached the rules of natural justice, and added that judicial review is not concerned with merits of a decision, and that the core question is whether the allocation of marks was done in accordance with the set criteria set out in clause 2.7.1 of section 11 of the Bid documents.

52. He further deposed that the applicant violated section 80 of the act and Regulation 16(5) by introducing a criteria which was not part of the required documents, which is letter of availability, and, added that by complying with the previous orders rendered by the Tribunal, the applicant conceded that it had introduced a criteria that was not provided for. He further averred that the letter by PI Makanya satisfied the requirements and that section 173 (c) of the act permits the Respondent to substitute its decision.

Issues for determination

53. Upon analyzing the facts presented by the parties, I find that the following issues distil themselves for determination:-

a) Whether the expiry of the tender validity period put to an end the procurement process.

b) Whether the Respondent fell into jurisdictional error by extending the validity period of a tender whose validity had lapsed.

c) Whether the impugned decision is tainted with bias.

d) Whether the impugned decision is tainted by illegality.

a) Whether the expiry of a tender validity period put to an end the procurement process.

54. The applicant's counsel argued that in Request for Review No. 155 of 2018, the tender validity period was extended for 45 days from 9th November 2018. She argued that the tender validity period lapsed on 24th December 2018. As a consequence, counsel argued that the Respondent's decision of 5th February 2019 extending the tender is a nullity because there was no tender to extend in the first place. She referred to an excerpt of the Respondent's ruling acknowledging that the tender validity period had lapsed and argued that once a tender validity period lapses, it dies. To buttress her argument, she referred to a decision by the Respondent in Zhongoman Petroleum & Natural Gas Group Limitd v Equipment Company Ltd & Another[4] and submitted that the subsequent orders were null and void.

55. The Respondent's counsel did not address this ground of assault in his submissions.

56. Counsel for the Interested Party submitted that the applicant applied for extension of time to comply with the Respondent's orders issued in Request for Review number 155 of 2018, and, the Respondent allowed the application and extended the time. He however maintained that before this court is a challenge on Request for Review number 22 of 2019 and not number 155 of 2018, hence, the argument grounded on the decision made in Request for Review Number 155 of 2018 is unwarranted. He urged that the said argument should not be entertained in this case because the applicant never challenged the said order.

57. Counsel argued that this court has no jurisdiction to adjudicate on matters decided in Request for Review Number 155 of 2018 and added that the applicant complied with the orders in 155 of 2018. He cited Republic v Public Procurement Review Board and another ex parte Knierem BV[5] for the holding that where the decision of the Review Board is not upset by the High Court, the same is final. He also referred to the Respondent's wide powers under section 173 of the act and maintained that the Respondent acted within its powers.

58. It is common ground that the tender, the subject of these proceedings is the same tender that was the subject of adjudication in the three Request for Review applications discussed above. It is uncontested that the award of the Tender was nullified in Request for Review Number 115 of 2018 and the Respondent issued orders and directed the applicant to comply as per its orders. Unfortunately, the tender validity period lapsed in the intervening period and the applicant moved the Respondent by way of Notice of Motion dated 10th January 2029 seeking extension of time to comply with the orders. Counsel for the Interested Party did not oppose the application. In fact, its grounds of opposition were withdrawn by consent and the application was allowed.

59. Despite the fierce battles as exhibited in the history of this case, the two combatants were on the same side on the question of the extension of the tender validity period.

60. On 5th February 2019, the Respondent extended the tender validity period for a further 81 days and granted the applicant 14 days to comply with the orders issued in the said case. The applicant proceeded to comply with the orders, and continued with the process, but its decision was again challenged in Request for Review Number 22 of 2019 which gave rise to the instant application. Even though the applicant is the one who moved the court, it now argues that the tender was actually dead by the time the Respondent extended it, hence, the purported extension was a nullity, and the subsequent proceedings are null and void.

61. The legal applicable legal position as I understand it is that an organ of State must procure goods and services in accordance with a framework and system which is fair, equitable, transparent, competitive and cost effective in conformity with Article 2278 of the Constitution. A contract may only be awarded on an acceptable tender, i.e. a tender that complies with the specifications and conditions set out in the tender documents.

62. The principal issue raised herein is the legal consequence of failure to complete a procurement process within the tender validity period. Furthermore the question is whether the expiry of the tender validity period puts to an end to the tender process, and whether it could subsequently be revived by agreement between the parties or by extension by the Respondent as happened.

63. The starting point is that when a bidder submits a bid or proposal in response to an invitation for bids or a request for proposals, they need to commit to their bid (this is done on the bid or proposal submission form) and also to how long the bid/proposal can be considered effective (this is what is commonly called the bid or proposal validity period). For the sake of simplicity and to avoid unnecessary repetition, I will refer from this point forward only to "bid validity."

64. *Our Constitution and the procurement laws are heavily borrowed from the South African model. Accordingly, jurisprudence from South African Courts interpreting similar situation can offer useful guidance.* Where the validity period of a tender had lapsed before the award of the tender, Southwood J held in *Telkom SA Limited v Merid Training (Pty) Ltd and Others, Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others**[6]* that:-

> *"As soon as the validity period of the proposals had expired without the applicant awarding a tender the tender process was complete – albeit unsuccessfully – and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender."*

65. The judgment of Southwood J cited above was followed in *Joubert Galpin Searle and Others v Road Accident Fund and Others*[7]where the central issues to be decided were the effect on the tender process of the expiry of the tender validity period and whether, if the expiry of the tender validity period put an end to the process, it could subsequently be revived. The court held that once the tender validity period had expired, the tender process had been completed, albeit unsuccessfully. There were then no valid bids to accept, so the Respondent had no power to accept the expired bids. There is therefore nothing to extend and any award subsequent to the expiry date would be unlawful.

66. I am alive to the established jurisprudence that the tender validity period remains in abeyance until the request for review and judicial review applications are determined. This proposition of the law was authoritatively stated in the South African case of *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another*.[8] However, cases are context sensitive. The facts in this case are distinguishable. Request for Review No. 115 of 2018 was concluded and final orders were issued. For all purposes, the Respondent was *functus officio*. The proceedings before it had been concluded, hence, the proposition that the tender validity period remains in abeyance during the pendency of court proceedings cannot apply. Time continued to run the moment the Respondent pronounced its decision.

67. The Applicant who was the Respondent in the said Request for Review was unable to comply with the orders within the time directed by the Respondent and or during the tender validity period. The applicant long after the expiry of the tender validity period approached the court for extension of time and the Respondent entertained the application and granted the extension, thereby extending a tender validity period that had lapsed.

68. I am in agreement with the reasoning in the above South African decisions. As a result, it is my view that, in this case, once the tender validity period expired, the tender process was completed, albeit **unsuccessfully.** There was no valid tender process to extent as the time the Respondent purported to extent it. In any event, section 88 of the act provides that before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period. A reading of this provision leaves no doubt that it is for the accounting officer to extent the tender validity period and this can only be done prior to the expiry of the tender validity period.

69. Recognizing the persuasive nature of the above decisions, I find no cause to deviate from them. Because the applicant is an organ of State it is required in terms of Article 227 of the Constitution, when it contracts for goods and services, to do so in accordance with a system that is "fair, equitable, transparent, competitive and cost effective." These core principles of public procurement are given effect by a range of statutes, such as the Public Procurement and Asset Disposal Act, the Regulations made thereunder and the Public Finance Management Act, policies and guidelines. Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework is thus legally required and that they are not merely internal prescripts that may be disregarded at whim. I am unable to fathom how both parties in this case and the Respondent failed to appreciate this basic requirement and necessity of a tender validity period and purport to extent an already expired tender. By so doing, the Respondent allowed itself to be driven by the parties to commit an illegality.

70. An "acceptable tender" is any tender which in all respects, complies with the specification and conditions of tender as set out in the tender document. The procurement process including the award of the tender must be completed during the tender validity period. Once the tender validity period lapses, it cannot be resuscitated, not even by consent, or an order by the Respondent. A reading of the bid documents and the act leaves me with no doubt that it cannot be revived once it expires. In addition, the Bid document does not provide for extension to

be granted retrospectively, that is, an extension that will operate to revive an expired tender. This means that, objectively, the bid had expired as at 5th February 2019 when the order was made. Irrespective of the intention of the parties to extend the bid after its expiry as they purported to do so, such an extension could not breathe life into a dead procurement process.

71. Once the validity period of the proposals had expired with no extension of the period being made before the expiry of the validity period, there were no valid bid in existence either for the Procuring Entity to extent in accordance with the above section or for the Respondent to extend as it purported to do. I am of the view that this issue is dispositive of the whole case before me, and, on this ground, this application succeeds.

72. Notwithstanding my above finding, I will proceed to address the other issues, starting with the next issue which is closely related to the above issue, which is the question of jurisdiction.

b) Whether the Respondent fell into jurisdictional error by extending the validity period of a tender whose validity had lapsed.

73. The applicant's counsel submitted that the Respondent acted in excess of its jurisdiction in that once a tender validity period expires, it had no powers to extend it. She argued that having found that the tender validity period had lapsed, the Respondent ought to have downed its tools since it lacked jurisdiction, hence, it acted ultra vires. She argued that in the circumstances, the Respondents powers under section 173 (b) of the act cannot lie for lack of jurisdiction. She relied on Owners of Motor Vessell Lillian "S" v Caltex Kenya Ltd[9] and argued that section 87, 88 and 135 of the act provide for the tender validity period and argued that the decision directing the applicant to proceed with an expired tender violates Articles 10, 47, 20 and 227 of the Constitution.

74. She argued that the fact that the applicant complied with the said order and proceeded to evaluate the tender could not breathe life into the tender, since, it is the same tender that gave birth to Request for Review No. 22 of 2019, the subject of these proceedings. She cited Republic v Public Procurement Administrative Review Board & 2 Others ex parte Higawa Enterprises Limited[10] for the proposition that the court is entitled to reverse a decision where there is an irregularity.

75. The Respondent's counsel cited section 173 of the act and argued that the Respondent remained faithful to its powers and mandate. He argued that this is not an appeal, hence, it's not the duty of this court correct the decision on merits. He relied on Pastoli v Kbale District Local Government Council, Others,[11] Republic v Kenya Revenue Authority ex parte Yaya Towers,[12] Seventh Day Adventist Church (EA) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another[13] and Republic v Kenya Revenue Authority & another ex parte Bear Africa (K) Limited all of which reiterated the judicial review grounds. He further relied on Kenya Pipeline Company Limited v Hyosung Ebara Company Limited and two others[14] which reiterated the powers of the review board which is a specialized body and best suited to hear breaches under the act.

76. On the question of jurisdiction, counsel for the Interested Party cited section 28 of the act and argued that on 13th November 2018, the Respondent extended the tender validity period for 45 days from 9th November 2018. Further, he cited the Respondents decision in CRCC11 Kenya Limited v Kenya Rural Roads Authority[15] which held that the Respondent has wide powers under section 173 of the act and argued that the Respondent acted within its jurisdiction.

77. A useful starting point for a discussion of jurisdictional error is the following proposition: "any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions."[16] When the legislature grants authority to an administrative decision-maker, the authority will perforce be limited; the decision-maker must act within the jurisdiction it has been granted.

78. It is correct to say that where an administrative decision-maker commits an error of law by interpreting the law incorrectly, a reviewing court may intervene. *Anisminic v Foreign Compensation Commission****[17]*** was a watershed case. A majority of the House of Lords held that an error in interpreting an Order in Council justified judicial intervention, even in the face of a privative clause.[18] As Lord Pearce put it, administrative decision-makers must "confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament."[19] When courts intervene to keep an administrative decision-maker within boundaries established by legislation, this represents "simply an enforcement of Parliament's mandate to the tribunal."[20] That the "very effectiveness" of statute should be ensured by judicial review[21]is underpinned by rule-of-law concerns: "By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law."[22]

79. A statute might, however, grant significant decisional authority to an administrative decision-maker, which a court paying due respect to the scope of the authority would be obliged to take into account:-

> *"The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more…. [In such a case] it is an erroneous application of the [jurisdictional error] formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends…"****[23]***

80. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.[24]

81. Hayne J defined jurisdictional error in the following terms:-

> *"The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error.* ***There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do.*** *By contrast, incorrectly deciding something which the decision maker is authorized to decide is an error within jurisdiction."*[25]

82. A more specific definition of Jurisdictional error is defined as follows:-

> *"Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers."*[26]

83. *Section 28 of the act provides for functions of the Review Board as* (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.

84. *Section 173 of the act. It provides that* upon completing a review, the Review Board may do any one or more of the following— (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety; (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings; (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings; (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and (e) order termination of the procurement process and commencement of a new procurement process.

85. The issue before me is not what the Respondent can do after completing a review as provided under section 173. It is not a question on its functions under section 28. The question is whether the enabling statute confers jurisdiction upon it to extend a lapsed tender. As stated in the earlier issue, the Respondent made a final determination in Request for Review Number 115 of 2018. The applicant approached the court much later seeking extension of time to comply with the final orders of the court. Unfortunately, at the tender validity period had lapsed before awarding the tender. As discussed earlier, procurement law is awash with jurisprudence holding that once the tender validity period lapses, the procurement process it terminated, albeit unsuccessfully. It follows that there was no contract to extent at the time the Respondent purported to extend. The purported extension was a nullity. It follows that the subsequent proceedings in Request for Review number 22 of 2019 and all the subsequent orders were a nullity.

86. The Respondent fell into jurisdictional error by extending the validity period of a lapsed tender which was non-existent. Guidance can be obtained from *Craig v South Australia (1995) HCA 58* which held that:-

> *"A jurisdictional error occurs when the extent of that authority is misconceived. Decisions affected by jurisdictional error can be quashed by judicial review.* …
>
> *Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers."*

87. In *Judicial Review of Administrative Action*[27] the learned author Mark Aronson identified 8 categories or types of jurisdictional error namely: a mistaken assertion or denial of the very existence of jurisdiction; a misapprehension or disregard of the nature or limits of the decision-maker's functions or powers; acting wholly or partly outside the general area of the decision-maker's jurisdiction, by entertaining issues or making the types of decisions or order which are forbidden under any circumstances; mistakes as to the existence of a jurisdictional fact or other requirement when the relevant Act treats that fact or requirement as something which must exist objectively as a condition precedent to the validity of the challenged decision; disregarding relevant considerations or paying regard to irrelevant considerations, if the proper construction of the relevant Act is that such errors result in invalidity; errors of law, although where the decision-maker is an inferior court or other legally qualified adjudicative body, the error will probably have to be such that it amounts to a misconception of the nature of the function being performed or of the body's powers; acting in bad faith and breaching the hearing or bias rules of natural justice.

88. The argument mounted by counsel for the Interested Party suggesting that since the applicant did not challenge the decision in Request for Review Number 115 of 2015, it cannot challenge it now is legally frail and unsustainable. True, before me is not a challenge on the Respondent's decision in Number 115 of 2018. But it's equally true that the validity of the tender, the subject of the instant application is under challenge. The same tender was the subject of the proceedings in number 115 of 2018 and the earlier other two Request for Review applications. The question is whether the tender had lapsed as at the time it was extended and whether the Respondent had jurisdiction to extend an expired tender.

89. The fact that the applicant never filed a Request for Review to challenge the decision in Request for Review Number 115 of 2018, or the fact that it complied with the said order and the fact that the applicant applied for the extension of the tender validity period which was not objected to is irrelevant. As was correctly held in *Niazons (K) Ltd. Vs. China Road & bridge Corporation (K)*[28] cited in *Republic v Complaints Commission Media Council for Kenya & 2 others,*[29] jurisdiction cannot be conferred by estoppel, consent, acquiescence or default.

90. The question here is whether the Review Board was properly seized of jurisdiction to extend a tender that had lapsed. A tribunal is only competent to adjudicate on a matter only if:-

> *a. it is properly constituted as regards number and qualification of the members of the Bench and no member is disqualified for one*

reason or the other;

b. the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

c. the case came before the court initiated by due process of law and upon fulfilment of any conditions precedent to the exercise of jurisdiction.

91. I have carefully studied the provisions of section 28 and 173 of the act and the entire act and Regulations. I am clear in my mind that the tender which was the subject of Request for Review Number 115 of 2018 is the same tender the subject of these proceedings. Accordingly, the validity of the said tender at all material times is a relevant factor in these proceedings. A reading of the act and the Regulations leave me with no doubt that the Respondent fell into jurisdictional error the moment it entertained the application for extension of time and proceeded to extend the tender validity period of a tender whose validity period had lapsed. On this ground, this application succeeds.

c. Whether the impugned decision is tainted with bias.

92. The applicant's counsel submitted that in Request for Review number 155 of 2018, the applicant applied for extension of time in order to comply with Respondent's orders. Counsel argued that despite the fact that the application was not opposed, the Respondent ordered the applicant to pay costs of Ksh, 250,000/=. It also states that the Respondent made sentiments which showed a clear leaning towards the Interested Party. In addition, Counsel referred to the decisions in Request for Review Numbers 80 of 2018, 104 of 2018 and 155 of 2018 and argued that they demonstrate bias. She argued that sections 60 and 80 of the act provide for the manner in which evaluation is to be done. Also, she argued that the bid documents required proof of ownership and or capacity to hire plant, machinery and equipment in the form of log books and or signed agreements accompanied by a copy of log books from the lessee. She argued that it was bias on the part of the Respondent to hold the applicant to a strict compliance with the bid terms where the decision favored the Interested Party but at the same time it introduced a different criteria when a strict evaluation would be unfavorable to the Interested Party. She relied on Republic v Public Procurement Administrative Review Board & Others ex parte Akamai Creative Limited[30] which cautioned against altering bid documents save as is provided under the act. In addition, counsel relied on JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co Ltd/ Pride Enterprises v Public Procurement Administrative Review Board & Others for the holding that the act and the Regulations bequeath the onus of amending a tender document on a procuring entity.

93. Counsel argued that the Respondent made contradictory decisions where the decision would be in favour of the Interested Party and cited several contradictory findings on the same issues in the four Requests for Review filed touching the instant tender process. Further, counsel argued that it was illogical for the Respondent to make contradictory decisions in the said cases.

94. The Respondent's counsel argued that the Respondent acted in good faith.

95. On the argument that the decision is tainted with bias, illegality, irrationality, lacked logic or was ultra vires, counsel for the Interested Party argued that the burden lies on the applicant to prove the allegations. Reacting to the argument that the Respondent was biased when it held that the letter from PI Makina was sufficient prove of ownership, counsel argued that the Respondent considered the relationship between the Interested Party and PI Makina and the position that it was a wholly owned subsidiary of ERG and fully integrated into the Interested Party. He argued that the Respondent went ahead and defined a subsidiary company under the Companies Act.[31]

96. Further counsel argued that the argument that the impugned decision is biased is premised not on the decision in the previous Requests for Review referred to earlier which are not before this court. It was counsel's submission that before this court is the decision in Request for Review number 22 of 2019 hence referring to the other decisions is not appropriate. He argued that the test of determining whether there was bias was stated in Republic v Chesang & 2 others ex parte Paul Karanja Kamunge t/a Davisco Agencies and 2 others[32] where the court held inter alia that there must be circumstances from which a reasonable man would think it likely or probable that the judge would favour one side at the expense of the other.

97. Counsel also referred to Ogang v Eastern and Southern African Trade and Development Bank (PTA)[33] which held that mere strong language by a judge does not establish bias and that the views expressed therein do not necessarily amount to a predetermination of issues. He also cited Haji Mohamed Sheikh T/A Has Hauliers v Highway Carriers ltd[34] for the holding that if the judge introduced into his consideration of the application extraneous matters and founded his decision either partly or wholly on them, then the exercise of his discretion can be faulted, but if there was evidence on record to show the genuineness of the suspicion, then there is nothing extraneous in the observation.

98. In her submissions in reply, the applicant's counsel argued that the previous decisions in the Requests for Review involving the same tender were referred to demonstrate bias. She argued that bias is a ground for judicial review under section 7 (2) of the Fair Administrative Action Act.[35] She argued that decision making process must be free from apparent partiality, bias or prejudice. She placed reliance on Republic v Speaker of the Senate and another ex parte Afrison Export Import Limited and another[36] which held that bias whether actual or real connotes absence of impartiality. She submitted that the Respondent approached the case with a closed mind. To buttress her argument, she referred to the Respondent's contradicting decisions on the same issue in two related cases involving the same parties in violation of section 80 of the act. She argued that the Respondent upheld strict compliance with bid terms when they favored the Interested Party and introduced alternative criteria when a strict application would be unfavorable to the applicant.

99. The Black's Law Dictionary[37]defines the word bias as:-

"Inclination; prejudice,…judicial bias. A judge's bias toward one or more of the parties to a case over which the Judge presides. Judicial bias is usually insufficient to justify disqualifying a Judge from presiding over a case. To justify disqualification or recusal, the Judge's bias usually must be personal or based on some extra judicial reason.''

100. The test of reasonable apprehension of bias was stated by Trevelyan J in the case of *John Brown Shilenje vs Republic*[38] as:-

> *"Reasonable apprehension in the applicants or any right thinking person's mind that a fair trial might not be heard before the magistrate. Mere allegations will not suffice. There must be reasonable grounds for the allegations''*

101. The test for establishing a Judge's impartiality is the perception of a reasonable person, this being a 'well-informed, thoughtful observer who understands all the facts' and who has examined the record and the law and thus 'unsubstantiated suspicion of personal bias or prejudice' will not suffice.'[39] The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[40]There are many similar judicial pronouncements, which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer.[41] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases, the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making. This approach begs the question of whether the fair minded and informed person is a neutral observer or little more than the court in disguise.

102. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that *"justice should not only be done, but be seen to be done."*[42] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.[43] This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the public.

103. The High Court of Australia explained, *"Bias, whether actual or apparent, connotes the absence of impartiality."* Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[44] A claim of apprehended bias requires a finding that a fair-minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent," "imputed," "suspected" or "presumptive" bias. [45]

104. The Supreme Court of Kenya in *Hon. Lady Justice Kalpana Rawal vs Judicial Service Commission & Anther*[46] citing Professor Groves M. in *"The Rule Against Bias"*[47] stated that-*"*… claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand."

105. As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[48]The Lords also made clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair-minded observer would take account of the circumstances of the case at hand.[49]

106. Whether the allegation relates to actual or apprehended bias, it is a serious matter, which strikes to the validity and acceptability of a decision. Actual bias has been applied in the following two fact-situations: (a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.[50]

107. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias,[51] apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.[52]

108. The current double reasonableness test, which commenced its journey in the Supreme Court of Canada[53] and then travelled through the High Court of Australia,[54] is so called because it translates into a two-stage requirement of reasonableness. It is a refinement of sorts of the formulation by the late Professor De Smith in his rationalization of the real likelihood test as "based on the reasonable apprehensions of a reasonable man."[55] There must be an apprehension of bias that must be reasonably entertained. That is the first stage. In the second stage, the apprehension must be one held by a reasonable person, someone who need not have interest in the outcome of the matter other than the general interest shared by the public in the fair administration of justice. The fulfilment of this general interest is mainly a pre-occupation with a fair administration of justice; a concern that justice is not only done but is manifestly and undoubtedly seen to be done.

109. In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.[56] As formulated, the test is: "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel.

110. I now apply the tests to the facts of this case. The Respondent ruled in favor of the Interested Party in 4 Request for Review applications. The applicant complied with the orders in three of them and never challenged the decisions. In the fourth case, the applicant moved the court for extension of time. The application was not opposed. The Respondent allowed it and ordered the applicant to pay costs. Whether the said decisions were right in law are grounds for Review. I find no bias in the said decisions.

111. The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. The ever present duty of a decision maker to act fairly is seriously compromised where the decision maker is seen to be guilty of the three categories of bias, namely, actual bias, imputed bias and apparent bias.

112. The allegation that the Respondent was inclined in favour of the Interested Party is largely based on the argument that the Respondent only upheld strict compliance of the bid requirements when they favoured the Interested Party and applied different tests when the strict compliance would be against the Interested Party is unsustainable. As authorities show the existence of bias requires a high standard of prove. Mere suspicion or apprehension is not enough. Applying the above tests, I find and hold that this ground or Review fails.

d. Whether the impugned decision is tainted by illegality.

113. The applicants counsel cited section 80 (2) of the act and argued that the Respondent ignored the provisions of the tender document. She further argues that the impugned decision lacks logic and is illegal. Counsel relied on Pastoli v Kabale District Local Government Council & others[57] which restated the grounds for judicial review. She also argued that it was illogical for the Respondent to require the applicant to evaluate the Interested Party using a letter of availability and find its tender to be responsive yet the Respondent had previously directed the applicant to disregard the said letter. Counsel argued that it was a bid requirement for bidders to establish ownership of an already existing equipment, plant and machinery with an ability to provide or manufacture equipment, plant and machiner*y.*

114. The applicant's counsel argued that the decision substituting the criteria for proof of ownership of equipment, plant and machinery with other documents not listed in the bid documents was in contravention of the terms of the act, particularly section 80 and Regulation 16(5) hence, ultra vires.

115. Counsel further argued that the Respondent failed to take into account relevant factors, hence, the decision is irrational. He relied on Republic v Public Procurement Administrative Review Board & 3 Others ex parte Olive Telecommunication PVT Limited[58]for the holding that this court can intervene where the Respondent fails to take into account relevant factors.

116. The Respondent's counsel submitted that this is an appeal disguised as a judicial review and placed reliance on Municipal Council of Mombasa v Republic and another.[59] He also cited Republic v Kenya Power & Lighting Company Limited and another[60] for the holding that it would be usurping the powers of the Respondent for this court to substitute the decision with its own views.

117. The Interested Party's counsel submitted that the applicant is not entitled to the orders sought. He urged the court to be guided by the proposition of the law that judicial review in not concerned with merits of the decision but the decision making process.[61] He added that judicial review is not an appeal.[62]Further counsel placed reliance on Republic v Kenya National Examinations Council ex parte Gathenji & others[63]which held that certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.

118. In addition, counsel cited Municipal Council of Mombasa v Republic and Umoja Consultants Ltd[64] and Pastoli v Kabale District Local Government Council and Others[65] which decisions clearly set out the province of judicial review jurisdiction and argued that the Respondent in arriving at the impugned decision acted within the law. He argued that the applicant has failed to demonstrate that the decision is tainted with illegality, irrationality or procedural.

119. Counsel also submitted that this is an appeal disguised as a judicial review application. He cited Kenya Pipeline Company Limited v Hyosung Ebara Company Ltd and 2 others[66]in support of the position that the applicant has not established that the Respondent acted without jurisdiction.

120. As for the alleged violation of section 80 of the Act, counsel submitted that it is the applicant who violated the said section by introducing new criterion, which is letter of availability which was never part of the Request for proposal. He relied on Republic v Public Procurement Administrative Review Board and 2 Others ex parte Central Kenya Fresh Merchants Limited[67] which held that judicial review remedies are discretionary and can be declined where the applicant has not acted in good faith.

121. A decision to award a tender constitutes an administrative action. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

122. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations or in this case the Tender terms and conditions. A procuring entity is bound to adhere to the terms of the procurement process. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[68]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

123. In *Council of Civil Service Unions v. Minister for the Civil Service****[69]*** Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality*, *irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality.*[70]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it to *"unreasonableness"* in *Wednesbury* Case.[71] By *"Procedural Impropriety"* His Lordship sought to include those heads of

Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

124. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[72]*where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith.* Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament, then a court will not interfere with the decision. A decision which falls outside that area can therefore be described, interchangeably, as:- a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

125. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

126. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and also established its limits.

127. Section **79** of the act provides for Responsiveness of tenders. It reads as follows:- **(1)** A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents. **(2)** A responsive tender shall not be affected by**—(a)** minor deviations that do not materially depart from the requirements set out in the tender documents; or **(b)** be taken into account in the evaluation and comparison of tenders. *The starting point is that* a contract must be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer.

128. Briefly, the requirement of responsiveness operates in the following manner:- a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.[73] Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[74] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a *sine qua non* for further consideration in the evaluation process.[75]The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome.

129. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

130. The constitutional and legislative procurement framework entails prescripts that are legally binding. The fairness and lawfulness of the procurement process and the decision under Review must be assessed in terms of the provisions of the Fair of Administrative Action Act. [76]The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of Review. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under Fair Administrative Action Act[77] has been established.

131. I start from the premise that it is uncontested that the evaluation criteria is as per the Bid documents. The contestation is what constitutes "proof of ownership" and or "capacity to hire in the form of logbooks" and or "signed agreements accompanied by copies of log books from the lessee."

132. *In resolving this issue, I will seek guidance from the Constitution, the act, the Regulations and the Tender documents. Article **227** of the* Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tender. The Article requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be 'fair, equitable, transparent competitive and cost-effective.' This position is replicated in section **3** of the act. As stated above, since the decision to award a tender constitutes administrative action, it follows that the provisions for the Fair Administrative Action Act[78] apply to the process.

133. The above is the constitutional and legislative background against which the present matter must be considered. The tender process the subject of these proceedings must be construed against the background of the system envisaged by Article **227** of the Constitution. In other words, whether the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged

against these values.

134. In my view a partial evaluation of tenders is not permitted. The Respondent is in law required to conduct a full and complete evaluation of the terms of tenders and the law. It is unlawful for the Respondent to pass a decision awarding a tender to a bidder in circumstances where there has not been a full and complete evaluation of the bidder's proposal and proper compliance with the bid requirements. Complete evaluation includes due diligence including proof of ownership of plant, machinery or equipment where required. To do otherwise is to engage in an illegality and such a decision will be tainted by an error of the law.

135. In order to give meaning to sections **83, 84** and **85** of the act, the Regulations and the Tender documents, regard must be had to their wording, read in context, and having regard to the purpose of the entire act and the dictates of Article **227** of the Constitution. Read against this backdrop, the plain wording of the relevant provisions and the scheme of the above sections make it clear that the said provisions are meant to ensure a fair, equitable, transparent, competitive procurement process which is consistent with the provisions of Article **227** of the Constitution. The wide meaning ascribed to the provisions would preclude a prospective tenderer who has not passed the due diligence test or has not passed the technical evaluation from being awarded the award. It is for this reason that the court must read the provision and the entire act and avoid reading one provision to the exclusion of all others.

136. Section **83(1)** of the act provides that an evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with the Act. The operative words here is "prior to the award of the tender." Section 84 of the act provides that:-

> *(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.*
>
> *(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.*
>
> *(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).*

137. Also relevant is section 85 of the act which provides for Recommendation for contract awards in the following words:-

> ***85. Recommendation for contract awards***
>
> *Subject to prescribed thresholds all tenders shall be evaluated by the evaluation committee of the procuring entity for the purpose of making recommendations to the accounting officer through the head of procurement to inform the decision of the award of contract to the successful tenderers.*

138. A reading of the above provisions and indeed the entire act reveals that the evaluation criteria is a series of standards and measures used to determine how satisfactorily a proposal has addressed the requirements identified in a bidding opportunity. They also play a major role in identifying the best overall cost effective solution to the proposal requirement. The complete evaluation process consists of:- Establishing appropriate criteria, and respective weights, Placing the criteria in the proposal document, Selecting an evaluation team, Evaluating the proposal using the criteria, and Preparing the evaluation report, including a recommendation. The need for the evaluation process is twofold. *First,* it offers all potential bidders a fair and equitable method of having their proposal reviewed and considered as a potential solution in a consistent and fair manner. *Second,* it provides the evaluators with a clear and concise method of identifying the competent proposals and ultimately the best overall bid.

139. Evaluation criteria are the standards and measures used to determine how satisfactorily a proposal has addressed the requirements identified in the Request for Proposals. Suppliers either meet or do not meet mandatory criteria. *Mandatory criteria* establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the *mandatory* criteria that *"competent"* tenders are established. Due diligence is in my view a mandatory requirement. The Evaluation Committee is required to conduct a post-qualification of the lowest evaluated responsive Tenderer, to determine the Tenderer's physical capability to perform the contract. Using the criteria specified in the Bidding Documents, this review include an assessment of the Tenderer's technical, financial and physical resources available to undertake the contract, including his current and past similar projects and ownership or capacity to hire the required plant, machinery and equipment.

140. If the lowest evaluated responsive Tenderer fails post-qualification, his Tender should be rejected, and the next ranked Tenderer should then be subjected to post-qualification examination. If successful, this Tenderer should receive the award. If not, the process continues for the other Tenderers. The rejection of a Tender for reasons of post-qualification requires substantial justification, which should be clearly documented in the attachments to the Evaluation Report.

141. In this case, the simple question before the Respondent was whether the Interested Party demonstrated proof of ownership and or capacity to hire in the form of logbooks and or signed document accompanied by copies of log books. The Interested Party presented a letter from PI Makina. It was argued that the letter was from a subsidiary company as defined in the Companies Act. [79] That may be so, but what was difficult in availing copies of log books as proof of ownership as provided in the bid documents. My reading of the Bid Requirements is that there was a clear emphasis on proof of ownership, such that where a bidder presented a signed agreement, it had to be accompanied by copies of log books. Similarly, proof of ownership if the plant, machinery or equipment belonged to the bidder or "to a subsidiary company" as claimed in this case, the bid requirements with the same force required proof by way of copies of log books.

142. Thus, the failure to proof ownership was is in conflict with the act, the Tender documents and Article **227** of the Constitution. In the premises, the Respondent's decision was irregular, inconsistent with the tender documents, the act and the constitutional dictates discussed above. Where a decision is inconsistent with the provisions of the Constitution, the act and the Tender documents, such a decision is invalid and the court does not have discretion on the matter - the court must declare is invalid.

143. The provisions of Article **227** of the Constitution are underpinned by the act, the Regulations, the Tender documents and policies. These procurement regulations and policies have been described by our courts as peremptory. Failure to comply with such provisions has been found to render the administrative decision unlawful and invalid. The validity of a tender process solely depends on whether or not there has been compliance with Article **227** of the Constitution and all the legislation and policies which have been enacted to give effect to it.

144. In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

145. To be considered for award, a bid must comply in all material respects prescribed in the invitation for bids. When any tender is passed over or regarded as non-responsive, the reasons for passing over such tender must be defendable in any court of law. Examples in this regard may include negative banking reports, non-submission of tax clearance certificates, not having the necessary capacity and / or capability, being listed on the Register for Tender Defaulters, negative due diligence reports, a history of poor performance in similar works or services, etc. Proof of ownership of plant, equipment and machinery is meant to demonstrate capacity to perform the tender, hence, a mandatory consideration.

146. It is beyond argument that our procurement law provides for compliance with tender conditions "in all respects". On a literal interpretation of the definition of an "acceptable tender" in the act, therefore, it would appear that procuring public entities "must" exclude tenders that fail to comply with the exact requirements of the tender conditions. The legislature does not appear to afford procuring entities any discretion in the matter nor does the Respondent herein or this court have any discretion on such matters.

147. The fairness prescribed in Article **227** of the Constitution must be decided on the circumstances of each case. It may in given circumstances be fair to ask a bidder to explain an ambiguity in its tender; it may be fair to allow a bidder to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or the attributes of transparency, competitiveness and cost-effectiveness.

148. The key question here is whether failure to proof ownership by providing logbooks stripped the tender process of an essential element of fairness; that is, the equal evaluation of tenders. Where failure to pass post qualification process subverts the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not. This strict requirement applies with equal force even where there is a single bidder. In my view, an "acceptable tender" is one that "in all respects complies with the specifications and conditions of tender as set out in the tender document." The definition of 'acceptable tender' must be construed against the background of the system envisaged in Article **227** of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective."

149. In other words, whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values. In this case, the winning bidder did not pass the post qualification evaluation. It never provided evidence of ownership as required. Whether it presented an agreement or a letter it ought to have been supported by ownership documents. The question is whether it can be argued that the winning bidder's tender was an "acceptable tender" within the meaning of the act, which, is, did the tender meet all the requirements of the tender. It did not.

150. I have severally in my determinations argued that there is a need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender. I am conscious of the ever-flexible duty of a tender committee to act fairly, and that fairness must be decided on the circumstances of each case. In the present case it is clear that post qualification was a mandatory requirement. Evidence of capacity to perform the tender by providing proof of ownership of plant, machinery and equipment was a prerequisite to qualification. What constitutes proof was stipulated in the Bid documents. The Respondent had no power or discretion to substitute the proof prescribed in the Bid documents with a letter that was unsupported by evidence of ownership. Parties to a procurement process are bound by the bid terms and conditions including the evaluation criteria. The set bar cannot be lowered to enable a tenderer to jump over.

151. A procuring entity may condone some deficiencies. For example, a *bona fide* mistake should not in and of itself disqualify a bidder. Substance should prevail over form. A distinction should be drawn between a material factor and the evidence needed to prove that factor. Regard must be had to the facts as a whole in the context of the applicable legislation and the principles involved; and the words "acceptable tender" which involves a consideration of the degree of compliance with tender conditions. Essentially, a failure to comply with prescribed conditions will result in a tender being disqualified as an "acceptable tender" unless those conditions are immaterial, unreasonable or unconstitutional.

152. As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so. The definition of an "acceptable tender" does not grant the Respondent any discretion when evaluating compliance with tender conditions unless the conditions imposed are immaterial, unreasonable or unconstitutional.

153. When Parliament enacted the act, it was complying with the obligation imposed by Article 227 of the Constitution which requires that legislation be passed in order to give effect to the implementation of a procurement policy referred to in the Article. Therefore the procurement process in the statute must be construed within the context of the entire Article 227 while striving for an interpretation which promotes 'the spirit, purport and objects of the Article.

154. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable.

155. Section **80(2)** of the act provides in mandatory terms that the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered. Section **83** of the act provides for Post Qualification in the following words:-

> *1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.*
>
> *2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.*
>
> *3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—*
>
> *a) initial each page of the report; and*
>
> *b) append his or her signature as well as their full name and designation.*

156. A proper construction of the impugned decision, the bid documents and the law leaves me with no doubt that the procuring entity's decision to cancel the tender was in conformity with the bid documents and the law. Put differently, the applicant has demonstrated that the Respondent acted *ultra vires* by failing to uphold the express requirements of the Tender documents and the provisions of the law cited above. On this ground alone, I find and hold that this application succeeds.

Conclusion

157. In view of my analysis and determinations of the issues discussed above, the conclusion becomes irresistible that the applicant's application succeeds. The *impugned decision is amenable for review on grounds discussed above.*[80] Judicial Review is concerned with testing the legality of the administrative decisions. A decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.[81]

158. Accordingly, I allow the applicant's Notice of Motion dated **12th** April 2019 and make the following orders:-

> *a. An order of **Certiorari** be and is hereby issued quashing the Respondent's decision dated **21st** March 2019 in Request for Review Number **22** of 2019 between Consortium of GBM Projects Limited and ERG Insaat Ticaret Ve Sanayi A.S and National Irrigation Board regarding the Tender No. NIB/T/018/2016-2017 for Funding, Design, Build, Own, Operate and Transfer of the High Grand Falls Dam Project and Associated Irrigation Infrastructure in Kitui, Tana River and Garissa Counties, Republic of Kenya.*
>
> *b. No orders as to costs*

Signed and Dated and Delivered at Nairobi this _17th_day of__January__2020.

John M. Mativo

Judge

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[1] Act No. 14 of 2019.

[2] Act No. 14 of 2019.

[3] Act No. 33 of 2015.

[4] *No. 2 of 2010.*

[5] {2017} e KLR.

[6] {2011} ZAGPPHC dated 7 November 2011 - now reported at {2011} JOL 26617 (GNP).

[7] {2014} 1 All SA 604 (ECP).

[8] {2015} ZACC 22.

[9] {1989} KLR 1.

[10] {2017} e KLR.

[11] {2008} 2 EA 300.

[12] {2008} e KLR.

[13]{2014} e KLR.

[14] {2012} e KLR.

[15] Application no. 30 of 2018.

[16] *Union des employés de service, local 298* v *Bibeault* [1988] 2 SCR 1048 at 1086, *per* Beetz.

[17] {1969} 2 A.C. 147.

[18] It is now widely accepted that the logic of *Anisminic* means that errors of law will generally justify judicial intervention. See *e.g. In re A Company*, [1981] A.C. 374, at p. 383, *per* Lord Diplock: "The break-through made by [*Anisminic*] was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished"; *R. v Hull University Visitor, ex parte Page*, [1993] A.C. 682, at p. 701, *per* Lord Browne-Wilkinson: "In my judgment the decision in [*Anisminic*] rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires".

[19] {1969} 2 A.C. 147, at p. 194.

[20] {1969} 2 A.C. 147, at p. 196. See similarly *R. v Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338, at p. 346.

[21] *R. (Cart) v Upper Tribunal*, [2009] EWHC 3052, [2010] 1 All E.R. 908, at para. 38, *per* Laws L.J.

[22] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 29.

[23] *R v Income Tax Special Commissioners, ex parte Cape Copper Mining Company* (1888) 21 QBD 313, at pp. 319-320, *per* Lord Esher MR. See *e.g. Tithe Redemption Commission v Wynne* {1943} KB 756.

[24] See *R v Hillingdon London Borough Council, ex parte Puhlhofer, {1986} AC 484, at p. 518, per Lord Brightman.*

[25] *Re Refugee Review Tribunal*; *Ex parte Aala* [2000] HCA 57.

[26] Craig v South Australia [1995] HCA 58.

[27] 4th Ed, 2009, [1.90].

[28] **Civil Appeal No. 187 of 1999.**

[29] **{2013} e KLR.**

[30] {2016} e KLR.

[31] Act No. 17 of 2015.

[32] {2017} e KLR.

[33] {2003} 1 EA 217.

[34] {1988} KLR 806, per Apaloo JA.

[35] Act No. 4 of 2015.

[36] {2018} e KLR.

[37] 8th Edition at page 171.

[38] Cr App No. 180 of 1980

[39] As was held in the American case of Perry vs Schwarzenegger, 671 F. 3d 1052 (9th Circ. Feb. 7th 2012

[40] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[41]*Minister for Immigration and Multicultural Affairs Ex p Jia* (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); *Bell v CETA* (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[42] *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": *Shrager v Basil Dighton Ltd* [1924] 1 KB 274 at 284.

[43] *See*, eg, *Ebner v Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 363 (Gaudron J) (HCA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [83] (Eng CA); Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187 at [14], [21] (HL); *Forge v Australian Securities Commission* [2006] HCA 44; (2006) 229 ALR 223 at [66] (Gummow, Hayne and Crennan JJ) (HCA). *See* also *Belilos v Switzerland* [1988] ECHR 4; (1998) 10 EHRR 466 at [67] where the European Court of Human Rights explained that the bias rule, as it arose from Art 6 of the European Convention of Human Rights, was based upon the importance of "the confidence which must be inspired by the courts in a democratic society".

[44] *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

[45] *Anderton v Auckland City Council* [1978] 1 NZLR 657 at 680 (SC NZ); *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414 (NSW CA); *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

[46]Supreme Court No. 11 of 2016.

[47] {2009} U Monash LRS 10.

[48] [1993] UKHL 1; [1993] AC 646 at 670.

[49] Porter v Magil [2001] UKHL 67; [2002] 2 AC 357.

[50] See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v IABSORIW Local No 97* 2008 CanLII 39763 (BCLRB) para 1.

[51] On the contrary, Burns and Beukes Administrative Law 303-304 think it is the other way round. For them, it is generally "a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised." In their view, "a reasonable suspicion of bias or perceived bias is rather more complex"

[52] Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant's medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him

[53] In Committee for Justice and Liberty v National Energy Board 1978 68 DLR (3d) 716 735 de Granpré J laid down what has become the trademark of public adjudication in modern Canada when he stated that: "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. … That test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.' Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?"

[54] In *Livesey v NSW Bar Association* 1983 151 CLR 288 293-294, the previous "high probability" test was supplanted by the reasonable apprehension test.

[55] De Smith Judicial Review 230

[56] *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire*; In *Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (Re Sapire).

[57]{2008} 2EA 300.

[59] {2002} e KLR.

[60] {2013} e KLR.

[61] Citing Michael S QC and Gondie J QC, Judicial Review, 1992, Butterworths, Chapter 3.

[62] Citing *Lord Brightman in Chief of North Wales Police v Evans.*

[63] Civil Appeal No. 266 of 1996.

[64] Civil Appeal No. 185 of 2001.

[65] {2008} 2 EA 300.

[66] {2012} e KLR.

[67] {2018} e KLR.

[68] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[69] {1985} AC 374.

[70] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[71] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[72] {2015} eKLR.

[73] The concept of bid responsiveness is used most often in relation to compliance with bid formalities.

[74] Hoexter 2012: 295.

[75] *Xantium Trading 42 (Pty) Ltd vS South African Diamond and Precious Metals Regulator and another* {2013} JOL 30148 (GSJ) para 25

[76] Supra.

[77] Ibid.

[78] Act No. 4 of 2015.

[79] Act No 117 of 2015.

[80] Citing *Republic vs Public Procurement Administrative Review Board & Another ex parte Uto Creations Studio Limited* {2013}eKLR.

[81] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 per Mason CJ. See also comments by Toohey and Gaudron JJ at 384.