REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 85 OF 2018

REPUBLIC...APPLICANT

VERSUS

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD................................RESPONDENT

AND

M/S AAKI CONSULTANTS ARCHITECTS AND URBAN DESIGNERS.......................INTERESTED PARTY

AND

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY...*EX PARTE* APPLICANT

JUDGMENT

The Parties.

1. The *ex parte* applicant, the Meru University of Science and Technology (M.U.S.T.), is a public University established under the Universities Act.[1]

2. 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[2] (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.

3. The Interested Party M/S AAKI Consultants Architects and Urban Designers is a limited liability company carrying on business in Kenya. It was a bidder in the procurement the subject of these proceedings. It was the applicant in Request for Review Number **19** of 2018 between the Interested Party and the *ex parte* applicant which culminated in the decision being challenged in these proceedings.

Factual Matrix.

4. These proceedings arose from procurement for "Consultancy Services for Design and Construction Supervision of the ex parte applicant's Proposed Health Sciences Complex which was factored in the ex parte applicant's 2017/2018 procurement, a project the ex parte applicant describes as important not only to itself, but also to the public.

5. The uncontested facts are that the project was initiated by an invitation for expression of interest on **23rd** August 2017. Qualified candidates were issued with a Request for Proposal on **5th** October 2017 followed by a pre-proposal meeting on **10th** October 2017. The submitted proposals were opened on **19th** October 2017 paving way for the Technical Evaluation in accordance with the Request for Proposal. The following bidders were technically qualified to have their financial proposals opened which was done publicly on **1st** December 2017 when the technical scores were read aloud:-

a. AAKI Consultants Architects and Urban Designers-83%

b. Scope Design Systems Ltd-72%

c. Triad Architects-72%

6. It is common ground that the respective financial bids were opened and read out in accordance with the law and the same were as follows:-

a. ASKI Consultants Architects and Urban Designers- Ksh. 12,770,173/=

b. Scope Design Systems Ltd- Ksh. 12,000,200/=

c. Triad Architects-Ksh. 27,877,466/=

7. It is contended that it was a mandatory requirement under the Request for Proposal for the ex parte applicant to conduct due diligence of the technically qualified bidders. The ex parte applicant states that as a consequence of the foregoing, it appointed a team of four of its staff to visit the various sites used as references by the technically qualified bidders to conduct due diligence, and, that, the team visited various sites provided by the Interested Party as proof of its recent experience on assignments of a similar nature. It contends that the team undertook an extensive due diligence of all qualified tenderers and filed a detailed report citing several flaws on the references provided by the Interested Party summarized as follows:-

a. Othaya Sub County Hospital--- Challenges cited were failure to involve Ministry of Health as users which led to various changes in design later after the project had kicked off which led to increased cost than earlier budgeted.

b. Egerton University, Njoro Campus-Faculty of Healthy Sciences--- The challenges cited were that the building had some defects which included a crack on concrete slab and the floor granite tiles were piling off.

8. The ex parte applicant states that the due diligence team prepared and submitted a report and recommended that the sites relied upon by M/s Scope Designs Systems Limited in their bid had markedly better feedback, hence, it recommended M/s Scope Designs Systems Limited over the Interested Party. Additionally, the ex parte applicant's procurement officer submitted a professional opinion recommending that the subject tender be awarded to M/s Scope Designs Systems Limited, and, vide a letter dated **18th** December 2017, the ex parte applicant informed the Interested Party that its bid was not successful, prompting a response from it insisting that its bid was the lowest. Further, the ex parte applicant wrote to the M/s Scope Designs Systems on **18th** December 2017 notifying them that the tender was awarded to them.

9. Also, the ex parte applicant states that they wrote to the Interested Party on **13th** January 2018 clarifying the reasons for their failed bid, and, in response the Interested Party wrote on **18th** January 2018 insisting that the award ought to be made to them, and, continued advocating in writing for a change in the award.

10. Lastly, the ex parte applicant states that for the sake of transparency and accountability and informed by the importance of the subject procurement, it sought an independent opinion from the Public Procurement Regulatory Authority.

Legal foundation of the application.

11. The application is predicated on the following legal grounds; namely:-

*a. that the Respondent acted ultra vires section **3(e)(h)** of the act in that it failed to uphold the principle of prudent utilization of public funds and deprived the ex parte applicant and the public the benefit of maximization of value for money in the subject tender;*

*b. that the Respondent acted ultra vires section **80(2)** of the Act by (i) failing to appreciate that the ex parte applicant was enjoined to conduct the evaluation in accordance with procedures and criteria set out in the tender documents including the imperative and compulsory conduct of due diligence in respect of the technically qualified bidders; and, (ii) directing the ex parte applicant to complete the procurement process by entering into a contract with the Interested Party for the sum of **Ksh. 12,770,173/=** without the benefit provided for at clause **2.10** of the Request for Proposal Documents;*

*c. that the Respondent acted ultra vires section **83** of the act by subjugating the ex parte applicant's right to conduct due diligence upon the Interested Party;*

*d. That it acted ultra vires section **84(1)** of the act by subjugating the ex parte applicants right to arrive at and rely upon a professional opinion taking into account the procurement process;*

*e. that it acted ultra vires section **85** of the act by annulling an award and recommendation made by a procuring entity pursuant to a procurement process applying all the parameters of the tender document and in the present case, the imperative for due diligence;*

*f. that it acted ultra vires section **86** of the act by compelling the award of the subject tender to a bidder whose bid was not successful in the context of the applicable tender documents;*

*g. It acted ultra vires section **167** of the act by entertaining a Request for Review manifestly filed out of time as read together with Regulation **73(2) (c)** of the Regulations;*

*h. that it acted ultra vires clause **2.9** of the Request for Proposal applicable to the subject procurement by subjugating the ex parte applicants right in any event to negotiate with the successful bidder before entering into a contract;*

*i. that it Acted ultra vires Article **227** of the Constitution;*

j. that it acted in excess of jurisdiction and fell into jurisdictional error;

k. that it failed to consider relevant pertinent an material facts;

l. that it abridged the right of the parties to negotiate and contract freely and in accordance with terms set out in the Tender Documents;

m. that it arrived at a decision that was on the whole irrational and "wednesbury" irrational.

The Reliefs sought.

12. As a consequence of the foregoing, the *ex parte* applicant seeks the following orders:-

*a. An order of **Certiorari** to quash the decision made by the Public Procurement Administrative Review Board on **16th** February 2018 in Request for Review Number **19** of 2018 between AAKI Consultants Architects and Urban Designers and Meru University of Science and Technology (MUST.*

*c. An order of **Mandamus** directing the Respondent to uphold the decision of the procuring entity in awarding Tender No. MUST/002/RFP/2017-2018 in relation to the provision of consultancy services (consortium) for the Proposed School of Nursing, Health Sciences Complex for Meru University of Science & Technologies (MUST).*

c. An order that the costs of this application be awarded to the ex parte applicant.

Respondent's Replying Affidavit.

13. Hennock K. Kirungu, the Respondent's Secretary swore the Replying Affidavit dated **25th** June 2018. He averred that the Respondent only into consideration the relevant facts presented before it, and, that, the decision was based in its findings inter alia that the ex parte applicant by not disclosing the name of the successful tenderer and by giving the wrong reason in the letter of Notification dated **18th** December 2018 violated the provisions of section **87(3)** of the act, and, that, the proper letter of notification was the letter dated **13th** January 2018.

14. Mr. Kirungu also deposed that the time for filing the Request for Request for Review started running from **13th** January 2018 and that the Interested Party's Request for Review filed on **26th** January 2018 was filed within time as provided for in section **167(1)** of the act, and, based on its findings, the Respondent held that it was seized of the jurisdiction to hear and determine the Request for Review. Additionally, he averred that the Respondent held that the ex parte applicant did not comply with the provisions of sections **80(2)** and **80(1)** of the act in evaluating the Interested Party's tender, and, that in making its decision, the Respondent considered all documents of evidential value placed before it by the parties and their submissions, and, that, the decision was made within its mandate particularly under section **173** of the act.

15. **Mr. Kirungu** also averred that the applicant has not demonstrated an iota of truth that the Board was unreasonable in arriving at its decision or that the Board was guilty of unreasonable exercise of power or irrationality in arriving at the decision, hence, the decision is grounded on law. Lastly, **Mr. Kirungu** averred that the applicant has not demonstrated that the Respondent is guilty of illegality, impropriety of procedure and irrationality to warrant interfering with the decision, and, that, the application is made in bad faith.

The Interested Party's Grounds of Opposition.

16. The Interested Party filed grounds of opposition on **14th** March 2018 stating inter alia that the Respondent had jurisdiction to hear and determine the Request for Review as it was filed within time, and, that, the Respondent took into account and upheld the guiding principles and values set out in section **3** of the act.

17. It also states that the Respondent did not act ultra vires section **80(2)** of the act, and, that, it took into consideration the procedures, criteria and the process of evaluation set out in the tender documents; and, that, the decision requiring the ex parte applicant to enter into the contract with the Interested Party was proper and in conformity with the Respondent's powers under section **173** of the act and consistent with clause **2.9** of the Request for proposal.

18. Also, it states that the Respondent never acted ultra vires section **83** of the act and that its finding was consistent with clauses **2.3, 2.6, 2.7** and **2.8** of the Request for Proposal Documents, and the provisions of section **83** of the act in that the conduct of due diligence after evaluation but before the award of the tender was not mandatory under the provision, and, that, the ex parte applicant had in the tender documents provided for the conduct of due diligence within the process of technical evaluation.

19. The Interested Party further contends that the ex parte applicant conducted due diligence contrary to the provisions of section **83** of the act in that it did not conduct due diligence on the tenderer who submitted the lowest evaluated responsive tender, but, on more than one responsive tenderer, thereby making the provisions of the said section inapplicable in the circumstances of the ex parte applicant's tender evaluation.

20. Also, it contends that the conduct of due diligence was contrary to the provisions of section **46(4)** of the act in that the ex parte

applicant purported to appoint a different committee other than the evaluation committee to conduct due diligence, and, that, the Respondents findings on the findings of the due diligence team and the professional opinion was not ultra vires section **84(1)** of the act as the Respondent properly took into consideration the facts regarding the projects that were inspected and the circumstances in which the professional opinion was given and found the same to be based inter alia on a due diligence report that was subjective, without measurable values, factually and legally untenable, and done contrary to the provisions of the tender documents and the act.

21.The Interested Party also contended that the impugned decision was not ultra vires the provisions of section **85** of the act. Also, it contended that the decision was consistent with all the provisions of the act and section **127** in particular on the procedures and criteria set out by the ex parte applicant in its Request for Proposals documents. It further stated that the Respondent did not act ultra vires Article **227** of the Constitution, nor did it act in excess of its jurisdiction or commit jurisdictional error. Also, it contended that the ex parte applicant did not fail to consider relevant, pertinent material facts or take into consideration any irrelevant or irrational matters, hence, it arrived at a proper, reasonable and considered decision.

Issues for determination

22. Upon carefully analyzing the diametrically opposed positions presented by the parties, I find that the following issues distil themselves for determination, namely:-

> *a. Whether the impugned decision is tainted by illegality, irrationality and procedural impropriety.*
>
> *b. Whether the decision is tainted with unreasonableness.*
>
> *c. Whether the Request for Review was filed out of time.*

a. Whether the impugned decision is tainted by illegality, irrationality and procedural impropriety.

23. Counsel for the ex parte applicant **Mr. Marete** submitted that the decision was tainted by illegality, irrationality and procedural impropriety, hence, it is amenable to be quashed. To buttress his argument, he cited R v Public Procurement Administrative Review Board & 4 Others ex parte Britam Life Assurance Company (K)Ltd & Another[3] in which the court reiterated its extraordinary powers to review a decision where illegality, irrationality or procedural impropriety has been proved and stated that an administrative action must be lawful, reasonable and procedurally fair.

24. He submitted that in exercise of right to conduct due diligence, the ex parte applicant appointed members of its staff including members of the evaluation committee to carry out due diligence on the projects relied upon by the bidders, and, that, the team visited various sites including those relied upon by the Interested Party and presented a report of its findings. He submitted that pursuant to section **84** of the act, a professional opinion report recommended that the tender be awarded to M/s Scope Designs Systems Ltd and vide its letter dated **18th** December 2017, it notified the first Interested Party that its bid was not successful.

25. **Mr. Marete** also submitted that the decision is ultra vires section **80(2)** of the act which provides that the evaluation and comparison shall be done using procedures and criteria set out in the tender documents. He referred to the tender documents at pages **104** to **181** of the record. He cited clause **2.7** of the Request for Proposal which provided for the Evaluation of Technical Proposals, in particular, the provision that the Tender Opening Committee appointed by the client shall evaluate the Technical Proposals on the basis of their responsiveness to the Terms of Reference, applying the evaluation criteria as follows: **(i)** specific experience of the consultants related to the assignments- **39** points; **(ii)** Adequacy of the proposed work plan and Methodology in responding to the terms Reference- **35** points, and, **(iii)** Qualifications and competence of the Key personnel for the assignment- **26** points.

26. **Mr. Marete** further submitted that the evaluation was done in accordance with the terms of the tender document. In his view, the contention is on clause **2.5.7** which provides due diligence will be undertaken by the ex parte applicant's staff for technically qualified consultants, which provision he submitted is couched in mandatory terms. It was his position that the ex parte applicant was obliged to abide by the said provision and disregarding it was tantamount to disregarding a pertinent and material fact. Additionally, he argued that clause **2.5.7** is anchored on section **83** of the act which provides for post qualification. He faulted the Respondent for holding that due diligence ought to have been undertaken during the technical evaluation exercise so that the visits to the projects would inform the evaluation committee. He also faulted the finding on grounds that clause **2.5.7** contemplated that due diligence would be carried on after technical evaluation of the bidders. He argued that there is no bar under section **46(4)** of the act for conduct of due diligence by members other than the evaluation committee, and, in any event, he argued that clause **2.5.7** provided that due diligence must be conducted by the Respondents staff. Additionally, he argued that section **84** of the act requires the procuring entity to consider the professional opinion of its head of procurement. Also, he submitted that section **84(2)** of the act contemplates a dissenting opinion between the tender evaluation and award recommendations.

27. **Mr. Munene**, counsel for the Respondent adopted their written submissions the substance of which is that the ex parte applicant seeks to substitute the Respondent's decision and to compel the Respondent to award the tender to a bidder of its choice, and in doing so, this court will be usurping the Respondent's jurisdiction conferred under section **28** of the act. He also submitted that the ex parte applicant is challenging the merits of the decision, and, that the decision was rational and proportionate.

28. **Mr. Marete,** counsel for the Interested Party submitted that the procuring under section **80(2)** of the act must evaluate and compare tenders in accordance with its procedures and criteria set out in the tender documents. He submitted that section **83** of the act gives an evaluation committee of the procuring entity the discretion after the tender evaluation, but prior to the award of tender, to conduct due diligence and present a report to confirm and verify the qualification of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract. He submitted that the provision for due diligence is discretionary, and, that, it cannot be used to overrule or dislodge the mandatory provisions of section **80(2)** of the act. He further argued that the Respondent's finding was consistent with section

83 of the act, and, that, due diligence cannot be conducted in a manner that contradicts the procedure, criteria and the order of events provided in the tender documents.

29. **Mr. Marete** submitted that the impugned decision did not offend section **84** since it took into account the circumstances under which the due diligence was done and observed that it was subjective, without measurable values and was done contrary to the provisions of the tender documents and the act. He submitted that the Respondent examined all the parameters of the procurement process in making the decision to annul the award and that its tender was the most responsive as provided under section **86(1)** of the act. To him, the impugned decision was consistent with section **83** of the act and the tender documents, and, that, section **83** provided that due diligence would be undertaken after evaluation but prior to the award of the tender. He cited several decisions to buttress his argument on the powers of the Respondent under section **173** of the act and submitted that the Respondent has power to substitute the decision of the procuring entity.[4]

30. A decision to award a tender constitutes 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.

31. 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.[5]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.

32. In *Council of Civil Service Unions v. Minister for the Civil Service* ***[6]*** 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*.[7]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.[8] 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.

33. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[9]*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.

34. 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.

35. 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.

36. 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. It is common ground that the Interested Party's bid scored the highest marks. The million dollar question is whether there was an objective criteria to justify the award to another tenderer as happened in this case.

37. 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.[10] Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] 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.[12]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. The Interested Party's bid passed the first hurdle but failed the second hurdle.

38. 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.

39. 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.[13]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[14] has been established.

40. I start from the premise that it is uncontested that post qualification is provided for under the law and the tender documents. The contestation is at what stage it was to be undertaken. In **Mr. Maira's** view, *it was to be undertaken after evaluation but prior to the award of the tender.*

41. In resolving this issue, I will seek guidance in 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 the decision to award a tender constitutes administrative action, it follows that the provisions for the Fair Administrative Action Act[15] apply to the process. This is the 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.

42. 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 that bidder's proposal. Complete evaluation includes due diligence. To do otherwise is to engage in an illegality and such a decision will be tainted by an error of the law.

43. In order to give meaning to section **83** 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 section **83** of the act make it clear that the 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 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.

44. 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 this Act. The operative words here is "prior to the award of the tender."

45. The Interested Party states that it had received a Notification of Award. Section **87(1)** of the act provides that before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted. Subsection **(2)** provides that the successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award. There is no mention that that the Interested Party had complied with this sub-section. Sub-section **(4)** provides that for greater certainty, a notification under subsection **(1)** does not form a contract nor reduce the validity period for a tender or tender security. Differently stated, the contract had not been signed at this point in time.

46. Consistent with section **83(1)** of the act, prior to the award of the tender, conduct of due diligence was legally permitted after which a report in writing would be presented to confirm and verify the qualifications of the lowest evaluated responsive tender to be awarded the contract in accordance with the act.

47. 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 recommendations. 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.

48. 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. The due diligence was 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.

49. 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. A history of poor performance may be considered a justification for failing post-qualification if the Tenderer is unable to demonstrate that steps have been taken to resolve previous problems. This case falls in this category. Adverse reports were unearthed during the post-qualification and the reasons were communicated in the letter dated **13th** January 2018.

50. It is also important to point out that the act permits cancellation of a tender before signing of the contract. *Section **63** of the act provides for termination or cancellation of procurement and asset disposal proceedings prior to signing of a contract on grounds inter alia where* subject procurement has been overtaken by operation of law, or, substantial technological change, *or*, material governance issues have been detected or *force majeure*.

51. In this case, the failure to pass the due diligence test 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 court does not have discretion on the matter - the court must declare is invalid.

52. 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 viewed 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 section **227** of the Constitution and all the legislation and policies which have been enacted to give effect to it.

53. 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.

54. 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.

55. 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.

56. 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.

57. The key question here is whether negative due diligence reports which are not contested 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. 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." 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 does not contest the due diligence report, but insists that it ought to have been done before the "award." The question is whether it can be argued that the winning bidder's tender was an "acceptable tender" within the meaning of the act, that, is, did the tender meet all the requirements of the tender.

58. 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.

59. True, 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.

60. 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.

61. 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.

62. The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. 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.

63. 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.*

64. 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 *ex parte* 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.

b. Whether the decision is tainted with unreasonableness.

65. **Mr. Marete** submitted that *the impugned decision was irrational and wednesbury unreasonable to the extent that it would exempt the interested party from due diligence. He also submitted that the impugned decision was ultra vires section **84(1), 85** and **86** of the act, and, unreasonable, in that, the accounting officer was enjoined to take the professional opinion into account.*

66. It was **Mr. Marete's** contention that a procurement process must at all times comply with the tender documents among them clause **2.9** which provided for negotiations, hence, by directing the ex parte applicant to enter into a contract with the Interested Party, the Respondent denied the ex parte applicant the benefit of negotiating as contemplated in the tender documents.

67. **Mr. Marete** contended that the Respondent acted in excess of jurisdiction in entertaining the request out of time, and, that, it purported to evaluate the tender by disregarding the findings of the due diligence team, hence exceeded its jurisdiction, and, that, the duty to evaluate a tender is the preserve of the evaluation committee. (cases cited: JGH Marine A/S Western Marine Services Ltd & Another v Public Procurement Administrative Review Board & 2 Others[16] & R v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power & Lighting Company Limited.[17]

68. Lastly, **Mr. Marete** argued that the decision is ultra vires Article **227** of the Constitution and section **3(e)(h)** of the act in that the Respondent rubbished the findings of due diligence process, deprived the ex parte applicant the right to negotiate and forced it into a contract with a party whose previous similar works raise queries on the prospects of value for money.

69. **Mr. Maira's** submission was that the ex parte applicant made generalized allegations of alleged violation of values, principles and values. He argued that it is the ex parte applicant and not the Respondent who did not take into account the values, principles and the law guiding procurement or consider all aspects of the tender as provided in the tender document.

70. Reasonableness, within the context administrative law cannot be imbued with a single meaning.[18] Pillay states that the first element of a reasonable administrative action is rationality, and the second proportionality. Rationality means that evidence and information must support a decision an administrator takes.[19] Hoexter explains that the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects and to consider using less drastic means to achieve the desired goal.[20]

71. Unreasonableness and irrationality are grounds for Judicial Review. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[21] which provides that:-" *A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator*."

72. The test for rationality was stated as follows:-***[22]*** "The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

73. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock[23] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[24]

74. In determining whether a decision is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.***[25]***

75. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it****[26]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[27]This stringent test has been applied in Australia[28] where the Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." Given the facts of this case, I am persuaded that a different tribunal properly addressing itself to the same facts and circumstances could have arrived at a different conclusion.

76. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Put differently, whether the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law. The following propositions can offer guidance on what constitutes unreasonableness:-

> *i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;*
>
> *ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;*
>
> *iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;*

77. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

78. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[29]

79. Section **84** of the act provides in mandatory terms for professional opinion in a procurement process. It reads as follows:- **84(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. Sub-section **(2)** provides that 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 while sub-section **(3)** provides that 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).** The use of the word shall in all these provisions is worth noting. It connotes a mandatory obligation.

80. Section **85** of the act provides that 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. This provision is also couched in mandatory terms.

81. Lastly, section **86(1)** provides that the successful tender shall be the one who meets any one of the following as specified in the tender document—

> *a) the tender with the lowest evaluated price;*
>
> *b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;*
>
> *c) the tender with the lowest evaluated total cost of ownership; or*
>
> *d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.*

82. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

83. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference, or where the decision maker failed to apply his mind to the matter.

84. From the above provisions, it is evident that compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in Fair Administrative Action Act.[30] Deviations from the procedure will be assessed in terms of those norms of procedural fairness.

85. It was a bid requirement that bidders would submit lists of similar projects they have undertaken and that a post qualification evaluation was to be undertaken. Due diligence was a requirement. The real import of this requirement could not be tucked away. It was a requirement that competitors had to be treated equally. To these requirements can be added a further one: that competitors are entitled to know beforehand on what basis their tenders are to be evaluated.

86. A core aim of the process is to select a competent firm with the capacity to implement the project. It is important to consider the qualifications of the firms behind each proposal. This can be done through a pre-qualification process to identify bidders, or as part of the first stage of the tender process (sometimes called post qualification). The qualification criteria can be qualitative or quantitative. It typically involves considering the firm's financial robustness, previous experience with similar projects, and the experience of members of it management team. In its broadest sense, the term '**due diligence**' simply refers to taking reasonable steps or exercising reasonable care in relation to a particular course of action.

87. All bidders must demonstrate that they have the required competencies in their core teams; the proposal must include all required documentation as requested in the Request For Proposal ; and all bidders are required to meet the minimum specifications of compliance, technical expertise, and experience. Where the post qualification evaluation suggests otherwise, the bid will be rejected if the discovery is material to the contract. It is my conclusion that it was unreasonable for the Respondent to ignore such a pertinent requirement which was material to the tender process and a legal requirement. In my view, a reasonable body applying the law to the facts of this case would have arrived at a different conclusion. On this ground, this application succeeds.

c. Whether the Request for Review was filed out of time.

88. **Mr. Marete** argued that the decision is ultra vires section **167** of the act and Regulation **73(2),** and that, the Request for Review was filed **57** days after the date of notification. It was his submission that the Request for Review ought to have been filed within **14** days from **18th** December 2017. He contended that the Interested Party opted to engage in correspondence with the ex parte applicant, prompting the ex parte applicants letter of **13th** January 2018. It was his argument that the Respondents holding that the letter of **13th** January 2018 was the notification was erroneous.

89. **Mr. Maira**, cited section **87(3)** of the act and submitted that the ex parte applicant's letter dated **18th** December 2017did not qualify to be a notification of award of tender as it did not comply with the mandatory provisions of the act. Citing the contents of the letter, he submitted that it did not disclose the party who won the tender nor did it give the correct reasons for the disqualification. He pointed out that the ex parte applicant apologized for the mix-up, which, admission was an acknowledgement that the there was no proper legal notice. It was his submission that the Interested Party filed the Request for Review after it received the letter dated **13th** January 2018, hence, it was filed within time. To him, the Respondent was seized with jurisdiction to hear the case. To buttress his argument, he cited Republic v Public

Procurement Administrative Review Board & 2 Others ex parte Kenya Power & Lighting Company Limited[31] and Republic v Public Procurement Administrative Review Board & 2 Others ex parte Numerical Machines[32]which decisions emphasized that the jurisdiction of the Board is available where an application for review has been filed within **14** days from date of delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded.

90. In *Republic vs Public Procurement Administrative Review Board & 2 Others**[33]*** the Court held that:-

> "*The jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. The Board has no jurisdiction to hear anything filed outside fourteen days.*
>
> ***...****The Board acted outside its jurisdiction by hearing the matter which was filed after 7 days from the date of the notification of the results of the tender. By doing so, the Board engaged in a futile exercise which amounts to nothing."[Underlining ours]"*

91. In *Republic vs Public Procurement Administrative Review Board & 2 Others*,[34] the High emphasized that the timelines in the Act were set for a purpose. Once a Party fails to move the Board within the time set by the Regulations, the jurisdiction of the Board is extinguished in so far as the particular procurement is concerned. The Board itself has been very consistent in downing its tools when faced with applications filed outside the statutory time. In *Geomaps Africa Limited –vs- National Land Commission*,[35] the Board emphasized the issue of timelines and vigilance of the bidder upon tendering stating at **page 21** that:-

> "*The time framework (under the Act) does not permit the exclusion of holidays or any other period of time unlike in other statutes. That being the case, the Applicant's Request for review was filed (8) days out of time.*

92. Section **167 (1)** of the Act provides that *"Subject to the provisions of this Part, a candidate or a tenderer, <u>who claims to have suffered or to risk suffering, loss or damage</u> due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, <u>may seek administrative review **within fourteen days** of notification of award</u> or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in <u>such manner as may be prescribed."</u>*

93. The jurisdictional issue here is twofold. *First*, did the Interested Party file a Request for Review on time, *Second*, when was the Interested Party duly notified that its bid was unsuccessful, and, did it move the Board within time.

94. It is uncontested that the Interested Party was notified that its tender was unsuccessful on vide a letter dated **18th** December 2017. In the said letter, the *ex parte* applicant notified the Interested Party that its proposal was not successful. In my view, at this point the Interested Party knew that its bid was unsuccessful. This, in my view is the effective date of the Notification. The Interested Party stood duly notified. Seeking for reasons could not serve to enlarge time. As pointed out above, the time frames under the act are rigid. It was possible to file the Request For Review, and, after obtaining the reasons, if need be, amend his pleadings. The assertion that time began to run after the reasons were supplied is not backed by any legal provisions.

95. An aggrieved is required to seek administrative review within fourteen days of notification or date of occurrence of the alleged breach at any stage of the procurement process. The communication dated **18th** December 2017 is the Notification. It is the date of the occurrence of the alleged breach. The Interested Party was notified that the award was not successful. That is substance of the Notification.

96. Section **87(3)** of the act which provides that when a person submitting the successful tender is notified under subsection **(1),** the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof. It's true the letter dated **18th** December 2018 did not disclose the successful tenderer nor did it provide reasons. But, the contest here is whether the Interested Party was notified that its tender was unsuccessful. To that extent, the message was clear.

97. There was an attempt to confuse the "competence of the Notification" and the "alleged breach." If the Interested Party desired to contest the competence of the Notification on the grounds that it did not offer reasons, he could have done so, but instead he sought for the reasons which were supplied.

98. In my view, 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 " the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful" in the act which involves a consideration of the degree of compliance with the provision. Essentially, to the extent that the communication is clear that the tender was not successful, it is safe to conclude that the Interested Party from that point in time knew the fate of his bid. He requested for reasons, and they were supplied. If it was its view that the Notification was incompetent, then it ought to have contested its validity as opposed to using it to justify commencement of time.

99. The Respondent's wide powers under section **173** of the Act can only be invoked if there is a competent Request for Review before it. Invoking powers under section **173** where there is no competent Request for Review or where the Request for Review is filed outside the period prescribed under the law is a grave illegality and a ground for this court to invoke its Judicial Review Powers. As earlier stated, the act prescribes very rigid time frames and since the substance of the Notification was clear, the Interested Party knew at that point in time that its bid had been rejected.

100. Put differently, a literal and plain interpretation of section **167(1)** of the act reveals that an administrative review prescribed in the section may be sought within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process or disposal process as in such manner as may be prescribed. The section does not say from the date reasons are

supplied. The question here is not the competence of the Notice, but the "occurrence of the alleged breach."The letter of Notification was issued on **18th** December 2018. The competence of the Notice could only have been a ground for the Request for Review, but the Interested Party opted to ask for the reasons and they were supplied.

Conclusion.

101. In view of my analysis and determinations of the issues discussed above, the conclusion becomes irresistible that the *ex parte* applicant's application succeeds. The *impugned decision is amenable for review on grounds discussed above.*[36] 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.[37]

102. Accordingly, I allow the *ex parte* applicant's Notice of Motion dated **6th** March 2018 and make the following orders:-

*a. An order of **Certiorari** be and is hereby issued quashing the Respondent's decision dated **16th** February 2018 in Request for Review Number **19** of 2018 between AAKI Consultants Architects and Urban Designers versus Meru University of Science and Technology (MUST.)*

*b. Further and or in the alternative and without prejudice to paragraph **(a)** above, the Respondent's decision dated **16th** February 2018 in Request for Review Number **19** of 2018 between AAKI Consultants Architects and Urban Designers versus Meru University of Science and Technology (MUST.) and all the consequential orders flowing therefore are hereby set aside.*

*c. **That** the decision of the Procuring Entity dated **18th** December 2017 awarding the tender to the M/S Scope Design Systems Ltd is hereby reinstated.*

d. No orders as to costs

Signed and Dated at Nairobi this 12th day of March 2019

John M. Mativo

Judge

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[1] Act No 42 of 2012.

[2] Act No. 33 of 2015.

[3] {2018}eKLR.

[4] Counsel cited *R v Public Procurement Administrative Review Board ex parte Kenya Power & Lighting Company Limited & Another* {2017}eKLR, *R v Public Procurement Administrative Review Board & 2 Others ex parte Coast Water Services Board & Another* {2016]eKLR.

[5] 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.

[6] {1985} AC 374.

[7] 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

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

[9] {2015} eKLR.

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

[11] Hoexter 2012: 295.

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

[13] Supra.

[14] Ibid.

[15] Act No. 4 of 2015.

[16] {2015}eKLR.

[17] {2017}eKLR.

[18] Hoexter, C. 2007. *Administrative law in South Africa.* Cape Town: Juta.

[19] Pillay, A. 2005. Reviewing reasonableness: an appropriate standard for evaluating state action and inaction? *South African Law Journal*, 122(2): 419-439.

[20] Supra Note 62.

[21] Act No. 4 of 2015.

[22] By Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (4) SA 674 *(CC)* at page 708; paragraph 86.

[23] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[24]Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*, {1995} 1 All ER 129 (HL) at 157.

[25] See *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 *(LAC)* at 316, para 36, per Froneman JA.

[26] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[27] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[28] In *Prasad v Minister for Immigration* {1985} 6 FCR 155.

[29] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[30] Act No. 4 of 2015.

[31] {2017}eKLR.

[32] {2015}eKLR.

[33] {2015} eKLR.

[34] {2015} eKLR.

[35] PPARB Application No.3 of 2015.

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

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