REPUBLIC OF KENYA

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

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 140 OF 2019

In the matter of an application for judicial Review orders of *Certiorari, Prohibition* and *Mandamus*

Republic.....Applicant

versus

The Public Procurement Administrative Review Board.....Respondent

and

Accounting Officer, Kenya Rural Roads Authority.....1st Interested Party

China Railway No. 10 Engineering Group Co. Ltd.....2nd Interested Party

S.S. Mehta & Sons Ltd.....3rd Interested Party

and

Roben Aberdare (K) Ltd.....*Ex parte* Applicant

JUDGMENT

Introduction

1.In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders.[1] 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, comply with tender conditions; a failure to do so would defeat the 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 the same terms and conditions.[2]

The Parties

2. The *ex parte* applicant, Reben Aberdare (K) Ltd is a limited liability company incorporated in Kenya.

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 first Interested Party is the Accounting Officer, Kenya Rural Roads Authority (herein after referred to as the Procuring Entity). It was the Respondent in PPARB No. 41 of 2019, Roben Aberdare (K) Ltd v Accounting Officer, Kenya Rural Roads Authority, China Railway No. 10 Engineering Co. Ltd, S.S. Mehta & Sons Ltd and Kenya Rural Roads Authority.

5. The second Interested Party, China Railway No. 10 Engineering Group Co. Ltd is the entity that was awarded Tender No. RWC 555 by the first Interested Party (herein after referred as the Procuring Entity). It was the second Respondent in PPARB No. 41 of 2019.

6. The third Interested Party, SS Mehta & Sons Ltd was a bidder in the tender the subject of these proceedings. It was the third Respondent in PPARB No. 41 of 2019.

Factual Matrix.

7. The *ex parte* applicant states that it participated in Tender No. RWC 555 for the Upgrading to Bitumen Standard and Maintainance of Endarasha-Charity-Gakanga-Embaringo-Kimunyuru-Jnct D447, Mweiga-Amboni-Bondeni-Riiru-Karadi-Jn 446, Issacco Camp-Mahiga-Sangare and, B5, Solio-Kabati-Gitegi-Honi River (B5) Wendiga Shopping Centre-Mairo (D446) Roads (67KMS) alongside the second and third Interested Parties.

8. By a letter dated 18th March 2019, the Procuring Entity notified it that its bid was unsuccessful because it was not the lowest evaluated bidder, and, that, the contract was awarded to the second Interested Party. The first Respondent dismissed its Request for Review.

9. Among the grounds it cited before the Review Board were that, the second Interested Party took advantage of duty free imports accorded to it by the Kenya Revenue Authority and imported plant and Equipment meant for a different project. It stated that the second Interested Party never disclosed the advantage it enjoyed in terms of capacity and the low cost of its duty free imports; instead, it submitted its tender documents as though it was on an equal footing with the other tenderers.

10. Before the Review Board, the *ex parte* applicant argued that the duty free equipment placed the second Interested Party at an undue advantage, unlike other tenderers. Consequently, the *ex parte* applicant argued that the tender process was not fair, equitable or competitive because the second Interested Party had an advantage over other contractors because it based its rates on equipment purchased on duty free basis while the other bidders based their rates on equipment, which was subjected to duties, and taxes on importation.

11. In addition, before the Review Board, the *ex parte* applicant stated that by evaluating the tender using the criteria of "lowest price" the evaluation process was neither fair nor equitable because the price quoted by the second interested party was remarkably lower due to the advantage of duty free importation of equipment and spare parts.

12. The *ex parte* applicant also stated that the second Interested Party, a foreign contractor as defined in the National Construction Authority Regulation did not submit an undertaking in writing to the National Construction Authority in compliance with Regulation 12(3) (d) of the National Authority Regulations, 2014. Consequently, it stated that the second interested Party's application was non-compliant, and therefore not qualified to undertake construction works in Kenya and should not have been eligible to participate in the impugned tender.

13. The *ex parte* applicant also stated that the second Interested Party's Engineers do not possess degrees in Engineering recognized by the Commission for University of Education, nor were they accredited by the Engineering Board of Kenya, hence, they are not qualified to render engineering services in Kenya, an omission that disqualified it from the tender process.

14. The *ex parte* applicant states the Review Boards decision was *inter alia* that the bid document did not require a bidder to demonstrate how the equipment were acquired and in absence of such requirement, the procurement did not offend Article 227 of the Constitution. The applicant further states that the Review Board ignored its submissions that the procurement process was not fair and competitive. It also states that the Review Board upheld the second Interested Party's Submissions that the Tax Clearance Certificate was conclusive evidence that the second Interested Party had fulfilled its tax obligations.

15. The *ex parte* applicant also states that the Review Board found that the Procuring Entity only required a Certificate from the National Construction Authority to be availed to the Procuring Entity, and, that, there was no provision in the bid document for provision of the 30% undertaking as stipulated under Regulation 12 (3) (d) of the National Construction Authority Regulations.

16. The *ex parte* applicant further stated that Review Board held that Regulation 12(3)(d) of the National Construction Authority Regulations is a pre-condition, *prima facie* evidence that the second Interested Party's registration by NCA is authentic, and, that, the bid document did not impose conditions, nor was it a restricted tender. In addition, the Review Board held that there are procedures undertaken by Competition Authority of Kenya to identify whether an entity enjoys a dominant position. Lastly, it stated that the Review Board held that the applicable margin of preference is in accordance with the Public Procurement and Disposal Regulations, 2011 and not as provided under section 86(2) of the act.

Legal foundation of the application

17. The *ex parte* applicant seeks to review the decision on the following grounds:-

*a. **Tha**t the impugned decision is ultra vires, irrational, in excess of jurisdiction, in breach of the rules of Natural Justice, made in error of law, in bad faith, constitutes abuse of power and discretion and is unreasonable;*

*b. **That** the Respondent erred in law in holding that the second Interested Party's tax compliance certificate was conclusive evidence that it had fulfilled its tax obligations, yet it had admitted that its plant and machinery had been imported duty free.*

*c. **That** the Respondent ignored clause 7 of the Schedule of Major Items of Plant to be used on the proposed contract.*

*d. **That** it is unreasonable and irrational for the Respondent to find that the second Interested Party set out the list of equipment in its bid document only to demonstrate capacity to execute the contract, and, that, the said equipment were not to be utilized to execute the tender.*

*e. **That** the Respondent failed to take into account that the second Interested Party had a distinct advantage since its equipment was imported duty free, hence, the amount quoted was lower on account of the tax advantage;*

*f. **That** the Respondent failed to make a determination on whether the tender process was fair, equitable or competitive since the second Interested Party had an advantage over other bidders;*

*g. **That** the Respondent abdicated its responsibility and refused to discharge its statutory duty as set out in the act by failing to take into consideration that the third Interested Party was undertaking six road construction projects whilst the applicant was undertaking one in breach of the equitable principle as set out in Articles 10 and 227 of the Constitution;*

*h. **That** the Respondent has no power to determine the terms that ought to be incorporated in a contract by a Procuring Entity;*

*i. **That** the Respondent acted outside its jurisdiction by framing and making determination on the issue of the academic qualifications of the applicants site agent, which was not an issue before it, and, that, it violated the right to be heard;*

*j. **That** the Respondent failed to exercise its jurisdiction and fell in error when it held that it could not interfere with the Procuring Entity's Evaluation Criteria;*

*k. **That** the decision is founded on an erroneous application of the law;*

*l. **That** the Respondents finding that the applicable margin of preference is 10% is ultra vires section 86 (2) of the act;*

*m. **That** the decision is contrary to the applicant's legitimate expectation because it went against the Respondent's own previous holding on a similar issue, hence, it is unreasonable and in bad faith;*

*n. **That** holding that the effect of Post Qualification analysis carried out by the Evaluation Committee amounts to due diligence as envisaged under section 83 of the act constitutes usurpation of power by the Interested Party, in that, it has no power to substitute a decision of the Evaluation Committee;*

*o. **That** the decision that the Post Qualification analysis carried out by the Evaluation Committee amounts to due diligence notwithstanding that the fact that the Evaluation Committee did not prepare a due diligence report is inconsistent with Article 227 and section 83 of the act.*

The Reliefs sought.

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

*a. An order of **Certiorari** to quash the Respondent's decision dated 23rd April 2019 in PPARB No. 41 of 2019, Roben Aberdare (K) Ltd v Accounting Officer, Kenya Rural Roads Authority, China Railway No. 10 Engineering Group Co. Ltd, SS Mehta & Sons Ltd and Kenya Rural Roads Authority.*

*b. An order of **Prohibition** to prohibit the first Interested Party from signing a contract with the second Interested Party in respect of Tender No. RWC 555 for the up grading to Bitumen Standard and maintenance of Endarasha-Charity-Gakanga-Embaringo-Kimunyuru-Jnct D447, Mweiga-Amboni-Bondeni-Riiru-Karandi-JN 446, Issacco Camp- Mahinga-Sangare and; B5, Solio-Kabati-Gitegi-Honi River (B5)-Wendiga Shopping Centre-Mairo (D446) Roads (67Kms).*

*c. An order of **Mandamus** to compel the first Interested Party to award Tender No. RWC 555 to the applicant.*

The Respondent's failure to file a Response

19. The Respondent did not file any pleading in this case nor did it participate in the proceedings.

The First Interested Party's Replying Affidavit.

20. **Eng. Luka K. Kimeli,** the first Interested Party's Acting Director General and Accounting Officer in his Replying Affidavit dated 16th May 2919 deposed that this application is an attempt to re-litigate the issues, which were determined by the Respondent. He averred that the Application does not demonstrate *ultra-vires*, irrationality, and unreasonableness, excess of jurisdiction, bad faith, and error of law, abuse of power or discretion on the part of the Respondent.

21. He averred that the *ex-parte* Applicant's total bid sum of KShs. 2,999,324,460.60 was high compared to the second Interested Party's Kshs. 2,391,387,352.40. He added that even after the application of the relevant preference margin, it was still more by Kshs. 308,004,662.14, hence, awarding the tender to the *ex parte* Applicant would offend the provisions of Article 227 of the Constitution.

22. He added that even after the application of the relevant preference margin to its bid, its bid was the fourth lowest, hence, awarding a tender to a bidder whose sum is Kshs. 308,004,662.14 higher that the lowest evaluated bid, would offend Articles 201 and 227 and Section 3 of the Act, and the Conditions of Tender & Instructions to Bidders. Mr. Kimeli averred that the *ex-parte* Applicant has not demonstrated any factors that the Respondent failed to consider in its decision, or took into consideration, which ought not to have been considered.

23. He deposed that as per the instructions to bidders, bidders were only required to indicate the core plant and equipment necessary for undertaking the project together with proof of ownership, a condition the second Interested Party complied with, and, that, there was no condition requiring bidders to demonstrate how they acquired their plant and equipment. He further averred that evaluating bids based on a criterion not provided for in the bid documents would be illegal, unfair to the bidders, and contrary Article 227 and Section 3 of the Act.

24. He further averred that the *ex-parte* Applicant did not provide any evidence before the Respondent to demonstrate that the core plant and equipment provided by the second Interested Party, is the same that was allegedly imported duty free. He averred that the Respondent's decision regarding responsiveness of the second Interested Party's bid regarding the core plant and equipment is proper, reasonable, rational and in accordance with the provisions of Article 227. He averred that the tender process was fair, equitable and competitive and that the evaluation was undertaken based on the Instructions to Bidders. He added that the evaluation was based on the principle of lowest evaluated bid and not lowest priced as alleged by the *ex-parte* Applicant.

25. He also averred that the second Interested Party fulfilled the requirements of the bid document that required the bidders to provide a Certificate of Registration by National Construction Authority in class NCA 1 as a paved roads contractor. He added that the second Interested Party complied with this condition as evidenced by annexures to the applicant's application. Further, he deposed that the *ex-parte* Applicant never availed any evidence of a complaint to the National Construction Authority regarding the registration of the second Interested Party with the National Construction Authority.

26. Mr. Kimeli averred that the second Interested Party's staff and more particularly the Site Engineer and the Deputy, having trained in Kenya, their degree certificates do not require recognition by the Commission of University Education, and, that, its Engineers were duly registered by the Engineers Board of Kenya and met all the requirements in the bid document. He averred that the issue of qualifications of the site agent was placed before the Respondent by the *ex-parte* Applicant, and, that, is an issue within the powers of the Respondent under Section 173 of the Act.

27. He also deposed that that the Respondent's decision regarding the compliance with the requirements of the regulations under the National Construction Authority Act, 2011, reflects a proper position in law and as such, no error of law was committed. He averred that the second Interested Party availed the relevant documents in respect of its registration, and, that, a substantial proportion of its employees are local. He added that the aspect of local employees is a requirement for registration with the National Construction Authority Regulations as per Section 12 (3) (d), and, that, the requirement of the bid document was that bidders provide a Certificate of Registration by National Construction Authority in class NCA 1 as a paved roads contractor. He added that the second Interested Party complied with this condition.

28. Mr. Kimeli stated that due diligence was carried out and no bidder, was prejudiced by the manner of compliance with the law on preferences and reservations.

29. He deposed that the issue of the number of the current road construction projects that a bidder was currently undertaking was not a condition in the tender documents nor was it an evaluation criterion. He added that the award of contract to the second Interested Party met the constitutional thresholds under Article 10 & 227 and Section 3 of the Act.

30. He added that the Respondent's finding on issues placed before it is not a ground for judicial review. He also averred that the e*x-parte* Applicant's submission regarding the fairness and competitiveness of the procurement process was duly considered by the Respondent and a finding made. He also averred that the second Interested Party provided a Tax Compliance Certificate as required. In addition, he averred that the tender evaluation was done in accordance with the Instructions to Bidders.

31. He averred that the issue of the number of the current road construction projects that a bidder was currently undertaking, was not a condition in the tender document and was not an evaluation criteria, and, that, the Respondent's decision on the applicable margin of preference, is proper and in accordance with the evaluation criterion in the bid documents.

32. He added that the first Interested Party complied with the mandatory requirement of the law on preference and reservation applicable to the tender, which is 10% as per Public Procurement and Disposal (Preference and Reservations) Regulations. He also stated that the aspect of interpretation of the applicable law in respect of the rate of preferences applicable cannot be a ground for judicial review.

33. Lastly, he averred that the *ex parte* applicant has failed to prove that the process was flawed, and added that the impugned decision was within the powers of the Respondent in terms of Section 173 of Act.

The Second Interested Party's Replying Affidavit

34. Liu Deyong**,** a Director of the second Interested Party in his Replying Affidavit dated 20th May 2019 averred that the Application seeks to re-adjudicate issues already litigated before the Respondent. He deposed that the Application contains material misrepresentation of facts, non-disclosure of facts and bare allegations, which cannot provide a basis for grant of the Judicial Review.

35. He deposed that a court of review is concerned with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects, and, that the Application does not satisfy this threshold. He further averred that the Application is essentially an appeal. He averred that the process was lawful, and, that, Judicial Review is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide*, and, that, the Applicant has not demonstrated any illegality, irrationality or procedural impropriety.

36. He deposed that the second Interested Party complied with all aspects of the invitation to tender. He pointed out that Paragraphs 1 to 7 of the facts in support of the application refer to RWC 550, which is distinct from the tender awarded to the second Interested Party, which is RWC 555.

37. On the engineers estimate, he averred that it is not open for the Applicant to introduce new issues at this stage. He added that section 70(6) (b) of the Act dictates that an engineer's estimate is not an item or a fundamental component of an evaluation criterion, and, that, the *ex parte* applicant has misinterpreted the impugned decision to mislead this court. Lastly, he averred that the first Interested Party has already executed a performance guarantee in respect of the Project and secured an All Risk Policy Statement.

The Third Interested Party's Replying Affidavit

38. Sanish Chadha, the third Interested party's Project Manager in his Replying Affidavit dated 21st May 2019 deposed that the impugned decision is tainted with illegality and that the Respondent acted *ultra vires* section 86(2) of the act by applying a margin of 10% instead of 20%. He averred that the *ex parte* applicant's verifying Affidavit is fatally defective since it contains no facts, and, it ought to be expunged.

Issues for determination

39. I have distilled the following issues for determination, namely:-

a. *Whether the Respondent failed to take into account relevant considerations.*

b. *Whether the impugned decision is irrational and unreasonable.*

c. *Whether the Respondent acted in excess of jurisdiction.*

d. *Whether the Respondent acted in breach of the equitable principle.*

e. *Whether the ex parte applicant is seeking a merit Review as opposed to a Judicial Review.*

a. Whether the Respondent failed to take into account relevant considerations.

40. The *ex parte* applicant's counsel submitted that the Respondent failed to take into account relevant factors, which if they had been taken into consideration, the decision could have been different. It was her submission that the matters not taken into account were that the second Interested Party's Tax Compliance Certificate dated 5th November 2018 was not conclusive evidence that it had discharged its tax obligations. She argued that the second Interested Party imported its plant and machinery duty free, and, it never proved that the duty was paid.

41. Counsel submitted that the Respondent failed to take into consideration the fact that the second Interested Party's low tender sum was as a direct result of the equipment purchased on duty free basis, hence, procurement process was substantially tilted in its favour, thus, making the process unfair, uneven and uncompetitive. Consequently, she argued that the Respondent erroneously concluded that the process was undertaken in accordance with Article 227 of the Constitution.

42. She further submitted that the decision ignored a clear term requiring the bidder to indicate the core plant and equipment considered by the company to be necessary for undertaking the project. She relied on *Republic v Public Procurement Administrative Review and 3 Others*[4] for the holding that where the Board fails to consider relevant evidence and considers irrelevant ones, this court must intervene. She argued that the Respondent failed to take into consideration that it has no power to make a determination on the terms that ought to be incorporated in a contract by a procuring entity.

43. The first Interested Party's counsel did not specifically address this issue. However, he maintained that the tender process was undertaken in accordance with the law.

44. Counsel for the second Interested Party submitted that the question of the tax compliance certificate was raised before the Respondent and a decision was rendered.

45. The third Interested Party's counsel argued that the Respondent failed to consider whether the second interested party had furnished the Kenya Revenue Authority with incorrect information. He added that the Tax Compliance Certificate is a rebuttal presumption, but not prove of payment of taxes.

46. If, in the exercise of its discretion on a public duty, or authority takes into account considerations, which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds. These are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury*-unreasonable manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

47. The law on relevant and irrelevant considerations was explained in *R. v. Somerset County Council, ex parte Fewings**[5]*** in which Lord Justice of Appeal Simon Brown identified three categories of considerations that decision-makers need to be aware of:-[6]

a) *those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had;*

b) those clearly identified by the statute as considerations which must not be had; and

c) those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so.

48. Lord Justice Brown elaborated that for the third category, there is "a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process," subject to *Wednesbury* unreasonableness.

49. The Singapore case of *City Developments Ltd. v. Chief Assessor**[7]*** illustrates a similar point. The Court of Appeal stated, "Where a wide range of considerations needs to be taken into account or a power is conferred on an authority exercisable on the authority's 'satisfaction', the courts are reluctant to intervene in the absence of bad faith or capriciousness." It was also said, "What is or is not a relevant consideration will depend on the statutory context."[8]

50. The duty of the court is to determine whether it has been established that in reaching its decision, an administrative body directed itself properly in law, and, had in consequence taken into consideration the matters which upon the true construction of the Act it ought to have considered and excluded from its consideration matters that were irrelevant to what he had to consider. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations.

51. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot,*[9] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The Court emphasized that the weighing of those relevant considerations was a matter for the Commission, not the courts.[10]

52. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment,**[11]*** a planning law case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority."[12] His Lordship stated:-

> *"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at. "*

53. The necessity to comply with the obligations imposed by Article 227 of the Constitution relating to public procurement policies and procedures to be adopted by organs of state, has resulted in the enactment of numerous interrelated statutes, regulations and directives. This, in turn, has given rise to a convoluted set of rules and requirements, among them that a bidder submits a Certificate of Tax Compliance issued by the Kenya Revenue Authority. In practice, procuring entities usually include a condition in their tender documents that bidders must submit tax clearance certificates issued by the Kenya Revenue Authority among other requirements in order to qualify for evaluation. Tax clearance certificates play an important role in our economy and are, almost without exception, a requirement when a person submits a tender or bid for doing business with government.

54. 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. When a tender is declared to be responsive, the reasons for so declaring must with equal force be defendable in law. Similarly, when an argument is propounded as in this case that a Tax Clearance certificate is not conclusive evidence to prove compliance with payment of taxes, such an allegation must be defendable in law.

55. Section 55 (1) (f) of the act provides for eligibility to bid and lists the criteria to be eligible. It provides *inter alia* that a person is eligible to bid for a contract in procurement or an asset if – (f) the person has fulfilled tax obligations. So serious is the question to fulfil ones tax obligations that section 41 of the act provides in peremptory terms that the Board established under section 10 of the act shall debar a person from tendering if he has defaulted on his or her tax obligations.

56. Thus, the act requires that a bidder must be tax compliant. It is noteworthy that the tender documents required bidders to submit a Tax Clearance Certificate. There is no contest that the second Interested Party submitted a Tax Clearance Certificate as required. The Review Board could not go outside the requirements of the bid documents and require a bidder to provide more than is contained in the tender documents. That would amount to inviting the Review Board to re-write the terms of the tender.

57. The official Website of the Kenya Revenue Authority defines a tax compliance, otherwise known as a Tax Clearance Certificate as an official document issued by KRA, as proof of having filed and paid all your taxes.[13] KRA issues the following Tax Compliance Certificates upon application:- (i) Tax Compliance Certificates for Taxpayers seeking tenders with Government Ministries and Institutions. (ii) Tax Compliance Certificates to employees leaving service nor seeking new job opportunities. (iii) Tax Compliance Certificates for taxpayers seeking liquor Licenses. (iv)Tax Compliance Certificates to Clearing and Forwarding Agents.[14]

58. An award must be made to the bidder whose bid conforms to the solicitation, and is declared to be responsive. To be considered for award, a bid must comply in all material respects with the invitation for bids. Non-responsiveness is defined in terms of the materiality of the nonconformity.

59. An assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process. In other words, what is important is not who won the tender, but the nature and extent of the alleged irregularity, and its materiality. The materiality of compliance with bid requirements depends on the extent to which the purpose of the requirements is attained. In this case, the bid documents required a bidder to provide Tax Compliance Certificate issued by the Kenya Revenue Authority.

60. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity, if established, must be 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 requirements in the bid documents, before concluding that a review ground has been established.

61. Consistent with the above approach, the first question is whether an irregularity occurred in this case. The second Interested Party submitted a Tax Clearance Certificate as required among other bid documents. The Clearance Certificate was issued by the KRA. I need not repeat the above definition. Its bid was successful. The assault is premised on the ground that the successful bidder had imported plant and machinery duty free, and, that, there was no evidence that the duty was paid. This argument falls on the following grounds. *First,* the bid documents provided that a bidder should provide a Tax Clearance Certificate. The second Interested Party complied with this requirement. *Second,* counsel for the *ex parte* applicant argued that the Tax Clearance Certificate is valid as at the date of issue. That is not true. As per the KRA Website, a Tax Compliance Certificates are valid for twelve months. *Third,* there is nothing to show that Clearance Certificate was invalid or it was invalidated thereafter. Differently stated, the validity of the Tax Clearance Certificate has not been disapproved. *Fourth,* by submitting the certificate, the bidder complied with the bid requirements. Its bid cannot be subjected to other requirements not in the bid documents. *Fifth,* exemption or waiver of taxes is a lawful process. No evidence was tendered to demonstrate that the exemption was illegally procured. *Sixth,* the alleged non-payment of taxes remains a mere allegation. *Seventh,* if the equipment's were procured duty free and that the exemption was lawful, it does not mean that the importer unlawfully procured them. It follows that the argument that the second Interested Party had an undue advantage over the other bidders must fall.

62. There was a sustained attempt to back the issue under consideration with the dictates of Articles 10 and 227 of the Constitution and section 3 of the act. This argument is impressive and attractive. I admire the argument and the attempt to show that the process was devoid of the values prescribed in Article 227. After all, arguments invoking violation of constitutional provisions and dictates are bound to evoke emotions because the Constitution is the supreme law of the land. However, this argument, impressive as it is, falls on the grounds stated in the succeeding paragraph.

63. *First,* 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 purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. As stated above, the second Interested Party complied with the bid requirements. *Second,* 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. *Third,* 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. *Fourth,* fairness must be decided on the circumstances of each case. Whatever is done may not cause the process to lose the attribute of fairness or, in the constitutional sphere, the attributes of transparency, competitiveness and cost-effectiveness.

64. Differently put, the attempt to assail the decision on the tests provided under Articles 10 and 227 of the Constitution and section 3 of the act collapses on grounds that there is absolutely nothing to show that the tender process lost the attributes of fairness, transparency, competitiveness and cost-effectiveness decreed under Article 227. The tender documents required a bidder to submit a Tax Clearance Certificate which as per the definition stated above is evidence that the tax payer had complied with his tax obligations. I have already stated that exemption of duty is a lawful process. The contrary has not been suggested or even proved.

65. It follows the attempt to attack the Respondents decision premising the attack on the said provisions and the submission that the Respondent failed to take into account relevant considerations lacks substance. Put differently, I find that no irregularity occurred.

b. Whether the impugned decision is irrational and unreasonable

66. The *ex parte* applicant's counsel argued that it was unreasonable and irrational for the Respondent to find that the second Interested Party set out the list of equipment in its bid document only to demonstrate capacity to execute the tender and that the equipment's were not to be utilized to execute the tender. She relied on *Kevin K. Mwiti & Otherrs v Council of Legal Education & Others*[15] in which the court held that to justify interference, the decision in question must be so grossly unreasonable that no reasonable authority addressing itself to the facts and the law would have arrived at such a decision.

67. The first Interested Party's counsel argued that the *ex parte* applicant has failed to demonstrate that the impugned decision is unreasonable, irrational or tainted with illegality. He argued that counsel failed to demonstrate the factors that were not considered which made the decision irrational. Citing *Republic v Public Procurement Administrative review Board & 3 Others ex parte Saracen Media Limited,**[16]* counsel argued that an administrative decision can only be challenged on grounds of *ultra vires*; illegality, irrationality and procedural impropriety which he submitted have not been established in this case.

68. The second Interested Party's counsel argued that the application has no merits. He added that judicial review is about decision-making process, not the decision itself. He relied on *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Saracen Media Ltd* (supra) and section 173 of the act, and argued that where there is substantial compliance with the relevant procurement laws, the court would not disturb the decision. He also submitted that in public procurement, only conforming, compliant or responsive tenders are considered, and that the *ex parte* applicant has not established illegality, irrationality or procedural impropriety. Counsel submitted that demonstrating capacity to perform the tender does not affect responsiveness and that there was no requirement to a bidder to demonstrate how he acquired its equipment. He maintained that the second Interested Party met the requirements under section 79(1) of the act.

69. Counsel for the third Interested Party argued that failure of a public authority to take into account relevant considerations and the taking of irrelevant ones into account are grounds for judicial review in administrative law, and, are regarded as forms of illegality.

70. The bid documents provided that a bidder must indicate the core plant and equipment considered by the company to be necessary for

undertaking the project with proof of ownership. This was a mandatory requirement in the bid documents. 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, Regulations or the Tender documents. A procuring entity is bound to adhere to the terms of the procurement process.

71. The purpose of competitive bidding is to ensure fairness, efficiency, and security in the construction of public projects. Competitive bidding is aimed at benefitting and protecting the public and not for the benefit of the bidders. The purpose of competitive bidding has been summarized as follows:

> *"The provisions . . . requiring competitive bidding . . . are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable and they are enacted for the benefit of property holders and taxpayers and not enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest."* ***[17]***

72. The starting point is that the bid documents required bidders to demonstrate capacity and competence. It provided that a bidder lists plant and equipment to be used in the project and proof of ownership. In strict adherence to this requirement, the second Interested Party provided a list of the plant and equipment it desired to use in the project. The assault on this list as I understand it is two-fold. *First,* it listed equipment which was procured duty free. I have already dealt with this ground of attack in the above issue. *Second,* it is argued that it listed equipment it was not going to use in the project. With tremendous respect, this ground of attack is highly speculative. The core test is whether a bidder demonstrated capacity and competence. The Procuring Entity knew what it was looking for, and, it was satisfied that capacity and competence were established. There is nothing materially wrong or unreasonable for a bidder to provide a list of Plant and Equipment it owns to perform a contract, provided the Plant and Equipment is relevant to the work in question. Demonstrating capacity and competence is the key test.

73. The leading authority in cases of this nature remains *Council of Civil Service Unions v. Minister for the Civil Service* ***[18]*** in which 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.*[19]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 to *"unreasonableness"* in *Wednesbury* Case.[20] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must adhere in certain circumstances.

74. 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.

75. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[21]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. I find no illegality in the Respondents decision on the issue under consideration.

76. Rationality as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action Act.[22] It 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*."

77. The test for rationality was stated as follows: -***[23]*** "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." It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that decisions must be rationally related to the purpose for which the power was given.[24]

78. As Nugent JA pointed out in *Minister of Home Affairs and Others v Scalabrini Centre****[25]*** that:

> *"... an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason - in contradistinction to one that is arbitrary - which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."*

79. 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[26] 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.[27]

80. 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*[28] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[29]This stringent test has been applied in Australia[30] 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, and the mandatory requirements in the bid document regarding plant and machinery, I am not persuaded that a different tribunal properly addressing itself to the same facts and circumstances could have arrived at a different conclusion.

81. 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. Differently put, a reasonable Tribunal looking at the bid requirements and the need for a bidder to demonstrate ability to perform the contract, could not have arrived at a different conclusion. I need not repeat that exemption of duty is a legal process, and, such the exemption did not divest the second Interested Party the ownership of the Plant and Equipment.

82. It was therefore reasonable for the Respondent to conclude as it did, that the tender process was lawful. The following propositions can offer guidance on what constitutes unreasonableness. *First*, *wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. *Second*, 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. *Third*, 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.

83. 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.

84. Legal unreasonableness as I understand it comprises of 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.[31]

85. 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.

86. 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.

87. It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid documents must be complied with. Deviations from mandatory bid requirement are not be permissible.

88. 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 and ability 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 its management team and capacity to deliver which must be demonstrated by a schedule of major items of Plant and Equipment to be used.

89. Applying the tests for reasonableness and rationality to the facts and circumstances of this case, I am not persuaded that the impugned decision is legally frail on the grounds cited under the issue under consideration or that it suffers from either unreasonableness or irrationality, hence, the assault on the grounds under consideration fails.

c. Whether the Respondent acted in excess of jurisdiction

90. The *ex parte* applicant's counsel submitted that the Respondent acted in excess of jurisdiction in holding that the contents of clause 14.1 of section VII of the second Interested Party's contract of the construction project of the three interchanges along A104 at Nyahururu Turnoff, Njoro Turnoff And Mau Summit Junctions can be incorporated into the subject tender.

91. Counsel for the first interested party argued that the *ex parte* applicant has failed to demonstrate breach of constitutional, statutory or regulatory requirements.

92. Counsel for the second Interested Party dismissed this claim as irrelevant and argued that the procurement in question was undertaken under a system that is fair equitable, transparent competitive and cost effective.

93. Counsel for the third Interested Party adopted a curiously but surprising dramatic shift oscillating from supporting the application to opposing it. He submitted that the Respondent fell into an error of law by failing to give effect to Regulation 12(3) (d) of the National Construction Authority Regulations and section 157(9) of the act. He cited Halsbury's Laws of England[32] for the proposition that a decision making body has no jurisdiction or power to commit an error of the law.

94. 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."[33] 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.

95. 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**[34]*** 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.[35] 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."[36] 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."[37] That the "very effectiveness" of statute should be ensured by judicial review[38]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."[39]

96. 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…"**[40]***

97. 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.[41]

98. Judicial review is about setting the boundaries for exercise of statutory power. It is about ensuring public bodies obey the law and act within their prescribed powers. There is no prove or cogent argument before me that the Respondent overstepped its jurisdictional boundaries while determining the issue under consideration. Differently put, I am unable to reconcile the *ex parte* applicant's counsel's submissions on this issue with the boundaries of judicial review discussed above. The *ex parte* applicant's counsel's arguments on the issue under consideration cannot pass the tests on what amounts to acting in excess of jurisdiction.

d. Whether the Respondent acted in breach of the equitable principle

99. The *ex parte* applicant's counsel argued that by undertaking six-road construction projects five of which are being executed on behalf of the first Interested Party, the third Interested Party was enjoying a position of economic dominance, which is a factor the procuring entity ought to have taken into consideration. Counsel faulted the Respondent for ignoring her argument on this ground and for holding that the third Interested Party's dominance should be raised before the Competition Authority, a position counsel argued was unreasonable and irrational. Counsel cited *Republic v Public Procurement Administrative Review Board ex parte Water Services Board & 2 Others*[42] for the holding that in public procurement and disposal, the starting point is the Constitution. Counsel further argued that it was unreasonable for the Respondent to ignore the need for a due diligence report.

100. Counsel for the first Interested Party cited section 157(2) of the act and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 and argued that the Respondents decision was proper. He argued that section 86(2) of the act entitles 20% of the total score in evaluation where the entity has attained the minimum score and ought to be read with section 82(b) of the act. Counsel distinguished the decision in Review App No. 47/2016 cited to by the *ex parte* applicant's counsel. He maintained that the observations on due diligence were proper.

101. Counsel for the second Interested Party argued that the question of economic dominance can only be addressed through the procedure provided under section 9(1) (i) as read with section 50 of the Competition Act.

102. The third Interested Party 'position was oscillating between opposing the application and supporting it, a position which I can only describe as confusing. In its Replying Affidavit, it urged the court to strike out the application as earlier mentioned. In his submissions, counsel took a diametrically opposite position. Counsel argued that the Respondent purported to apply 10% margin of preference pursuant to the Regulations, yet subsidiary legislation cannot take precedent over an act of Parliament.

103. Procurement disputes revolve around the proper interpretation and application of Article 227 of the Constitution; hence, they raise

constitutional issues. This is because procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner.

104. It is important to point out that the allegations of the alleged dominance are directed against the third Interested Party who never won the tender, and not against the successful bidder. On this ground alone, it cannot be argued that the alleged dominance influenced the award to the second Interested Party. It is important to bear in mind that fairness, equitability, transparency, competitiveness and cost-effectiveness are the guiding principles, required by the Constitution in relation to all public procurement in Kenya. Thus, whatever is done should not cause the process to lose the attribute of fairness or, the attributes of transparency, competitiveness and cost-effectiveness.[43] Fairness in the procurement process is a value in itself and a proper compliance with the procurement process is necessary for a lawful process.

105. The requirement that the public procurement process be fair requires that the evaluation of the tender be undertaken by means that are explicable and clear and by standards that do not permit individual bias and preference to intrude. Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was made on the relative importance and weight attached to each, the process is objective and the procurement process is fair.

106. The subject matter and the awarding criteria were clearly defined in the tender documents.[44] The bidders were in a position of equality at all times. Equally unacceptable is the fact that the criteria used was not aimed at identifying the tender who was economically the most advantageous, but the tenderers' ability to perform the contract.[45] I have examined section 157(2) of the act and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011. I have also examined section 86(2) of the act which permits 20% of the total score in evaluation where the entity has attained the minimum score. I am unable to agree with the position taken by the *ex parte* applicant's counsel on this issue.

107. In any event, the dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. The applicant has failed to bring its allegations on the alleged dominance within the ambit of this test.

108. Article 227 of the Constitution, the Act and the Public Finance Management Act[46] provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in the Fair Administrative Action Act.[47] The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in the Fair Administrative Action Act.[48] There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in the Fair Administrative Action Act.[49] If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established.

109. Fairness is inherent in the tender procedure. Its very essence is to ensure that before a State organ purchases goods or services, or enters into contracts for the procurement thereof, a proper evaluation is done of what is available and at what price, so as to ensure cost-effectiveness and competitiveness. Fairness, transparency and the other facts mentioned in Article 227 of the Constitution permeate the procedure for awarding or refusing tenders.[50]

e. Whether the ex parte applicant is seeking a merit Review as opposed to a Judicial Review.

110. The *ex parte* applicant's counsel argued that the Respondent abdicated its statutory duty by failing to make a determination on whether the process was fair, equitable or competitive since the second Interested Party had an advantage over other contractors. It was her submission that the second Interested Party based its rates on equipment purchased on duty free, unlike other bidders who based their rates on equipment, which was subjected to duty. She argued that by evaluating the tender using the criteria of the lowest price, the Respondent failed to give effect to Articles 10 and 227 of the Constitution and section 3 of the act. She relied on *Republic v Public Procurement Administrative Review Board ex parte Meru University of Science &Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party)*.[51]

111. She argued that the Respondent acted *ultra vires* by substituting the decision of the evaluation committee and usurped the powers of the first Interested Party. She relied on *Public Procurement Administrative Review Board & 3 Others, ex parte Central Bank of Kenya Ltd & 2 Others*[52] which held that the powers of substitution given to the Review Board are restricted to the decision of the Accounting Officer and that the Review Board can only exercise such powers as restricted by Parliament.

112. In addition, counsel argued that the Respondents finding that the post qualification analysis carried out by the Evaluation Committee amount to due diligence, notwithstanding the fact that the Evaluation Committee did not prepare a due diligence report is inconsistent with the provisions of Article 227 and section 83 of the Act.

113. She also argued that the Respondent erred by relying on the Public Procurement and Disposal Regulations, 2011 and disregarding the provisions of section 86(2) of the act on the applicable margin of error hence it was illegal and *ultra vires*. Counsel relied on *Pastoli v Kabale District Local Government Council & Others*.[53] Counsel also argued that in holding that the applicable margin of preference is as set out in Regulation 15(c) of the 2011, the Respondent went contrary to its previous holding in Review Application No. 47/2016, *H. Young & Co, (EA) Ltd/Gibb Africa Limited vs Kenya National High Ways Authority* where it held that the applicant was entitled to a preference of 20%. She maintained that finding that the applicable margin of preference is 10% is contrary to the legitimate expectations of the applicant since it went contrary to the Respondent's previous decision, and that the decision was made in bad faith.

114. In addition, counsel argued that the Respondent committed an error of law by shifting the burden of proof to the applicant regarding the second interested party's compliance with Regulation 12(3) (d) of the NCA Regulations. She also argued that the Respondent acted *ultra vires* by framing and determining an issue on academic qualifications of the applicant's site agent yet it was not an issue submitted by either

of the parties. Lastly, she argued that by holding that the applicant failed to provide evidence of academic qualifications of its site agent was in violation of natural justice.

115. Counsel for the first Interested Party submitted that the *ex parte* applicant seeks to re-litigate the issues that were before the Respondent. He cited *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Saracen Media Limited,*[54]which held that judicial review, is about decision making process. He also cited *Kenya pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others*[55] for the holding that judicial review orders can't be granted on grounds of appeal which are outside the scope of judicial review. He submitted that the *ex parte* applicant is challenging the merits of the decision.

116. He further argued that the responsiveness of the tender were determined based on the conditions in the bid document and in accordance with section 79 of the act. He relied on *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Saracen Media Limited*[56] in which it was held that a bid only qualifies as responsive if it meets all the requirements set out in the bid document. It was his submission that the decision is in accordance with section 28 of the act. He cited *Republic v Public Procurement Administrative Review Board & 2 Others ex parte Numerical Machining Complex Ltd*[57] for the holding that review in respect of procurement proceedings need not be exercised in a manner that renders the idea conceived by the procuring entity totally useless. He submitted that the Respondent reviewed all the documents and arrived at the decision in question. Counsel invited the court to decline to exercise discretion in favour of the applicant and added that the applicant has not demonstrated any grounds to qualify for the orders sought.[58]

117. The second Interested Parties counsel submitted that no abuse of powers or *ultra vires* has been established. He pointed out that the first Interested Party has already executed the contract and the harm to the public outweighs the need to grant the reliefs. He invited the court to find that the applicant has not demonstrated illegality, impropriety or irrationality, and, that, the application is made in bad faith.

118. As pointed out earlier, counsel for the third Respondent kept on shifting positions, blowing both hot and cold air, at times opposing the application and at other times supporting it. He submitted that the applicant's application is incompetent and ought to be dismissed on grounds that the facts relied upon are not averred in the verifying affidavit. To support this position, he cited *Republic v National Environment Management Authority ex parte Sound Equipment Limited*[59] and *Republic v Makeni District Land Disputes Tribunal & 2 Othrs ex parte Mwilu Ngui & 3 Others*.[60]

119. In a dramatic departure from the above submission, counsel submitted that there are sufficient grounds for the court to grant the orders sought. In particular, he argued that the decision is *ultra vires* Article 227(1) of the Constitution, sections 86(1)(a)& (2) 155(3) (b) & (4) and 157 (9) of the act, Regulation 12(3)(d) of the NCA Regulations, 2014 as read with section 31(b) of the Interpretation of General Provisions Act.[61] To buttress his argument, he cited *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 Others*.[62] He urged the court to grant the order of *prohibition* to prevent the first and second Interested Party from executing the contract. As for *Mandamus*, counsel took an interesting third position and argued that *Mandamus* should only be issued to compel the first interested party to apply 20% margin preference in favour of the third Interested Party and award the tender to the third Interested Party.

120. It is important to recall that most of the grounds relied upon by the *ex parte* applicant as reproduced above were also cited in support of the other issues discussed above. I have already pronounced myself on the said issues. Accordingly, I will confine myself on the question whether the *ex parte* applicant is citing grounds of appeal as opposed to grounds for judicial review.

121. There is a long-established and fundamental distinction between an Appeal and Review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

122. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach.' It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.

123. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji:-**[63]***

> *"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant..."*

124. **Lord Reid** in ***Animistic -vs- Foreign Compensation Commission**[64]*** held that:-

> ***"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are***

many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

125. Nevertheless, whatever the purpose of Judicial Review is deemed to be, some propositions have become clear: orthodox principles of administrative law prescribe that courts engaged in review should not reconsider the merits of the action because they are not the recipients of the discretionary power.[65] Judicial review is not an appellate procedure in which a judge reverses the substantive decision of an administrative body because of the sole ground that the merits are in the applicant's favour. Rather, it is a supervisory procedure whereby a judge rules only upon the lawfulness of the decision, or the manner in which one was reached. The question for review, therefore, is whether the decision was 'lawful or unlawful,' the question for appeal by contrast is whether the decision was 'right or wrong.'

126. The substance of the *ex parte* applicant's grounds and the arguments in support thereof are a clear in vitiation to this court to determine whether the Respondents decision was right or wrong, which is an invitation to this court to venture into merit review.

127. An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations [66]and intervene only when an applicant has demonstrated grounds for review.

Conclusion

128. An "acceptable tender" must be construed against the background of the system envisaged by Article 227(1) 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 bid documents" must be judged against these values.

129. It is correct to emphasize that an "acceptable tender" means any tender, which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. Moreover, 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.

130. The impugned decision has not been shown to be legally frail on any of the known grounds for judicial review. 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.[67] Simply put, subjecting the entire procurement process to the values set out in Article 227(1), I am not persuaded that the tender process cannot be read in a manner that is consistent with the said values and the dictates of the procurement laws and Regulations.

131. Accordingly, I dismiss the *ex parte* applicant's Notice of Motion dated **13th** May 2019 with costs to the first and second Interested Parties.

Signed and Dated and Delivered at Nairobi this 23rd day of July 2019

John M. Mativo

Judge

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[1] The term "procuring entities" is used here to refer broadly to government or public entities and for our purposes specifically those entities that are bound by the procurement clause in Article 227 of the *Constitution* and by relevant procurement laws.

[2] See generally Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 650-673; Cibinic and Nash *Formation of Government Contracts* 537-592.

[3] Act No. 33 of 2015.

[4] {2014}e KLR.

[5] {1995} 1 W.L.R. 1037, Court of Appeal (England and Wales).

[6] Ibid, pp. 1049–1050.

[7] {2008} 4 S.L.R.(R.)

[8] p. 159, para. 17.

[9]{1983} Q.B. 600, C.A. (England and Wales).

[10] Ibid, pp. 635–637.

[11] {1995} 1 W.L.R. 759, H.L. (UK).

[12] Ibid, p. 780

[13] https://www.kra.go.ke/en/individual/filing-paying/types-of-taxes/tax-compliance

[14] Ibid.

[16] {2018} eKLR.

[17] McQuillin, Mun. Corp. (3d ed.) Section 29.29.

[18] {1985} AC 374.

[19] 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

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

[21] {2015} eKLR.

[22] Act No. 4 of 2015.

[23] 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.

[24] Ponnan JA, relying on *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)

[25] 2013 (6) SA 421 (SCA) at para [65].

[26] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

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

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

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

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

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

[32] 4th Edition para 77

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

[34] {1969} 2 A.C. 147.

[35] 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".

[36] {1969} 2 A.C. 147, at p. 194.

[37] {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.

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

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

[40] *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.

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

[42] {2017} e KLR

[43] See *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) Conradie JA in para [13].

[44] See *Commission v French Republic* {2004} ECR I-9845.

[45] See ECJ Judgement of 24 January 2008, in case C-532/06, Lianakis v Alexandroupolis [2008] nyr at [30].

[46] Act No. 18 of 2012.

[47] Act No. 4 of 2015.

[48] Ibid.

[49] Ibid.

[50] See *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 9.

[51] {2019} e KLR.

[52] {2018} e KLR.

[53] {2008} 2EA 300. Also counsel relied on Republic v Public Procurement Administrative Review Board & 2 Othetrs ex parte Transcend Media Group Limited {2018}e vKLR

[54] {2018}e KLR.

[55] {2012} e KLR.

[56] 2018} e KLR.

[57] {2016} e KLR.

[58] Citing Republic v Public Procurement Administrative revirw Board & 3 Others ex parte Saracen Media Ltd (suprs) and Okiya Omtata Okoiti v Kenya ex parte Revenue Authority and 2 Others {2016} e KLR.

[59] {2010} e KLR.

[60] {2012}e KLR.

[61] Cap 2, Laws of Kenya.

[62] {1997}e KLR

[63] {2014} eKLR.

[64] **{1969} 1 All ER 20.**

[65] S. De Smith, H. Woolf and J. Jowell, *Principles of Judicial Review* (Sweet and Maxwell, 1999) at 20.

[66] See *Gauteng Gambling Board v Silverstar Development & others* 2005 (4) SA 67 (SCA) para 29, Heher JA.

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