



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 142 OF 2018

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI

REPUBLIC.....APPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE

REVIEW BOARD.....RESPONDENT

LEEDS EQUIPMENTS AND SYSTEMS LIMITED.....INTERESTED PARTY

EX PARTE:

KENYA VETERINARY VACCINES PRODUCTION INSTITUTE

JUDGMENT

The Application

1. The ex-parte Applicant herein, (hereinafter “the Applicant”) is the Kenya Veterinary Vaccines Production Institute, and was the procuring Entity in a restricted tender for The Supply, Installation, Training and Commissioning of laboratory equipment (hereinafter Tender No. KVVPI/T/1/2017-18”). The Respondent on the other hand is statutory body formed under section 27 of the Public Procurement and Asset Disposal Act 2015 and mandated to review, hear and determine public tendering and asset disposal disputes. Leeds Equipment and System limited which is the Interested Party herein, is a Company registered to carry on business in Kenya, and participated in Tender No. KVVPI/T/1/2017-18 as a bidder.

2. The Applicant averred that it intended to automate its vaccine production plant to serve the market better, and had planned and budgeted for the said plant to be procured in the 2017/2018 financial year. Further, that the said plant was procured through restricted tendering for the supply, installation, training and commissioning of laboratory equipment; and the bids were opened on 11th December 2017. The Applicant stated that the following tenderers submitted their bids Brookpharm Biotech Limited, Med Surge Healthcare Limited, LA Scientific Limited; Leeds Equipment Limited, F & S Scientific Limited, Leeds Equipment And Systems Limited, Leud A Chemicals Limited and SWAMA.

3. According to the Applicant, upon evaluation of the bids the lowest evaluated bid prices were above the approved budget, and its head of procurement gave her professional opinion and recommended that the Applicant awards the tenders, despite the finding by the evaluation committee that the lowest evaluated prices were above the approved budget. However, that this recommendation was rejected by the Applicant’s Accounting Officer, who terminated the tender and duly notified the tenderers of the decision and the reasons thereof.

4. It was the Applicant’s case that the Interested Party challenged the decision through Request for Review No 34 of 2018 that was filed with the Respondent, and that on the 16th March 2018 the Respondent upheld the request for review, annulled the decision to terminate the tender, and directed the Applicant to award the same to the Interested Party. However, that the directive to award the tender presents practical difficulties, as the Applicant is unable to pay the Interested Party’s bid price.

5. The Applicant thereupon filed the instant judicial review proceedings by way of a Notice of Motion application dated 5th April 2018, seeking an order of certiorari to remove to the High Court for purposes of quashing the Respondent’s decision dated 16th March 2018, and that costs of the suit be provided for. The application is supported by statement of facts, verifying affidavit sworn on 29th March 2018 by Dr. Jane Wachira, the Applicant’s Accounting Officer, and the annexures thereto.

6. The Applicant contends that the Respondent failed to review the Interested Party's technical bid, and thereby failed to take into consideration the fact that the same is technically unresponsive because the automatic vial washing machine offered by the Interested Party has a container height of 750+50 mm as opposed to the tender requirement; it is a single head powder filling machine as opposed to the tender requirement of four head liquid filling machine; it is not fully automated as it contains no digital vial counter and variable sealing pressure; the vertical Self-adhesive sticker labelling machine offered has no online mechanism for counting products to exit point; and it has no label roller diameter thickness of 0.035mm.

7. That the Respondent also failed to take into consideration the fact that the evaluation report was not factual and was at variance with the Interested Party's bid; and that the Applicant's Head of Procurement's professional opinion was dishonest and misleading, and failed to distinguish between evaluation criteria and award criteria. In closing, the Applicant stated that unless the orders are set aside an award of the tender to the Applicant Respondent would lead to an illegality and absurdity.

The Responses

The Respondent's Response

8. The Application was opposed by the Respondent through the replying affidavit sworn on 16th July 2018 by its Secretary, Henock K. Kirungu. He deposed that upon receiving the Interested Party's Request for Review dated 18th February, 2018 with regard to Tender No. KVVPI/T/1/2017-18, he directed that the Applicant be served and notified of the pending review as per section 168 of the Public Procurement and Disposal Act 2015. Further, that the Applicant filed a response in opposition to the Request for Review, and the same was heard and a decision delivered on the 16th March 2018.

9. In addition, that in its decision, the Respondent allowed the request for review by the Interested Party and set aside the Applicant's decision to terminate Tender No. KVVPI/T/1/2017-18. That it further directed the Applicant to issue a letter of award in respect of Tender No. KVVPI/T/1/2017-18 to the Interested Party within fourteen days from the date of the ruling, and avail a copy of the letter of award to the Respondent and Director General of the Public Procurement Regulatory Authority within the period. Lastly, that the Respondent directed that the Interested Party be awarded costs of the review to be agreed upon failure to which it was at liberty to file bill of costs of with the board for taxation.

10. According to the Respondent, it was aware of, and took into account all factors in arriving at its decision; namely the tender documents, evaluation reports, professional opinion issued by the Head of Procurement of the Applicant and the submissions of all parties. Further, that it observed all the rules of natural justice, acted lawfully, fairly and reasonably in the exercise of its statutory mandate, and found on the basis of the law that the termination of the procurement process was not lawful.

11. Furthermore, that under section 53(8) of the Public Procurement and Asset Disposal Act, before an accounting officer commences procurement proceedings she must first be satisfied that there are sufficient funds. That it cannot therefore be open for a procuring entity to advertise for goods works and services, and then turn around and terminate the process after tenders have been submitted, evaluated and recommendation of the award done.

12. The Respondent contended that after examining the material presented, it came to the conclusion that no sufficient material was placed before it to justify the termination. Further, that it went into great lengths to address a number of jurisdictional issues and merits of the case in great detail. Therefore, that the application is made in bad faith is calculated to harass the credibility of the Respondent's mandate and function, and ultimately erode public confidence in the procurement procedures and processes, and to delay the Interested Party from proceeding with the tender evaluation process.

The Interested Party's Response

13. The application was also opposed by the Interested Party, who filed a replying affidavit sworn on 11th April 2018 by its Director, one Geoffrey Koech. It was the Interested Party's Case that on the 12th February 2018, it received information through an email letter dated the 8th February 2018 that the lot he had participated in the Applicant's tender had been terminated due to inadequate budgetary provisions. That being aggrieved by the decision, the Interested Party lodged a request for review on the 23rd February 2018 before the Public Procurement Administrative Review Board.

14. The Interested Party averred that it met all the technical specification as per the tender document, and the reason given was not a ground for the termination of the tender proceedings. Further, that the Applicant admitted in their response to the Request for Review dated 2nd March 2018 that the Interested Party had won the tender after the procuring entity had finalised on all evaluation stages.

15. In addition, that the board paper by the Applicant's Chief Executive officer dated 28th March 2018 faulted its Head of Procurement recommendation in awarding the tender to the Interested Party, yet the same recommendation was used in the award of the tender to other successful bidders, namely DLA Scientific, for the supply installation, training and commissioning of 250 L Bio Reactors.

16. It was also the Interested Party's case that the Applicant introduced a new issue as a ground for the application which was not subject to the Respondent's decision, which is an abuse of the Court process aimed at frustrating a successful bidder, and that this Court has no jurisdiction to hear and determine grounds not raised before the Respondent. In addition, that the decision taken by the Applicant's Chief Executive Officer to deny the notification of the award to their company despite the Respondent's decision amounts to discrimination, aimed at locking the Interested Party from being awarded the tender, and which goes against the rules of natural justice and contrary to the constitutional dictates of procurement principles.

17. In conclusion, the Interested Party stated that the Respondent is a specialised tribunal and is better equipped than this Court to handle

disputes relating to technical procurement details, and that the technical issues being raised by the Applicant could have been properly settled by the Respondent had they been raised. In addition, that the application has not disclosed any complaint with regard to the decision making process of the Respondent and instead focuses on the merit and demerits of the Respondent's decision, Therefore that it should fail, as the Court can only interfere with the said decision if it was found to be illegal, unreasonable, irrational or disproportionate.

The Determination

18. The application was canvassed by way of written submissions which the parties relied upon for determination. Onyoni Opini & Gachuba Advocates filed two sets of submissions dated 16th October 2018 and 22nd October 2018 in support of the Applicant's case. The Interested Party's Advocates, Cheboi Kiprono Advocates, filed submissions dated 25th September 2018 on behalf of the Interested Party. The Respondent did not file any submissions.

19. Four main issues arise from the pleadings and submissions filed by the parties. Firstly, whether the Respondent's decision dated 16th March 2018 was in error of law and/or *ultra vires* the Public Procurement and Disposal Act of 2015 (hereinafter referred to as "the Act"). Secondly, whether the Respondent failed to take into account relevant considerations in making the said decision. Thirdly, whether the said decision was irrational; and lastly, whether the Applicant is entitled to the reliefs sought.

20. In determining the said issues, this court is guided by the broad grounds for the exercise of judicial review jurisdiction as stated in the case of **Pastoli vs Kabale District Local Government Council & Others** [2008] 2 EA 300 at pages 303 to 304 thus:

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

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

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

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

21. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

22. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that while *Article 47* of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. This Court will now proceed to examine and determine the issues raised by the parties in light of the foregoing principles.

On whether the Respondent's decision was in error of law and/or ultra vires

23. It was the Applicant's submission that the Respondent herein acted in excess of its jurisdiction and powers in entertaining the Interested Party's request for review and annulling the aforementioned tender, and specifically that it contravened Section 167 (4) (b) of the Act which excludes the termination of a procurement or asset disposal proceedings under section 63 of the Act from review. The Applicant relied on the decision in **Fedha Electronics Limited vs. National Transport and Safety Authority, Application No.53 of 2017**, where the Respondent held that it lacked jurisdiction to entertain matters falling under section 63 of the Act. The Applicant additionally cited the case of **Anisminic Vs. Foreign Compensation Commission**, (1969)2 AC 147 to argue that the Respondent embarked on an inquiry beyond that directed by statute.

24. Reliance was also placed on on Section 7(2) (d) read together with section 11(1)(e) of the Fair Administrative Action Act 2015 for the

submission that any administrative decisions made in error of law ought to be quashed. The Applicant also cited the procedures set out in sections 53, 79 (1), 80 (1) and (2) and 84 of the Act on the preliminary and technical evaluations of a bid, and requirement for a procurement to be within the approved budget.

25. The Applicant submitted in this regard that the evaluation report and the professional opinion by its Head of Procurement were *ultra vires* the statutory scope, and not binding on the Accounting Officer, who had a statutory discretion whether or not to award the tender, and who had a duty to conduct an independent review of the evaluation report as held in the case of **Energy Regulatory Commission vs. SGS Kenya Limited & 2 Others, (2018) e KLR**. Further, that the Applicant's Accounting Officer acted within the powers provided in section 44(1) and (2) of the Act, to ensure compliance with the Act and that procurement is within the approved budget of the Applicant.

26. The decisions in **R vs Public Procurement administrative Review Board & another Ex-parte Teachers Service Commission, Misc. Application No 17 of 2015** and **R vs Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Intergrati, (2008) e KLR** were distinguished by the Applicant on the ground that they frustrate the legislative intention.

27. The Interested Party on the other hand submitted that section 28(1)(a) of the Act empowers the Board to review, hear and determine tendering and asset disposal disputes, and relied on the decisions in **Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) e KLR** and **Mutanga Tea & Coffee Company Ltd vs. Shikara and Another, (2015) e KLR** for the position that the Respondent is also allowed by Article 159 of the Constitution to provide statutory and specialized dispute resolution mechanism.

28. Further, that the Respondent has heard and determined cases of a similar nature, and pointed to the case of **R v Public Procurement administrative Review Board & another Ex-parte Teachers Service Commission, Misc. Application No 17 of 2015**. Reliance was also placed on the decision of this Court (Matico J.) in **R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Intergrati (2008) e KLR** that the Respondent had jurisdiction to hear and determine disputes including termination of tender proceedings. Lastly, that after hearing the parties, the Respondent came to the conclusion that not enough reasons were given for termination of tender proceedings under section 63(1) of the Act.

29. The main question to be answered is whether the Respondent erred in finding it had jurisdiction to entertain the Interested Party's Request For Review of the Applicant's decision to terminate the subject procurement. In answering this question, this Court is further guided by the circumstances when a public body shall be deemed to have made an error of law as expounded in **Halsbury's Laws of England, 4th Edition** at paragraph 77 as follows:

“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself *ultra vires*; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power.”

30. Section 167 of the Act in this regard provides as follows on the jurisdiction and powers of the Respondent in a request for review:

“(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date

of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.”

31. The termination of procurement proceedings is provided for in section 63 and not 62 of the Act as follows:

“(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement have been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination.”

32. The Respondent’s finding in its decision of 16th March 2018 on the issue of its jurisdiction and powers under the above cited sections as regards the Interested Party’s Request for Review was as follows:

“In a nutshell therefore and based on the above decided cases where the decision of a procuring entity to terminate procurement process is challenged before the Board, the procuring entity is under to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and the procedural requirements set out under the provisions of Section 63 of the Public Procurement and Asset Disposal Act 2015.

Based on all the above decisions, the Preliminary Objection on jurisdiction therefore fails and is disallowed and the Board finds and holds that it has the jurisdiction to hear and determine this Request for Review on its merits.”

33. A plain reading of section 167(4)(b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

34. As has previously been held by this Court in **Republic v Kenya National Highways Authority Ex Parte Adopt –A- Light Ltd [2018] eKLR** and **Republic v Secretary of the Firearms Licensing Board & 2 others Ex -parte:Senator Johnson Muthama [2018] eKLR**, it is for the public body which is the primary decision maker, in this instance the Applicant as the procuring entity, to determine if the statutory pre-conditions and circumstances in section 63 apply before a procurement to be terminated. Therefore it was indeed within the Accounting Officer’s powers to make that inquiry.

35. However, the Respondent and this Court as review courts have jurisdiction where there is a challenge is as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard. This was the essence of the Interested Party’s challenge in its Request for Review, which was annexed by the Applicant as “Annexure JW 8” to its verifying affidavit sworn on 29th March 2018. The Interested Party in this respect alleged that the Applicant terminated the subject tender on the ground that there were insufficient funds whereas it had adequate budgetary allocation for the same, and that the termination was thus without legal justification.

36. The Respondent was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant’s Accounting

Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there were no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in in **R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Intergrati (supra)** which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act.

On Whether the Respondent Failed to Consider Relevant Considerations.

37. The Applicant relied on section 7(2) as read with section 11(1) (e) of the Fair Administrative Act which provides for quashing of decisions made without making relevant considerations. The Applicant in this regard submitted that the Interested Party's proposed technical solution did not satisfy the Applicant's technical requirements as specified in its tender document, and gave the details of the relevant technical specifications. Therefore, that the Applicant's evaluation committee failed to evaluate the Interested Party's bid in compliance with section 80(2) of the Act, and its report cannot be the basis of the tender award.

38. The decisions in **Republic vs. Public Procurement Administrative Review Board & another Ex- parte Uto Creations Studio Ltd (2013) e KLR** and **Kenya Pipeline Ltd. vs. Hyosung Ebara Company Limited (2012) e KLR** were cited for the submission that the Respondent failed to review the Applicant's tender technical requirements vis-à-vis the Interested Party's technical proposal. The decision in **OJSC Power Machines Limited, Transcentury Limited and Civicon Limited (Consortium) vs Public Procurement Administrative Review Board Kenya & 2 Others, (2017) e KLR** was also cited for the position that the Respondent was under a duty to take into account all relevant considerations.

39. The Interested Party on its part submitted that the Applicant is introducing new grounds to justify its bias, and that the allegation that the Interested Party had not met the technical requirement is an afterthought by the Applicant, aimed at justifying their arbitrary decision to lock it out of the tender. Therefore, that the Applicant is introducing new grounds which were not presented before the Respondent, even though the Applicant had an opportunity to present all its grievances.

40. The Interested Party relied on the holding in **Republic vs Public Procurement Administrative Review Board & 2 Others Exparte OJSC Power Machines Limited And Others, Misc Civil Application No 284 Of 2005**, that an applicant cannot under the guise of challenging the decision of the Respondent attack the decision of the Procuring Entity when the same was not the subject of the proceedings before the Respondent.

41. Further, that it was common ground that the Interested Party's bid had been subjected to all the evaluation criteria and was in conformity with the tender document. Therefore, that the only issue left for the Respondent to determine was whether the termination of the procurement process was lawful, which it found to be unlawful as the Applicant had ignored mandatory provisions of section 53(8) and 53(9) of the Public Procurement and Asset Disposal Act.

42. I have considered the rival arguments made on this issue of the Respondent's failure to take into account relevant considerations. The general rule on this issue was stated in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) 1 KB 223** that a public body when making a decision, must take into account all the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard. The extent to which a public body inquires into a particular factor, and the weight to be attached to a factor, are however matters to be decided by the public body, provided its acts reasonably. In addition, the considerations to be taken into account will also depend on the circumstances of each case.

43. In the present application, the issue before the Respondent was the termination of the tender by the Applicant's Accounting Officer on account of insufficient funds. The Respondent in its decision took into account the relevant factors as set out in section 63 and section 58 of the Act as regards budgetary allocation for procurement. Its decision in this regard was as follows:

“The Board finds on the basis of the law and the said documents that the termination of the procurement process herein was unlawful for the following reasons.

Under the provisions of Section 53(8) of the Public Procurement and Asset Disposal Act, the law expressly requires that before an Accounting Officer of a Procurement Entity commences any procurement proceeding he/she must first be satisfied that there are sufficient funds to meet the obligations arising from any contract that may be entered into pursuant to the procurement process.

Section 53(9) of the same Act makes it an offence for an Accounting Officer of a Procuring Entity to commence a procurement process without first ascertaining that the goods, works or the services to which the procurement process related have been budgeted for.....

It cannot therefore be open for a Procuring Entity to advertise for goods, works or services and then turn around at the end of the process and terminate a procurement process after tenders have been submitted, evaluated and a recommendation of award made. This view is further fortified by the fact that the budget available for any procurement is always known to the Procuring Entity way before an invitation for tenders is made public through advertisement.

The prices quoted by bidders are also known at the public opening of the tenders and what a prudent procuring entity ought to have done is to terminate the process immediately after tender opening in the event that the prices were above the available budgetary allocation but not to evaluate the tenders and terminate the procurement process upon the conclusion of the evaluation exercise

Secondly and notwithstanding the provisions of Section 53 of the Act, where the decision of a Procuring Entity to terminate a

procurement process is challenged the Procuring Entity whose decision is challenged must provide sufficient evidence/material to justify the termination of the procurement process.

The Board has looked at all the evidence placed before it by the Procuring Entity to support the allegation of lack of sufficient funds to continue with the procurement process herein and finds on the basis of the material placed before it that the Procuring Entity did not place sufficient evidence before the Board to justify the termination. “

44. In addition, the issue of the technical responsiveness of the Interested Party's bid was not raised by the interested Party or the Applicant in the Request for Review, neither did the Applicant bring any evidence to show that it raised the said issue in the Request for Review, and that the Respondent failed to address it. The Respondent cannot therefore be accused of failing to consider the same in the context of the Interested Party's Request for Review as a relevant factor, even though it has powers to review the technical responsiveness of a bid.

On whether the Respondent's decision was irrational

45. On irrationality, the Applicant cited section 7 (2) (i) (iii) & (iv) as read with Section 11(1) (e) of the Fair Administrative Act, to submit that the Respondents decision was irrational, such that no logical decision maker could direct the Applicant to award the tender to the Interested Party when the evidence was clear that the Interested Party's technical proposal did not meet the applicant's technical specifications. The Applicant also relied on the decision in **Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others (2016) e KLR** and section 7(2)(l) of the Fair Administrative Action Act that the court is empowered to undertake such a merit review.

46. The Interested Party on its part submitted that on the contrary, the Respondent's decision was rational as the Applicant made awards to other bidders like DLA Scientific Limited, and the position that the tender was cancelled was a scheme aimed and misleading the court and locking out the Interested Party. Furthermore, that the court can only interfere with the Respondent's decision where it's the case that there was absolutely no evidence before it that would have justified rendering the Applicant's decision to terminate the tender irregular. Reliance was also placed on the decision in **Republic vs County Government of Tana River & 2 Others [2018] eKLR** that such an examination of evidence would take this Court outside the realm of judicial review.

47. It is now an established principle of law that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense of being a decision which no public body acting reasonably would have reached. This was principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)** as follows:

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

48. This Court has already found that the Respondent took into account the applicable law and relevant factors when it made the impugned decision. The Applicant has also not demonstrated what part of the Respondent's decision did not resonate with the evidence placed before it, or indeed that any evidence as to the variance in the technical specifications of the Interested Party's bid was placed before the Respondent and disregarded. The Applicant has thus not met the threshold required to show irrationality on the part of the Respondent.

On whether the Applicant is entitled to the reliefs sought

49. The Applicant relied on Article 47(1) of the Constitution and section 11(1) of the Fair Administrative Actions Act, on this Court's jurisdiction to quash any decision made outside such powers. The Court of Appeal explained in **Kenya National Examination Council vs Republic, Exparte Geoffrey Gathenji & 9 Others, (1997) eKLR** that an order of certiorari issues to quash a decision already made, and if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with. This Court has found that the Respondent acted within its jurisdiction and powers and did not act illegally, and the order sought of certiorari cannot therefore issue in the circumstances of this present application.

50. In the premises, I find that the Applicant's Notice of Motion dated 5th April 2018 is not merited, and it accordingly fails. The same is hereby dismissed with costs to the Respondent and Interested Party.

51. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2018

P. NYAMWEYA

JUDGE