



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS (JUDICIAL REVIEW DIVISION)**  
**MISCELLANEOUS APPLICATION NO 402 OF 2016**  
**(CONSOLIDATED WITH MISC. APPLICATION NO. 405 OF 2016)**

**BETWEEN**

**REPUBLIC.... APPLICANT**

**AND**

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

**AND**

**MACHIRI LIMITED..... INTERESTED PARTY**

**EX PARTE:**

**ATHI WATER SERVICE BOARD.....1<sup>ST</sup> EX PARTE APPLICANT**

**WEIHAI INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE COMPANY  
LIMITED.2<sup>ND</sup> Ex Parte APPLICANT**

**JUDGEMENT**

**Introduction**

1. By an order dated 22<sup>nd</sup> September, 2016, this Court consolidated JR Nos. 402 and 405 both of 2016 and directed that the same be heard in JR No. 402 of 2016. It was further directed that the 1<sup>st</sup> ex parte applicant would be **Athi Water Services Board** (hereinafter referred to as “the Procuring Entity” or “Athi Water”) while the 2<sup>nd</sup> ex parte applicant would be **Weihai International Economic & Technical Co-operative Limited** (hereinafter referred to as “Weihai”). The Respondent, it was directed would be the **Public Procurement and Administrative Review Board** (hereinafter referred to as “the Board”) while the interested party would be **Machiri Limited** (hereinafter referred to as “Machiri”).

**The 1<sup>st</sup> Applicant’s Case**

2. The 1<sup>st</sup> ex parte applicant, **Athi Water Services Board**, seeks the following orders:

**1. An Order of Prohibition prohibiting enforcement, execution and/or implementation of the Respondent Board's decision contained in the decision dated and delivered on 22<sup>nd</sup> August, 2016 in Request for Review Application No. 56/2016 of 1<sup>st</sup> August, 2016: MACHIRI LIMITED =VERSUS= ATHI WATER SERVICES BOARD in respect of tender number AWSB/WASSIP-AF/COMP.1/W-33/2016, PROCUREMENT OF KABETE WATER TREATMENT WORKS TO MOMBASA ROAD WATER TRUNK DISTRIBUTION MAIN.**

**2. An Order of Certiorari removing to this Honourable Court for purposes of being quashed the entire decision of the Public Procurement Administrative Review Board dated and delivered on 22<sup>nd</sup> August, 2016 in the Request for Review Application No. 56/2016 of 1<sup>st</sup> August, 2016: MACHIRI LIMITED =VERSUS= ATHI WATER SERVICES BOARD in respect of tender number AWSB/WASSIP-AF/COMP.1/W-33/2016, PROCUREMENT OF KABETE WATER TREATMENT WORKS TO MOMBASA ROAD WATER TRUNK DISTRIBUTION MAIN.**

**3. The cost of this application be in favour of the Ex-parte Applicant.**

### **1<sup>st</sup> Ex Parte Applicant's Case**

3. According to the Procuring Entity, in line with implementing its statutory mandate for improving bulk water supply within the Applicant's areas of geographical jurisdiction and as part of its significant role in the attainment of Vision 2030, in April, 2016, using funding from the International Development Association (IDA), secured by the Government under a Financing Agreement of 21<sup>st</sup> June, 2012 between the Government of Kenya and the IDA (hereinafter "the Financing Agreement"), it commenced procurement of Kabete Water Treatment Works to Mombasa Road Water Trunk Distribution Main – Tender No. AWSB/WASSIP-AF/COMP.1/W-33/2016 (hereinafter "the subject tender).

4. Pursuant to the foregoing, on 22<sup>nd</sup> October, 2015, it advertised the subject tender in the *Daily Nation* and *The Standard* inviting bidders' participation under International Competitive Bidding and informing bidders on how to obtain the tender documents. It was averred that it was a condition of the financing agreement that the subject tender be carried out in accordance with the *World Bank Guidelines; Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers, Revised 1<sup>st</sup> July, 2014* (hereinafter referred to as "The World Bank Procurement Guidelines"). It was averred that all bidders were duly notified in the tender notices published in *The Daily Nation* and *The Standard* that the subject tender process would be carried out in accordance with the World Bank Procurement Guidelines, and particularly that, as required by the financing agreement, National Competitive Bidding (NCB) procedures would be adopted in the subject tender.

5. To this end, the Procuring Entity prepared a detailed tender document in accordance with the mandate conferred by section 52 of the ***Public Procurement and Disposal Act, 2005*** (hereinafter referred to as "the PPDA" or "the Act") and availed the same to fifty eight (58) firms which all intended to submit their respective tenders in response to the tender notice and in accordance with the tender documents and which had paid the requisite fees stipulated in the tender notice.

6. It was averred that in accordance with Clause 7.4 of the Instruction to Bidders, the Procuring Entity conducted a pre-bid site visit on 10<sup>th</sup> May, 2016 from 10.00 am at the Kabete Water Treatment Works Offices as well as the Mombasa road existing chamber wherein all potential bidders and/or their authorized representatives were afforded an opportunity to acquaint themselves with the project site prior to preparation of their respective tenders. At that meeting, the Procuring Entity clarified issues and responded to any questions raised by the potential bidders in relation to the subject tender.

7. It was averred that on the 8<sup>th</sup> June, 2016, upon the expiry of the tender submission deadline, the Procuring Entity's tender opening committee opened the bids which had been submitted within the stipulated time in the presence of the bidders' designated representatives and it was found that sixteen

(16) bidders submitted their respective bids in the subject tender. The said tender opening committee prepared Minutes of the opening of tenders for the subject tender detailing the names of the bidders' designated representatives who were present at the tender opening and the particulars of 16 bidders which had submitted their bids in response to the subject tender herein.

8. Thereafter, the Procuring Entity, averred that it proceeded to carry out evaluation in accordance with the criteria set out in the tender documents and in strict compliance with the express provisions of the World Bank Procurement Guidelines and the Financing Agreement pertaining to National Competitive Bidding. At the bid opening the bid prices of the respective bidders were read out loud and recorded by the Procuring Entity's tender opening committee and it is at this stage that the Applicant learnt of the bid price submitted by the 1<sup>st</sup> Interested Party herein in the manner contained in **Machiri's** Letter of Bid.

9. To the Procuring Entity, the evaluation criteria entailed preliminary examination to confirm completeness, validity and substantial responsiveness of the bidders' respective bids to the tender document as provided under paragraph 2.48 of the World Bank Procurement Guidelines and the Instruction to Bidders entailed in the tender document. Upon completion of the preliminary examination, the Procuring Entity averred, its tender committee found thirteen (13) bidders to have complied with the preliminary evaluation criteria and thus the thirteen bidders' bids proceeded for further detailed evaluation to determine the lowest evaluated bid in accordance with Clause 31 of the ITB as well as paragraph 2.50 of the World Bank Procurement Guidelines taking into account arithmetic errors and/or unconditional discounts in the respective bids.

10. It was disclosed that **Machiri's** financial Bid was an amount of Kshs 755,759,076.24 on which (according to the Letter of Bid) it offered a discount of 11% to be applied to "all priced Bill items except employer's inserted provisional sums and Contractor's on cost provisional sums." It was the Procuring Entity's case that it found this bid price stated in an unclear manner and in order to ascertain the net price after the application of the discount the Applicant sought to compute **Machiri's** bid price by applying the 11% discount using the methodology stated by **Machiri** and its computation of **Machiri's** net bid price was Kshs 677,371,441.86. In line with Clause 27 of the ITB on clarifications the Applicant sought to clarify and confirm from **Machiri** vide a letter dated 24<sup>th</sup> June, 2016 of the net bid price as computed by it using the method provided by **Machiri**. To this **Machiri** however responded by providing additional information on how its bid price should be computed which if applied would bring its net bid price to Kshs 676,990,651.56 which was Kshs 149,821 below the winning bidders bid price of Kshs 677,140,472/-. In its letter of response, **Machiri** stated that in computing the bid price the Applicant should not apply the 11% discount to costs of attendance and overheads but should apply it only on profits and that **Machiri's** profit margin was 10% of the quoted Bid price. It was however the Procuring Entity's position that this additional information was not provided in the **Machiri's** Letter of Bid and was therefore supplemental and additional to the information already provided in the Letter of Bid and could not therefore be admitted at that stage of the procurement as taking it into account would result in a variation of the bid price as quoted in the Letter of Bid. In the result, the Procuring Entity rejected the additional information provided and informed **Machiri** that its bid price was non-responsive and non-compliant for the following reasons:-

a. **Machiri's** bid price as quoted in the Letter of Bid was ambiguous and fell short of the requirement in the Letter of Bid which required it, as bidder, to provide the exact method of calculations to be used to determine the net price in applying the discount offered;

b. In contravention of Clause 29.2(b) of the Instructions to Bidders **Machiri's** Letter of Bid contained a material omission which if rectified by the provision of additional information would unfairly affect the competitive position of other Bidders presenting substantially responsive bids, the omission being the information that the 11% discount applied only to profits and that the profit margin to be used was 10%.

c. **Machiri's** letter dated 27<sup>th</sup> June 2015 which sought to change the net bid price contravened Clause 27 of the Instruction to Bidders which states that "no change, including a voluntary increase or decrease in the price or substance of the bid shall be sought, offered or permitted ..."

d. **Machiri's** letter dated 27<sup>th</sup> June, 2017 addressed to the Procuring Entity was a disguised attempt to alter the substance of the bid price as quoted by **Machiri** in its Letter of Bid and was motivated by the desire to reduce its bid price to below the bid price of the winning bidder which, given that the tenders had been opened and read out publicly, **Machiri** now knew.

e. The said mischievous attempt by **Machiri** to alter the substance of its bid price contravenes the peremptory requirements of Paragraph 2.46 of the World Bank Procurement Guidelines as well as Clause 27.1 of the ITB entrenched in the tender document; and

f. As confirmed by **Machiri's** letter to the Procuring Entity dated 26<sup>th</sup> July, 2016, wherein **Machiri** claimed that even if a profit margin of 5% was applied its (**Machiri's**) bid would still be lower than that of the winning bidder, the profit margin of a bidder was information known to a bidder and therefore could be 5%, 10% or any other figure and therefore the omission to provide this information rendered the letter of Bid ambiguous, subjective and non-compliant with the terms of the tender document.

11. In view of the above the Procuring Entity proceeded to evaluate the responsive tenders and having taken into account the evaluation criteria in the tender document and upon completion of the evaluation process the said Committee made recommendations for award of the subject tender to **Weihai** at the bid price of Kenya Shillings 677,140,472.00 to whom the tender was awarded vide Letter of Award dated 18<sup>th</sup> July 2016 addressed to the successful bidder. The other bidders were also notified of the outcome of the evaluation process vide Letters of Notification of similar dates.

12. However, it was disclosed that **Machiri** irregularly sought a reversal of the said award, through letters addressed to the Procuring Entity, arguing that it ought to have been awarded the subject tender instead. **Machiri** then proceeded to file a Request for Review Application to the Respondent Review Board vide the Review Application No. 56/2016 of 1<sup>st</sup> August, 2016 which led to the impugned decision by the Respondent Review Board delivered on 22<sup>nd</sup> August, 2016 in which the Respondent Board annulled the award of the subject tender to **Weihai** and purported to direct the Procuring Entity to award the subject tender directly to **Machiri** by claiming unlawfully that “the 1<sup>st</sup> Interested party offered a lower bid and is entitled to preference.”

13. According to the Procuring Entity, the Respondent Board:

a. wrongly interpreted the provisions of the *Public Procurement and Asset Disposal Act* to give itself jurisdiction over the subject tender when it has no such jurisdiction in light of the provisions of section 4(2)(f) of the Act which states expressly that procurements under a multilateral agreements are procurements “to which the Act does not apply;

b. unlawfully applied the provisions of section 86(2) of the Act to give Machiri a preference of 20% of its total price when pursuant to the tender document and the Financing Agreement no domestic preference was applicable;

c. unlawfully directed that the tender be awarded to Machiri without evaluating the said tender as against the criteria in the tender document;

d. unlawfully treated **Machiri** in a preferential manner by awarding to it a 20% preference without awarding the same margin of preference to all other complaint Kenyan citizens who had bid; and

e. unlawfully directed the award of the tender herein to **Machiri** without determining **Machiri's** “total price”, without applying the 11% discount and without determining **Machiri's** net bid price.

14. It was further contended that the Respondent Board failed to take into account the relevant factors and instead opted to take into account irrelevant factors in hearing and determining the purported Request for Review Application No. 56/201 hence its decision of 22<sup>nd</sup> August, 2016 is unreasonable, based on

extraneous, irrelevant and unlawful considerations, arbitrary, ultra vires, and in excess of jurisdiction conferred on it by law on the grounds *inter alia* that:

- a. The Respondent Board has abused its mandate by directing the award of the subject tender to **Machiri** in full disregard of the other bidders who duly submitted compliant bids.
- b. The Respondent Board acted in excess of its powers by purporting to direct the award of the subject tender to **Machiri** who had alleged that the tender document was flawed.
- c. The Respondent Board usurped the Procuring Entity's mandate by claiming that **Machiri's** bid was the lower bid.
- d. The Respondent acted in excess of its powers by directing the Applicant to evaluate the bids of only **Machiri** and **Weihai** and no others which direction offends the principle of fairness and competition in public procurement as other bidders were not evaluated alongside **Machiri** on the basis of domestic preference prior to giving the direction.
- e. The Respondent Board acted unreasonably (in the *Wednesbury* unreasonableness sense) by directing that the award of the subject tender be made to **Machiri** who sought to change its bid after learning of the bids by other bidders following tender opening.

15. The Respondent was further accused of having acted outside of its jurisdiction and made grave errors of law in failing to take account of relevant factors as stated hereunder:

- a. The **Public Procurement and Asset Disposal Act, 2015** does not apply to the subject tender by dint of section 4(2)(f) of the Act which excludes application of the Act to procurements carried out under bilateral agreements between the Government of Kenya and a multilateral agency, such as the International Development Association of the World Bank.
- b. The Financing Agreement of 21<sup>st</sup> June, 2012 did not permit local preference in the subject tender.
- c. The value of the subject tender was above the prescribed threshold of Kshs 500 million hence local preference could not apply;
- d. The project in the subject tender was not 100% funded by the Government of Kenya so as to be subject to local preference as stipulated under section 157(8)(a) of the **Public Procurement and Asset Disposal Act**.

15. It was reiterated that the Respondent breached the Applicant's and other bidders' right to a fair hearing and fair judicial process by directing that only the bids of **Machiri** and **Weihai** be evaluated and compared on the basis of domestic preference without affording the other bidders parties an opportunity to make representations on whether they too would qualify for domestic preference. Further, the Respondent Board breached the Applicant's right to a fair administrative action by unreasonably delaying the issuance a copy of the Respondent Board's decision to the Applicant in a bare-faced attempt to prejudice the Applicant's right to institute judicial review proceedings within the constricted fourteen days' period.

16. It was further contended that the Respondent acted outside its jurisdiction and in so doing failed to appreciate that its jurisdiction was limited to determining whether or not the applicable World Bank Procurement Guidelines were complied with in the conduct of the subject tender and made a grave error of law by proceeding to direct that the 1<sup>st</sup> Interested Party be given domestic preference when there was no information before it on which it could conclude that 51% of the shares in **Machiri** are owned by Kenyan citizens.

17. The Procuring Entity therefore contended that the impugned decision of the Respondent Board is

tainted with bias as it affords **Machiri** undue preferential treatment which has not been afforded to other Kenyan bidders that participated in the subject tender contrary to the Act. Further, in reaching its decision, the Respondent made grave errors of law and fact with the effect that it assumed jurisdiction which it does not have and applied criteria which were expressly excluded by the tender document and thereby breached the legitimate expectations of the Applicant for a fair judicial process and thereby rendered the said decision illegal. It was further contended that the Respondent Board acted unlawfully and in breach of the Applicant's legitimate expectations by applying the provisions of the **Public Procurement and Asset Disposal Act, 2015** which was not applicable to the subject tender and could not lawfully have been resorted to by the Procuring Entity in the conduct of the subject tender.

18. The Respondent was therefore accused of having breached the Applicant's legitimate expectation that **it would apply its mind to the relevant law and facts and would not act deliberately misinterpret the clear provisions of the law to irregularly assume jurisdiction and defeat the legislative intent as regards donor funded public procurements.**

19. **To the Procuring Entity**, the Respondent's actions are *ultra vires*, unlawful, arbitrary, malicious, capricious, based on wrong interpretation of the law, unreasonable, discriminatory, actuated by bad faith and malice, based on extraneous considerations, against the Applicant's lawful, legitimate and rightful expectation and a breach of the rules of natural justice.

## 2<sup>nd</sup> Applicant's Case

38. The 2<sup>nd</sup> Applicant, **Wei Hai International Economic & Technical Cooperative Company Limited**, by its motion dated 8<sup>th</sup> September, 2016 on its part sought the following orders:

1. **This Honourable Court be pleased to issue in favour of the Weihai International Economic & Technical Cooperative Company Limited an Order of Certiorari to remove and bring to this Honourable Court for purposes of quashing, the Respondent's entire decision and subsequent orders delivered on 22<sup>nd</sup> August, 2016 in Request for Review No 56 of 2016 annulling the Award Decision of Athi Water to Weihai in Tender No AWSB/WASSIP-AF/COMP.1/W-33/2016 for Construction of Kabete Works-Mombasa Road Water Distribution Main.**

2. **This Honourable Court be pleased to issue in favour of the Wei Hai an Order of Prohibition restraining Athi Water from implementing the decision and consequential orders of the review Board in REQUEST FOR REVIEW NO 56 OF 2016 BETWEEN MACHIRI LIMITED AND ATHI WATER SERVICES BOARD.**

3. **This Honourable Court be pleased to issue in favour of Weihai an Order of Mandamus directed at Athi to compel it to formally award Weihai Tender No AWSB/WASSIP-AF/COMP.1/W-33/2016 - for the Construction of Kabete Works-Mombasa Road Water Distribution Main in terms of letter of Notification of Award.**

4. **This Honourable Court be at liberty to grant further orders as it may seem just**

5. **The costs of this Application be provided for.**

39. According to **Weihai**, the Respondent Board is a statutory body established under section 27 of the **Public Procurement and Asset Disposal act No 33 of 2015** with the mandate to hear and determine disputes on tendering and disposal decisions while **Weihai** is a company incorporated in the Peoples Republic of China. **Athi Water** ("the Procuring Entity") is a statutory body duly constituted and established under **Water Act, 2002** whose responsibilities are among others the planning for improvement in provision of water supply and sewerage services, the appointing and contracting of water service providers and was the Procuring Entity herein.

40. It was averred that on or about 25<sup>th</sup> April, 2016, the Procuring Entity advertised the Tender in tender referenced Tender No NCB: WASB/WASSIP-AF/COMP.1/W-33/2016 for Construction of Kabete Water Treatment works to Mombasa Road Water Trunk Distribution Main (“the subject tender”) in the local print media in which advertisement the procuring entity stated as follows:

- a. That the Government of Kenya had received funding from the World Bank toward the cost of the Kenya Water and Sanitation Service Improvement Project (WASSIP) Additional Financing, and intended to apply part of the proceeds toward payments under the contract for Construction of Kabete Treatment works-Mombasa Road Water Distribution Main to be undertaken by the 1<sup>st</sup> Respondent under the Ministry of Water;
- b. The advertisement called for qualifications *inter alia* of a minimum number of one (1) similar contract of minimum value of Kshs. One Billion that had been satisfactorily and substantially completed as a prime contractor, joint venture member, management contractor or sub-contractor between 1<sup>st</sup> January 2010 and application submission deadline.
- c. That the Bidding would be conducted through the National Competitive Bidding (NCB) procedures as specified in the World Bank’s Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers Revised 1<sup>st</sup> July 2014, and was open to all eligible bidders as defined in the Procurement Guidelines.

41. According to **Weihai**’s assessment of the said tender, the estimated cost of the project would be around Kshs. 1 billion, and giving the capacity to undertake a project of such magnitude, it elected to participate in the project. **Weihai** further noted that it was National Competitive bidding Tender as stipulated under World Bank Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and Credits by World Bank Borrowers Revised 1<sup>st</sup> July, 2014 (“Procurement Guidelines”) and that it was open to all bidders who met the Tender requirements without any specified exceptions.

42. Pursuant to the foregoing **Weihai** obtained the detailed Tender Document which provided the Instructions on how the Bidders would submit the bids, contained qualification information, Conditions of Contract, specifications and Forms among other guidelines and proceeded to fill its bid as required under the Tender Document. The bids were closed, received and opened on 8<sup>th</sup> June, 2016 and **Weihai** attended the Tender Opening and noted that at the opening there were 16 Firms, both local and International and that the bids placed as read out at the opening ranged between Kshs 1,700,000,000 and Kshs. 556,000,000.

43. The Procuring Entity proceeded to evaluate the bids in line with the Constitution of Kenya and the Act, and as per the Tender Document and upon conclusion, it made a Tender Award decision where **Weihai** was notified by a letter dated 18<sup>th</sup> July, 2016 that it was the Successful Bidder to undertake the works at the bid price of Kshs. 677,140,472.00.

44. However, **Weihai** was thereafter notified that **Machiri Limited** had filed a Request for Review on 1<sup>st</sup> August, 2016 against the Procuring Entity before the Respondent in which it challenged the decision of the Procuring Entity to award the Tender to **Weihai**. To this Request, the **Weihai** filed a Replying Affidavit and the Application was heard on 17<sup>th</sup> August, 2016 before the Respondent and Ruling was rendered on 22<sup>nd</sup> August, 2016 by which the Respondent stated that in exercise of powers conferred by section 173 of the **Public Procurement and Asset Disposal Act** (“the Act”):

- a. **Machiri**’s Request for Review dated 1<sup>st</sup> August, 2016 and filed before the Respondent and on the same date was allowed.
- b. The Procuring Entity’s award of the subject Tender to **Weihai** vide Procuring Entity’s letter

dated 18<sup>th</sup> July, 2016 was annulled.

- c. The Procuring Entity was directed to carry out a Financial Re-evaluation of the Tenders of **Machiri** and **Weihai** and award the same taking into account the Respondent's findings and more particularly that **Machiri** offered the lower price and was entitled to preference.
- d. That each party was to bear own costs.

45. It was averred by **Weihai** that from the same decision, the Procuring Entity, by way of evaluation and comparison of Tenders had found **Weihai** to be the Successful Bidder by virtue of having submitted the lowest evaluated bid of Kshs. 677,140,472.00 and was awarded the Tender. According to it, it was required under the Tender Document that all tenders be subject to a process of evaluation as follows:

- a. Determination of responsiveness of the Bids in accordance with ITB 29.
- b. Correction of arithmetic errors of all responsive bids in line with ITB 31.
- c. Conversion to a single currency and application of margin of preference for domestic contractors (ITB 32 and 33) where in this case, the Tender provided that the preference shall not be Applicable.
- d. Evaluation of bids in accordance with ITB 35.

46. According to **Weihai**, ITB 35 guided the Procuring Entity on the detailed evaluation and stated that no other evaluation criteria or methodologies shall be permitted. The clause further guided the Procuring Entity to undertake the evaluation by taking into account the bid price, price adjustments due to correction of errors and price adjustments due to discounts among other considerations and that it is only upon compliance with the requirements of ITB 35 that the Procuring Entity was allowed to proceed and compare evaluated prices for purposes of determining the lowest evaluated bidder. The Procuring Entity thereafter submits itself to the requirement of ITB 37 for purposes of evaluating the bidder found to be the lowest evaluated and substantially responsive bid for purposes of establishing whether the specific bid meets the qualifying criteria set under Section III of the Tender Document.

47. It was averred further that the determination under clause 37 was to be based upon examination of documentary evidence of Bidder's qualifications submitted by the Bidder in its Tender Document and further that, where the Procuring Entity finds that the lowest bidder meets the entire qualifying criteria, it forms a pre-requisite for the award of contract, while a negative finding means that the Procuring Entity is required to examine the second lowest bid for qualification criteria.

48. According to **Weihai**, in the present instant, the Procuring Entity undertook the evaluation of the bids for all responsive bids in line with ITB 35 and in the course of evaluation of the bids, **Machiri's** bid was found to be Kshs. 755,759,076.24 with 11% discount and in line with ITB 31, the Procuring Entity applied the stated discount, by applying the formula as stated by **Machiri** in its Letter of Bid submitted with the Tender and sent the adjusted figure of Kshs. 677,371,441.86 to **Machiri** for purposes of acceptance of the correction of arithmetic error in line with ITB 31.3.

49. According to **Weihai**, it is clearly stipulated under ITB 31.2 that where the bidder who is requested to accept the correction of error fails to do so, then such refusal shall result in rejection of the bid by the Procuring Entity. In the present Tender, **Machiri** responded to the request to accept the error by providing further breakdown of how the 11% discount is to be provided and in the process, it provided a bid price of Kshs. 676,990,651.00 which resulted in the Procuring Entity rejecting the bid by **Machiri** in line with ITB 31.2. According to **Weihai**, in doing so, *the Procuring Entity* was clearly guided by two elements of the Instruction to bidders under the Tender Document:

- a. That the methodology for calculation of the discount is submitted with the Letter of Bid which should be outlined in the Letter of Bid in line with ITB 14.4 (page 1-13 of the Tender Document) and as per Letter of Bid Form Clause (f)(i) at Page 1-46 of the Tender Document. Provision of a

methodology when requested to accept corrected bid was therefore not acceptable.

b. That the request for acceptance of error in line with ITB 31.1 is not to be qualified by a bidder and failure to accept the corrected figure will lead to automatic rejection of the bid.

50. It was therefore **Weihai's** case that the Procuring Entity, upon rejection of **Machiri's** bid proceeded to evaluate the lowest bid for qualification criteria based on the following parameters to be found at section III Evaluation and Qualification Criteria which are eligibility, historical contract non-performance, financial situation, experience, personnel, and equipment and found an entity called **Atticon Limited** to be the lowest bidder but proceeded to disqualify the bidder for failure to meet the qualifying criteria. The Procuring Entity therefore turned to the **Weihai** as the second lowest bid and evaluated it against the qualifying criteria and having met all parameters, it proceeded to award it in line with ITB 37.3

51. It was therefore contended by **Weihai** that the Tender submitted by **Machiri** had not been subjected to the mandatorily required Qualifying Criteria as it was rejected during the ranking of bids hence it was illegal and totally unreasonable for the Respondent to direct **the Procuring Entity** under the impugned ruling to now subject **Machiri's** Tender to Financial re-evaluation and proceed to make the award without undertaking a detailed qualifying criteria evaluation of the said bid. According to **Weihai**, at no point, in the impugned Ruling, has the Respondent stated that it has undertaken a detailed evaluation of the Qualifying Criteria of **Machiri's** Tender, which in any event, is a function reserved for the Evaluation Committee of the Procuring Entity under the Act and not the Respondent.

52. It was explained by **Weihai** that in this particular tender, the process of tender evaluation required that the evaluation process be in the following sequence:

- a. Evaluation for responsiveness of the Tenders;
- b. Financial Evaluation of the bids of all substantially responsive tenders;
- c. Evaluation for Qualifying Criteria starting with the lowest bid based on documentary evidence submitted by the Tenderers on parameters of experience, historical non-performance, personnel, equipment and financial situation and thereafter making award to the lowest bid who meets the Qualifying Criteria.

53. Therefore by directing that the Procuring Entity ranks only two bids, compares them and proceeds to make award to **Machiri**, the Respondent was acting in breach of express provisions of the Act requiring that the evaluation be based on Tender Documents. In addition, by directing a Financial Re-Evaluation of **Machiri's** bid without subjecting its Tender to Qualifying Criteria, the Respondent was in effect extending preferential and biased treatment to **Machiri**, much to the prejudice of **Weihai** herein whose Tender had been examined and found to be qualified. Further **Weihai** contended that by allowing the rejected adjusted bid price by **Machiri** to be admitted for ranking of the bids, the Respondent acted in total disregard of the law in that:

- a. The Act at section 81 requires that a clarification should not change the substance of the Tender but in this case submission of other figures and new methodology substantially changed the substance of the Tender as submitted by Machiri.
- b. The Act at section 82 requires that the Tender amount as read out at the opening be absolute and final and shall not be subject to any change, correction or adjustment by any person or entity, not even the Respondent.
- c. In any event, the Tender Document required that if a bidder refused to accept the corrected bid price, in the case of **Machiri** upon calculation of the discount, then the adjusted bid price must be rejected by the procuring entity.

54. It was averred that the Respondent made a finding that the Procuring Entity should have extended preference to **Machiri** based on the fact that it is a domestic entity as against **Weihai** which is a foreign entity. To **Weihai**, the tendering process herein was undertaken on the following basis:

- a. The advertisement called for qualifications *inter alia* a minimum number of one (1) similar contract of minimum value of Kshs. One Billion that had been satisfactorily and substantially completed as a prime contractor, joint venture member, management contractor or sub-contractor between 1<sup>st</sup> January 2010 and application submission deadline.
- b. That the Bidding would be conducted through the National Competitive Bidding (NCB) procedures as specified in the *World Bank's Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers*, 2011 Revised 1<sup>st</sup> July 2014, ("Procurement Guidelines"), and is open to all eligible bidders as defined in the Procurement Guidelines.

55. It was **Weihai's** case that preference, where applicable, is granted within limits permitted by the Act, which states at section 157(8) namely that preference shall be given to citizens of Kenya on condition that the funding is 100% from the Government of Kenya and that amounts are below the prescribed threshold which is set at Kshs. 500 million. Therefore noting that the subject Tender called for bidders who can handle and complete contracts of Kshs. 1 billion and above and further that all the bids submitted were valued at Kshs. 500 million and above, it was contended that reservations were not to be given under the subject Tender. It was further averred that the Applicant participated in the Tender on the basis that the same was through the National Competitive Bidding (NCB) procedures as specified in the ***World Bank's Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers Revised 1<sup>st</sup> July 2014***, ("Procurement Guidelines"). Under the said guidelines, the **Weihai** was eligible to participate in the Tender and to bid for the works even as a foreign entity. Further, the said guidelines provided for the Tender documents to be used in the process-Standard Bidding Documents (SBD) as issued by the Bank with minimal alterations as may be allowed by the Bank and that it is only on strength of the advertisement and the Guidelines that the Applicant elected to participate in the Tendering process in which the Tender Document omitted the issue of preference in that ITB 33 (**Page 1-23 of Tender document Annex "YH 2"**) by clearly stating that margin preference for domestic bidders shall not apply. It was therefore **Weihai's** legitimate expectation that in evaluation of the bids, the Procuring Entity or any other entity including the Respondent would not alter this requirement and allow domestic preference where the same had already been eliminated. However with regard to the issue of preference, **Weihai** stated that the following must have been fulfilled for the same to be applicable in this case:

- a. It must have been provided for under the guidelines. In the present tender, the guidelines do not make it mandatory for the Procuring Entities to apply preferences.
- b. Preference should be clearly indicated under the Tender Document. In this case, the Tender document expressly eliminated application of preference.
- c. Preference, where applicable, must be below the threshold of Kshs. 500 million set by the Act. In the present instance the amount concerned was over Kshs. 500 million.
- d. Under both the Act and the guidelines, where preference is applicable, it is required that a bidder provides evidence of eligibility as prescribed (section 157 (6)). In the present case, there was no prescribed requirement for provision of evidence to be able to qualify for preservation.

56. From the foregoing, it was contended that preference was not available for grant to **Machiri** or any other bidder under the Act or within the Tender document and certainly the same was not available for grant by the Respondent. However as it stands, the Procuring Entity has been compelled to award the subject tender to **Machiri** without the evaluation of its technical information by the former and this poses the grave risk of the Tender being awarded to a contractor without the requisite capacity and capability to undertake the project under the Tender. The subject Tender, it was asserted involves huge amounts of

money extended as loan to Kenyans, and undertaking important project for the benefit of the public, must not result in payments being made to a contractor with inadequate capacity and further, it is important that the same be undertaken within the legal requirements set under the Constitution namely a system that is fair, equitable, competitive, and cost effective.

57. It was therefore averred that the Respondent's actions and decision are unconstitutional, *ultra vires*, unlawful, arbitrary, malicious, capricious, based on incorrect and extraneous consideration and wrongful interpretation of the law, actuated by bad faith against the **Weihai's** lawful, legitimate and rightful expectations and taken in breach of the rules of natural justice.

58. According to **Weihai**, the said decision was illegal in that it contravened the Constitutional provisions with regard to Public Procurement and the applicable provisions of **Public Procurement and Asset Disposal Act** and the Tender Document applicable to procurement proceedings under the subject Tender in that:

a. The decision ordered the Procuring Entity to undertake a Financial Re-Evaluation of **Machiri's** Tender and proceed to make an award without undertaking the detailed Technical Evaluation (Qualification Criteria) of **Machiri's** bid which would eventually determine its capacity to undertake the project.

b. The decision purported to affirm preference in favour of **Machiri's** bid as a domestic contractor despite the same not being applicable under the **Public Procurement and Asset Disposal Act** as the bid amount was above the set threshold and despite the preference being expressly omitted by the Tender document.

59. It was contended that the decision of the Respondent was unreasonable in that it ignored the applicable legal provisions under the Act and the guiding clauses of the Tender Document with regard to calculation of errors, by allowing the submission of a totally different bid amount by **Machiri** thereby irregularly reinstating its bid for further consideration by the Procuring Entity.

60. Further the decision of the Respondent is *ultra vires* in that:

a. It arrogated itself the functions of the procuring entity by purporting to re-Evaluate the Financial Bid of **Machiri** which had already been found by the procuring entity to have been non-compliant as the purported second bid was outside the letter of the bid, and subsequently requiring the procuring entity to make an award based on the non-compliant bid amount.

b. It made a finding on the question of preferences while disregarding the fact that preference has to be in line with the Act, must have been clearly stipulated in the Tender and also that bidders must have been requested to adduce evidence of their entitlement to the preference - whereby none of this was applicable in the subject Tender.

61. It was averred that the Respondent acted outside jurisdiction by failing to limit its mandate to determining whether **the Procuring Entity** properly applied the issue of correction of errors and whether **Machiri** was entitled to preference as required by the Act and proceeded to make a finding on the Award in disregard of the Act and the Tender Document.

62. To **Weihai**, the Respondent in making the impugned decision made grave errors of the law by failing to observe critical elements of accountability, equitability, competition and fairness as enshrined under the Constitution and the Guiding Principles of public procurement as espoused under the Act. **Weihai** further asserted that there was legitimate expectation on its part that the Guidelines would be observed as the basis for conduct of tendering process as stated by the Procuring Entity in the advertisement inviting bidders to participate. Further, there was legitimate expectation on the part of the **Weihai** that Standard Bidding Documents as required under the Guidelines would be observed as the basis for conduct of tendering process more so in undertaking the evaluation and comparison of tenders.

63. It was **Weihai's** position that the Respondent's decision is fraught with bias in favour of **Machiri** in that through:

a. Purporting to direct **the Procuring Entity** to make an award decision by ranking the bid amounts of the technically un-evaluated bid of **Machiri** against that of **Weihai** which had been found to be technically compliant under the qualification criteria as set out under the Tender Document.

b. Purporting to apply non-existent preference criteria in favour of **Machiri** but to the prejudice of **Weihai** in a manner to ensure that **Weihai** does not stand a chance of being found to be the Successful Bidder while ensuring that **Machiri** is awarded the subject Tender.

64. It was **Weihai's** contention that the subject matter involves a negotiated loan between the Government of Kenya and International Development Association (IDA) for purposes of development of water facilities within Nairobi and it is therefore in the public interest that the funds be utilized in a manner that is transparent including but not limited to selection of a contractor in a manner that is fair, equitable, transparent, competitive and cost effective as required by the Constitution.

65. It was accordingly argued that it is only fair and just that the decision of the Respondent in Application No 56 of 2016 be reversed by this Court through issuance of the orders sought herein in accordance with the law.

66. **Weihai** therefore sought the following orders:

1. **This Honourable Court be pleased to issue in favour of the Applicant WEIHAI INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE COMPANY LIMITED an Order of Certiorari to remove and bring to this Honourable Court for purposes of quashing, the Respondent's entire decision and subsequent orders delivered on 22<sup>nd</sup> August, 2016 in Request for Review No 56 of 2016 annulling the Award Decision of the 1<sup>st</sup> Interested Party to the Applicant in Tender No AWSB/WASSIP-AF/COMP.1/W-33/2016 for Construction of Kabete Works-Mombasa Road Water Distribution Main.**

2. **This Honourable Court be pleased to issue in favour of the Applicant WEIHAI INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE COMPANY LIMITED an Order of Prohibition restraining the 1<sup>st</sup> Interested Party from implementing the decision and consequential orders of the review Board in REQUEST FOR REVIEW NO 56 OF 2016 BETWEEN MACHIRI LIMITED AND ATHI WATER SERVICES BOARD in which the Applicant as the Interested Party.**

3. **This Honourable Court be pleased to issue in favour of the Applicant WEIHAI INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE COMPANY LIMITED an Order of Mandamus directed at the 1<sup>st</sup> Interested Party to compel the 1<sup>st</sup> Interested Party to formally award the Applicant Tender No AWSB/WASSIP-AF/COMP.1/W-33/2016 - for the Construction of Kabete Works-Mombasa Road Water Distribution Main in terms of letter of Notification of Award dated.**

4. **This Honourable Court be at liberty to grant further orders as it may seem just**

5. **The costs of this Application be provided for.**

67. It was submitted that under the impugned Ruling, the Board made a finding on the clarification sought from the Interested Party by the Procuring Entity as follows:

***"The Procuring Entity sought to argue that the clarification altered the substance of the Applicant's bid. The Board however finds it difficult to accept this view because the request for clarification emanated from the Procuring Entity which cannot now seek to blame the Applicant***

**for having acted according to its instructions which brought the Tender Sum to Kshs. 676,990,651.56”**

**“Having clarified its figure coupled with the fact that the Applicant was entitled to preference which was not awarded, the Applicant’s tender was the lower in terms of price and the Applicant ought to have been considered for the award of the tender.”**

68. This finding, it was averred, was what culminated in the orders of the Respondent Board, where the Procuring Entity was directed to carry out a financial re-evaluation of the Applicant and the Successful Bidder’s tenders and award the same taking into account the Boards findings and more particularly the finding that the applicant offered the lower price and is entitled to preference.

69. It was **Weihai’s** contention that the Respondent Board did not consider the relevant provisions of the law and in particular section 81 of the Act in arriving at the decision that led to the issuance of the above order. To **Weihai**, this order is based on the finding by the Respondent Board at pages 41-44 where the Respondent in apparent error concluded that the clarification sought by the Procuring Entity by the letter dated 24<sup>th</sup> June, 2016 automatically entitled **Machiri** to provide a different version of what it felt the discount should have been and in doing so, the Respondent Board permitted departure from the Tender Document by way of a change of the methodology proposed by **Machiri** under the Letter of Bid.

70. According to **Weihai**, the Act states at section 81 that:

***A Procuring Entity may, in writing request a clarification of a tender from a tenderer to assist in the evaluation and comparison of tenders...A Clarification shall not change the terms of the Tender.***

71. The Tender Document similarly states at **ITB 27** that in order to assist in the examination, evaluation and comparison of the bids, and qualification of the Bidders, the Procuring Entity may ask for clarification from a bidder. The clause further adds that in responding to a clarification, there should be no change including any voluntary increase or decrease in the price or substance of the bid shall be sought, offered, or permitted.

72. It was therefore submitted that from a clear reading of the provision, it follows that the only action expected of a bidder is to confirm the correction of arithmetic errors discovered by employer in the evaluation of the bids. However, it is common ground that in **Machiri’s** tender, there was no error for purposes of clarification. The clarification sought by the Procuring Entity by the letter dated 24<sup>th</sup> June, 2014 was therefore only for purposes of verifying the calculations applied in calculated the discounted Bid Price based on the 11% discount. **Weihai** relied on ***Black’s Law Dictionary (Revised 4<sup>th</sup> Edition)***, where the word “**verify**” means to confirm, or to check or test the accuracy or exactness of and submitted that in relation to the subject case, the Procuring Entity clearly only required for the Interested Party to confirm (check or test the accuracy or exactness) that the application of the 11% discount was properly undertaken by the Procuring Entity which application was through a methodology submitted by **Machiri** in its bid. The same was well stated “a discount of 11% on all billed items except Employer’s inserted provisional sums”. The said letter of 24<sup>th</sup> June, 2016 clearly stated that “***calculations for the discounted Bid Price have been carried out on all billed items except Employer’s inserted Provisional Sums and Contractors on Cost on Provisional Sums. The total amount exempted from the 11% is Kshs. 32,342,500.00***”. A table was attached to guide the Interested Party in the verification process.

73. According to **Weihai**, while it was clearly expected of **Machiri** to confirm the figures, it instead in the letter of 27<sup>th</sup> June, 2016 elected to offer a different, (changed, alternate or additional) methodology to the Procuring Entity. The opening line of that letter “***Our discount is on profits of all billed items***” on its own is adequate manifestation of the alteration of the substance of the issue under clarification. It was submitted that it was on the strength of this alteration that the Procuring Entity wrote to **Machiri** by a letter dated 18<sup>th</sup> July, 2016 that the information in response to clarification failed to comply with **ITB 27.1** since the said methodology was not in the Letter of Bid of the Interested Party. The Procuring Entity

was as such required under the Tender Document to reject the Interested Party's bid, which it did.

74. However, when the Respondent Board addressed itself to this issue, it made a finding that it found it difficult to accept the view that the clarification submitted by **Machiri** altered the substance of its bid because "the request for clarification emanated from the Procuring Entity which cannot now seek to blame the Applicant (the Interested Party)" for having acted according to the instructions which brought the tender sum to Kshs. 676,990,651.56.

75. To **Weihai**, in arriving at that conclusion, the following can be noted:

a. A Clarification is allowed in the subject tender by virtue of section 81 of the Act and the ITB 27 in the Tender Document. The process of clarification must therefore be undertaken in accordance with the requirements within these provisions.

b. One of the foundations of these two provisions is that there must be no change in the terms of the tender as a result of such clarification. This requirement is mandatory and it is not based on the circumstances at the time the clarification is made;

c. By the strength of the above statement only, the Respondent Board admits that there was alteration in the applicable methodology introduced by **Machiri** at that point.

d. The Respondent Board indeed did not fault the calculations of arriving at the discounted Bid Price by the Procuring Entity. The Respondent Board instead sought to justify the suitability of change in the terms of tender, namely, the actions of the Procuring Entity to seek clarification from **Machiri**.

e. In effect therefore, by allowing the alternate methodology by **Machiri**, the Respondent Board allowed for substitution of the methodology which is in breach of ITB 12.1.

76. It was submitted that section 81 does not envisage any circumstances under which the substance of the Tender would change. ITB 27 similarly does not allow any changes to the substance of the tender. It was however submitted that the Respondent Board clearly failed to take into account these two important aspects in arriving at the decision that the letter by **Machiri** dated 27<sup>th</sup> June, 2016 could effectively change the terms of the Letter of Bid as presented by it in the Tender. In the alternative, the Board in arriving at this decision considered irrelevant fact, namely that since the clarification came from the Procuring Entity then the feedback from **Machiri**, however incorrect, must be accepted by the Procuring Entity. To **Weihai**, the Respondent Board erroneously concluded that because the Procuring Entity had requested for verification of the Discounted Bid amount from **Machiri**, the Procuring Entity should have ignored the requirement that a clarification should not alter the substance of a bid. In other words the Board failed to apply the legal requirements in application and use of clarification in procurement and instead assigned its own meaning and import which resulted in a gross departure from the law.

77. It was submitted that the failure to take these issues into consideration account for the incorrect finding which resulted in the above order which if allowed will compel the Procuring Entity to ignore section 81 of the Act and ITB 27 of the Tender Document and thereby enable **Machiri** to submit a bid in total alteration of the terms of its Bid and as a result benefit unfairly and at the expense of **Weihai**.

78. It was contended that had the Respondent Board considered these relevant factors, then it would have arrived at a different decision namely that the Discounted Bid price as submitted by the Interested Party was Kshs. 677,371,441.86 and that any effort to adjust the methodology of arriving at the Bid Price as suggested by the Interested Party would result in alteration of the substance of the Bid, whose only result would have been automatic rejection of the Bid.

79. This submission was based on the finding by this Honourable Court in **Misc Application No 261 of 2015 - Republic vs. Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex** where the court upheld the view that where the Respondent Board

compelled a Procuring Entity to ignore a provision of the law, then it exceeded its jurisdiction and the resultant decision could not be allowed to stand.

80. The Court continued:

*Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law.*

81. It was submitted that a look at section 82 of the Act also reveals that the tender sum as submitted and read out at during tender opening is absolute and final and cannot be the subject of correction, adjustment, or amendment in any way by any person or entity.

82. The tender sum is read from the Letter of Bid at the submission of the tenders. In the subject tender as stated, it includes the methodology of calculating the discount. Section 82 states that no entity, including the Respondent Board can introduce any amendment to the Bid Price, as the Respondent Board purported to under the impugned decision. It was contended that the Form of Tender (equivalent to Letter of Bid) is the document by which an offer is communicated to the Procuring Entity. It is the offer that the Procuring Entity would consider and either accept or reject and it has always been held as supreme, even by the Respondent Board, in consideration of the Bid Price in any Tender. All entities are bound to stick to the Letter of Bid as submitted in establishing the Bid Price.

83. By altering the terms of the Letter of Bid, the Board was accused of having acted outside jurisdiction and in so doing committed a grave error of law by purporting accord itself powers to change the Bid Price which is clearly in excess in light of strict provisions of section 82. In this respect reliance was placed on **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR**, on the importance of remaining true to the criteria laid out under the Tender Document and specifically for the holding that:

**“The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document. If the Tender Document was defective, then the only order that was available to the Board was to direct the PE to commence the tender process afresh.”**

84. It was further submitted that the Interested Party had an obligation to clearly state the basis for the calculation of the discounted Bid Price since ITB 14.4 requires a bidder to state any discounts and the methodology for their application in the Letter of Bid, in accordance with ITB 12.1. If the Interested Party intended to rely upon the adjusted methodology, nothing would have been easier than to state so in the Letter of Bid, but not under the clarification or any time after tender submission.

85. The Procuring Entity, it was submitted, in preparation of the Tender Document has one crucial role-to ensure that the tender document used in a particular procurement process contain sufficient information

to allow fair competition among those who may wish to submit tenders as per section 70 (3) of the Act and that the Procuring Entity fulfilled this obligation as required.

86. Accordingly, all entities including the Procuring Entity and the Interested Party further have a legal obligation to comply with the Act and Regulations under Section 72 of the Act and this includes an obligation to ensure that the terms of the tender are not altered through clarification under section 81 or any other provision.

87. The insistence by the Board that a clarification emanating from the Procuring Entity can elicit a response that can validly alter the substance of the bid as happened in this constitutes failure by the Board to consider relevant factors, and consideration of irrelevant factors in making a finding. The Board ought to have restrained itself from considering the extraneous methodology introduced by the Interested Party and ought to have considered that a clarification cannot alter the substance of a bid. The Respondent Board should have limited its decision within the relevant factors, namely a clarification can only elicit a response that is within the issues under adjudication. In this respect support was sought from **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** where the Respondent Board had failed to consider the Certificate of Incorporation in making a decision with regard to the Applicant's experience. The Court held that while the Honourable Court could not state with certainty the decision which the Board would have arrived at had it considered the Certificate of Incorporation, it was of the view that the failure to consider the same was a failure to consider a relevant factor.

88. The Respondent Board similarly cannot make any valid finding when it considers irrelevant factors or irrelevant factors. As well demonstrated, the disregard of the effect of a response, and the consideration of the fact that the Procuring Entity must accept a clarification because it requested for the same means that the considerations that resulted in the decision were erroneous and the same cannot be allowed to stand.

89. It was therefore submitted that any finding of the Respondent Board which is in excess of the powers lawfully allowed must be quashed by the Honourable Court and the correct decision of the Procuring Entity be allowed to stand.

90. It was contended that by directing that the bid by **Weihai** and that of **Machiri** be ranked for Financial Re-Evaluation the bid when **Machiri's** bid by **Weihai** has never been subjected to Technical Evaluation, was discriminatory. Similarly, as the Tender Document requires that all bids that will be found responsive be compared for purposes of identifying the lowest (ITB 36) which will be subjected to Technical Evaluation (ITB 37), the Order by the Board that only two bids should be subjected to Financial Re-Evaluation is biased and also unreasonable for the following reasons:

- a. The Respondent Board unfairly directed the Financial Re-Evaluation of the two bids where one bid will definitely be so evaluated in violation of the Act and Tender Document by virtue of having not undergone Technical Evaluation;
- b. The Respondent Board cannot make decisions, or compel the Procuring Entity to act outside the law. By directing the Procuring Entity to rank two bids only, the Respondent Board is unreasonably denying the ranking of all bids before identification of the lowest bid price;
- c. While **Weihai** held the view that preference and reservations was not applicable in this tender and definitely not to the benefit of **Machiri**, the Respondent's decision in effect extended the benefit of preference and reservations to **Machiri** to exclusion of other bidders.

91. The Applicants therefore submitted that the issue of ranking of bids for financial Re-Evaluation and consideration of preference and reservations ought to have been applied to all the thirteen (13) other bidders whose bids were responsive and subsequently subject the emergent lowest bidder for Financial Re-Evaluation and there was indeed no justification in picking out the Second Applicant and the Interested Party to be Re-Evaluated on a criteria that would ensure that there was no chance of the Second Applicant (or any other bid) being the lowest evaluated bidder. The applicants relied on **Republic vs.**

**Public Procurement Administrative Review Board & 3 Others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, where the Court stated:

**“Whereas, we are not in a position to hold that the Board was in error in finding that the applicant ought not to have included additional services in its quotation we hold that view ought to have been applied to all the parties which made provision for the said additional services and having found that all the parties herein did so, there was no justification in picking out the applicant and applying that criteria to disqualify the applicant from the process.”**

92. Further reliance was placed on **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge [1997] eKLR**, where **Omolo, JA** stated that once it is accepted that a judge was in fact biased against a party, then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic.

93. The Court also agreed with the finding in **Legal and Human Rights Centre and Others vs. Attorney General [2006] 1 EA 141**, where it was held that so long as the law is framed in a way which can result in a differential treatment there cannot be equality before the law in respect of that law and that once the provisions are discriminative, the intention of the doer is irrelevant.

94. It was therefore submitted that in this case, the application of the law by the Respondent Board towards **Weihai** was biased and discriminative and as such the intentions of the Respondent Board are not of relevance- the finding by the Board is bad and must subsequently be nullified.

95. To the applicants, this Court has consistently held that the exercise of discretion by the Respondent Board must be lawful and within the limits of what the Procuring Entity is permitted to undertake both substantively and procedurally and that the power of discretion in decision making is granted to the Board under the Act at section 173(c) which states that *upon completion of a Review, the Review Board may substitute the decision of the Review Board for any decision of the Accounting Officer of a Procuring Entity in the procurement or disposal proceedings*. This Section is substantially a replication of **section 98** of the now-repealed **Public Procurement and Disposal Act** of 2005 in almost every aspect. However, in application of this discretionary latitude, this Court in the case of **Republic –vs- The Public Procurement And Administrative Review Board & 2 Others ex parte Numerical Machining Complex Limited** observed that:

**“If I understand the Respondents correctly they seem to be relying on the provision of section 98(c) which donated to the 1<sup>st</sup> Respondent the power to substitute its decision for that of the procuring entity. However, this provision cannot be read in isolation to the other provisions. In my view the power to substitute the decision of the procuring entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally....”**

96. It was submitted that evaluation criteria applicable in the subject tender should be based on criteria in the Tender Document by virtue of section 80 (2) of the Act. The Tender Document also specified the applicable criteria, that is, criteria and methodologies listed under ITB 35. This clause is even more specific in stating that that no other criteria or methodologies shall be permitted.

97. It was reiterated that **Machiri’s** bid having not been ranked for the purposes of all evaluated bids by the reason of having not been found responsive as opposed to the other Thirteen (13) bids, the process of complying with Section III Evaluation and Qualification Criteria commenced. It therefore followed that the Board’s direction that the procuring entity carries out **a financial Re-Evaluation of the Applicant and the Successful Bidder’s tenders and award the same taking into account the Board’s findings and more particularly the finding that the Applicant offered the lower price and is entitled to preference**, was erroneous.

98. The Respondent Board was therefore accused of having acted in excess of its powers by ordering a bid which was nonresponsive to be subjected to Financial Re-Evaluation while in actual fact it is only a responsive bid and one which has been ranked in accordance with ITB 36 that can be subjected to Financial Re-Evaluation. The Interested Party therefore does not merit the said Re-Evaluation.

99. It was contended that whereas the Tender Document mandatorily required at ITB 36 that all substantially responsive bids be ranked for purposes of evaluation of the lowest price, the order by the Respondent Board on the other hand would mean that only two tenders (2<sup>nd</sup> Applicant's and Interested Party) were to be financially Re-Evaluated. This is in direct violation of ITB 36 and grossly offends Section 80(2) regarding application of criteria in Tender Document only. The effect of directing the procuring entity to award a tender before the same is subjected to Technical Evaluation, it was submitted was that if the Procuring Entity is allowed to proceed to implement the order, upon the purported Financial Re-Evaluation, it should immediately proceed to make award. However, section III of the Tender Document is intended to enable the Procuring Entity determine the technical quality of a tender. This Section determines the following:

*a. Adequacy of the technical proposal;*

*b. Eligibility;*

*c. Experience of the Bidder;*

*d. Equipment which the Bidder proposes to use.*

100. To the applicants, the evaluation under section III must be conducted for any bidder to be declared successful. Without technical Evaluation, the Procuring Entity cannot determine if the bidder is qualified to undertake the contract or not.

101. It was therefore submitted that the Respondent Board lacks the power to order a Procuring Entity to consider a tender whose Technical Evaluation has not been conducted to be considered for ranking and award. In so doing, the Respondent Board clearly acted in excess of its powers and the Honourable Court is urged to intervene and rectify the situation.

102. The Act at Section 80 (2) states that the comparison and evaluation shall be done using procedures and criteria set out in the Tender Document. Under section III, it is also clearly stated that in accordance with ITB 35 and ITB 37, no other methods, criteria and factors shall be used. It was therefore submitted that the Respondent Board had no power to introduce an evaluation criteria requiring the Procuring Entity to consider the Interested Party's Bid for award without being subjected to the criteria set out in the Tender Document as required by the Act and the Tender Document itself and reliance was placed on **Republic vs. Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR (Misc Application No 116 of 2016)**, where it had been contended that the Respondent Board had awarded the Tender to a bidder whose bid price had not been subjected to adjustment for arithmetical errors, ranking and post qualification evaluation, and that the Respondent had committed a procedural impropriety by failing to adhere and observe procedural rules expressly laid down in the World Bank Evaluation Guidelines governing the Tender. In the said case the Court relied on **Republic –vs- The Public Procurement And Administrative Review Board & 2 Others ex parte Numerical Machining Complex Limited** where at paragraph 136 you quoted the finding in part:

**“The effect of compelling the Applicant to award the tender to the interested party was to compel the Applicant to ignore the aforesaid provision. The 1<sup>st</sup> Respondent in my view had no power to compel the Applicant to act unlawfully. By so doing it clearly exceeded its jurisdiction. It could only issue such directions and make decisions that the Applicant itself was lawfully permitted to issue or make. Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The**

**courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law...In my view, it is unlawful for the Board to adopt a procedure by which the provisions of the Tender documents are bypassed in the award of the tender. Where the Board awards the tender in disregard of the provisions of the Tender document the Court would not hesitate to quash such a decision since section 66 of the repealed Act provides that the successful tender shall be the tender with the lowest evaluated price. The Board cannot in such circumstances justify its actions by reference to section 98 of the repealed Act since it ought not to in effect substitute itself for the procuring entity in matters where the Entity has addressed itself on.**

103. In the applicants' view, just like in the above case, by application of Section 173 (c) (similar to 68 (c) in that case) the Board only merely fell short of pronouncing "direct award" since the said order was adequately subjective- its implementation would only amount to an award to the Interested Party. The order as made was intended to ensure that the Interested Party's bid would automatically be declared the successful bid at the expense of the Second Applicant's bid. It was submitted that in doing so, the Procuring Entity would have failed to comply with the requirement for technical evaluation which is the only way a successful lowest evaluated bidder can be identified.

104. The applicants contended that the said order is procedurally unsound to the extent that it will deny the Procuring Entity an opportunity to examine a bidder's capacity, eligibility, experience and equipment before proceeding to a contract. The Procuring Entity, in making such award, will not have looked and has indeed never looked at the Interested Party's Technical Proposal. To the applicants, the Respondent's Board decision was biased against **Weihai** to the extent that it purported to compel the Procuring Entity to rank **Machiri's** bid which has not undergone Technical Evaluation alongside that of the Second Applicant which had undergone the Technical Evaluation as required by the law.

105. It was contended that the Respondent Board's order is as such in breach of **Article 227 of the Constitution** in that it is devoid of fairness, competition, and transparency and only intended to achieve one end- to ensure that the Tender is awarded to the Interested Party. The Respondent Board has the obligation to comply with the Constitution and the Act and the law requires that all tendering evaluation procedures must be based on the Tender Document. In as much as the Respondent Board has discretion in making findings upon Application for Review, the same must be applied in line with the prevailing legal provisions.

106. The Court was therefore urged to find that the Respondent Board's decision in directing Financial Re-Evaluation of Interested Party's non-responsive bid was tainted with procedural impropriety as it amounted to bypassing of an important and critical stage in the tender process and also in arriving at its decision the Board failed to take into account a relevant matter being the lowest evaluated price in the tender.

107. It was submitted that in the case of **Republic vs. Kenya Revenue Authority Ex Parte Universal Corporation Ltd [2016] eKLR**, the circumstances under which a legitimate expectation arises is quoted as captured by **De Smith, Woolf & Jowell**, "***Judicial Review of Administrative Action***" 6thEdn. Sweet & Maxwell page 609 that:

**"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."**

108. The applicants relied on the article “*The Doctrine of Legitimate Expectations and Distinction between Reliance and Expectation Interests*” by Daphne Barak Erez (European Public Law Vol. 11 Issue 4), that:

*As it turns out, only in a minority of cases does the doctrine of legitimate expectations protect expectations per se, while the focus is usually on the protection of reliance. Although the protection of ‘pure’ expectations sometimes prevails, its relative scope is narrow, given the public interest in avoiding restrictions on administrative discretion. The suggested understanding of the doctrine of legitimate expectations is based on an evaluation of the arguments justifying the protection of the reliance and expectation interests, in general as well as in the context of administrative law...The discussion of these arguments reveals reasons for protecting ‘pure’ expectations, but also shows that these justifications become particularly significant once reliance is also involved, thus highlighting the importance of assessing the involvement of a reliance factor in the case. Where reliance had occurred, the balance tilts against changes in official decisions. Moreover, even when the administration is allowed to change its decision (for important public reasons) the private party who had relied on the authorities should still be compensated.*

109. The Act, it was submitted, provides for preference and reservations under Section 157. Under this provision, the Procuring Entity is required to conduct procurement without discrimination except where participation is limited in accordance with this Act and the Regulations.

110. At section 157(8), the Act requires that in specific instances, preference and reservation be granted to Kenyan citizens where:

- a. The funding is 100% from national government or county government or a Kenyan body;*
- b. The amounts are below the prescribed threshold;*
- c. The prescribed threshold for exclusive preference shall be above 500 million shillings.*

111. It was submitted that the Respondent Board addressed itself to this issue in the impugned Ruling and found that despite ITB 33.1 of the Tender Document expressly ruling out preferences, the Interested Party was entitled to have the margin of preference applied on its tender sum for purposes of award. The Respondent Board stated that preference is an issue of the law and not even provisions of the Tender Document can take it away.

112. It was however submitted that the Invitation for Bids (equivalent to Invitation to Tender) stated as follows:

*The Government of Kenya has received financing from the World Bank toward the cost of the Kenya Water and Sanitation Service Improvement Project (WASSIP) Additional Financing, and intends to apply part of the proceeds toward payments under the contract for Construction of Kabete Treatment works-Mombasa Road Water Distribution Main.*

113. The Invitation further stated:

*Bidding will be conducted through the National Competitive Bidding (NCB) procedures as specified in the World Bank’s Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers Revised 1<sup>st</sup> July 2014, (“Procurement Guidelines”), and is open to all eligible bidders as defined in the Procurement Guidelines. In addition, please refer to paragraphs 1.6 and 1.7 setting forth the World Bank’s policy on conflict of interest.*

114. To the applicants, a perusal of the said World Bank’s **Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank**

**Borrowers Revised 1<sup>st</sup> July, 2014** (“the Guidelines”) states the following with regard to eligibility at 1.8:

***To foster competition, the Bank permits firms and individuals from all countries to offer goods, works, and non-consulting services for Bank-financed projects. Any conditions for participation shall be limited to those that are essential to ensure the firm’s capability to fulfill the contract in question.***

115. The Guidelines further state at 1.9

***In connection with any contract to be financed in whole or in part from a Bank loan, the Bank does not permit a Borrower to deny participation in a procurement process or award to a firm for reasons unrelated to: (i) its capability and resources to successfully perform the contract; or (ii) the conflict of interest situations covered under paragraphs 1.6 and 1.7 above.***

116. It was further noted that the said clause 1.8 had attached to it a footnote (footnote 12) which read:

***The Bank permits firms and individuals from Taiwan, China to offer goods, works, and non-consulting services for Bank-financed projects.***

117. The Invitation to Tender, it was contended therefore pointed the bidders to a reference point regarding their eligibility namely the Guidelines in making a decision to participate in the Tender. It is stipulated that this was a National Competitive Bidding tender and according to the Guidelines, foreign firms wishing to participate were guided thus:

***If foreign firms wish to participate in NCB they shall be allowed to do so on the prevailing NCB terms and conditions that apply to national bidders.***

118. This meant in the applicants’ view that the terms applicable for national bidders (presumably citizen contractors) were the same terms to be applied to foreign firms wishing to participate as long as they abided by the guidelines and followed the Tender Document requirements. Based on this information, **Weihai** was absolutely certain of eligibility and therefore elected to participate in this bidding process. As such there was a legitimate expectation on its part that the Procuring Entity and indeed the Respondent Board would follow the Guidelines in looking into this Tender.

119. It was disclosed that a look at the bidding document reveals the following:

***ITB 33.1- Unless otherwise specified in the BDS, a margin of preference for domestic bidders shall not apply***

***Under the BDS, the Tender Document stated that a margin of preference shall not apply.***

120. Having established that preference did not exist under the Tender Document, it means that only the Act can impose restrictions with regard to eligibility. As stated, under the Act, the Procuring Entity is supposed to undertake the subject tender without any discrimination except where participation of all bidders is limited by the Act or Regulations and that the limitations in question here would be the preference and reservations. The Act as demonstrated above imposed parameters where there would be exclusive preference for Kenyan citizens namely where there is 100% Government of Kenya funding of the works as a condition for imposing preference and reservations. In this case, the funding was by the IDA and procurement Guidelines clearly guided under the IDA guidelines. As such, preference and reservations would not be applicable.

121. The other limitation would be that for exclusive preference and reservations to be applicable, the amounts should be below the prescribed minimum which under the Act is set at Kshs 500 million. The bid amounts under the Subject Tender even deducing from the submitted bids were above the prescribed minimum and therefore the preference and reservations would not be applicable.

122. There also exists a firm requirement for unequivocal communication for preference and reservations and a corresponding requirement for submission of evidence in support of entitlement to such preference and reservations for bidders so claiming. Section 157 (6), it was submitted, clearly states that to qualify for a specific preference and reservation, a candidate is required to provide evidence for eligibility as prescribed. To the applicants, this raises the following issues:

a. The preference and reservation cannot be general. The preference and reservation must be specified- whether for domestic contractor, the youth, women or such other category. In the instant case, none was specified.

b. The eligibility for preference and reservation must be prescribed. The prescription should be in terms of the Act as stipulated under (section 157 (2)). Up to this point, no Regulations or Guidelines have been prescribed by the Cabinet Secretary pursuant to Section 157(2) and the Respondent Board cannot enforce nonexistent Regulations;

123. The Act further requires that the Procuring Entity discloses the issue of preferences and reservations at the onset of the procurement process. Section 74 (Invitation to Bid) mandates an accounting officer to among others set out the applicable preference and reservations when sending out the Invitation to Tender. The subject Tender never included any preference and reservations in the Invitation to Tender.

124. The requirement under section 74 goes in line with the Guidelines where for instance under Appendix 2 (Domestic Preferences), the guidelines require that bidding documents shall clearly indicate any preference to be granted to domestically manufactured goods or works and the information required to establish the eligibility of a bid for such preference in each case where preference is allowable.

125. The applicants therefore submitted that for preference and reservations to be allowed, there needed to be in place three fundamental requirements:

a. The Bidders must be informed at the onset that preference and eligibility is allowable under the tender;

b. The Bidders must be informed and required to provide specific information/evidence upon which they shall prove their eligibility to preference;

c. The preference and eligibility applicable shall be in line under with the Act and its application stipulated under the Tender Document.

126. It was submitted that there can therefore be no eligibility for preference and reservations without prescription for parameters of such preference and reservations. To the applicants, **Weihai** and other foreign bidders should have been informed of the issue of preference so as to make a decision with regard to participations. However since the Tender Document had expressly omitted preference and reservations from the subject tender, this issue was indeed raised as an afterthought by **Machiri** in the application before the Respondent Board at the tail end of the bidding process.

127. It was the applicants' case that the application of preference and reservations as proposed by the Respondent Board was therefore against the legitimate expectations of the **Weihai**. Further, the finding was founded of erroneous application of the law, arbitrarily and without any legal basis and was only intended to ensure that **Weihai** would end up as the successful bidder. In any event, as pointed out, the Guidelines specifically permitted companies from China like **Weihai** to participate (see above). The Tender did not provide any conditions for such companies' participation meaning that the Procuring Entity should have undertaken the process without any discrimination whatsoever.

128. The applicants asserted that impositions of preferences should therefore only be done under the law and must be highlighted clearly in the Tender Document for a specific category of bidders and it must be granted based on evidence made available by the bidders upon request of the Procuring Entity to entitle them to the said preference. Failure to achieve this falls below threshold set for satisfying the legitimate

expectations of **Weihai** as stated in **Republic vs. Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR**, and **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**.

129. On the issue of conflict between the provisions of the Act with those of the Financing Agreement as a negotiated loan the applicants relied on **Republic vs. Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & Another [2016] eKLR**.

130. It was therefore submitted that by reason of the above finding, with the Financing Agreement, and the documents which flow from it namely the Guidelines and the Tender Document having categorically exempted the issue of preference, then the same cannot be validly re-introduced by the Respondent Board into the process.

131. It was therefore the applicants' case that the proceedings herein failed to reach the expected threshold as envisaged under Article 227 of the Constitution, meaning procurement being taken within a system that is fair, equitable, cost effective, competitive and transparent. The Court was urged to quash the decision of the Respondent Board which in the applicants' view was made outside jurisdiction by consideration of extraneous issues, failure to consider relevant factors, is loaded with bias and in total breach of the Second Applicant's legitimate expectations and that its implementation be prohibited as prayed. The applicants also prayed that the cost of this Application be awarded to them.

### **Respondent's Case**

132. In opposition to the application, the Respondent averred that on 1<sup>st</sup> August, 2016, it received **Machiri's** Request for review challenging the award of the Tender for Procurement of Kabete Treatment Works to Mombasa Road Water Trunk Distribution Main Tender No. AWSB/WASSIP-AF/COMP.I/W-33/2016. Thereafter, it served a copy on the procuring entity notifying it of the pending review and the suspension of any contractual process pending the determination of the review, in accordance with Section 168 of the ***Public Procurement and Asset Disposal Act, 2015***.

133. It was disclosed that on 8<sup>th</sup> August, 2016, the procuring entity filed a Notice of Appointment of advocates together with a Memorandum of response with the respondent seeking the dismissal of the said request.

134. Following the hearing of the parties on 17<sup>th</sup> August, 2016, and after considering their pleadings and submissions both oral and written as well as documents presented before it the Respondent delivered its ruling on 22<sup>nd</sup> August, 2016.

135. According to the Respondent, it identified three issues for determination from the application for review namely:

- a. Whether the board had the jurisdiction to hear and determine the request for review by virtue of Section 4(2)f of the ***Public Procurement and Asset Disposal Act***.
- b. Whether the applicant was entitled to the application of preference scheme provided for under the Act.
- c. What was the applicant's tender price for the purposes of this tender.

136. The Respondent was of the view that it in making its findings contained in the said decision it was within its powers as provided for in section 173 of the ***Public Procurement and Asset Disposal Act, 2015***. It was therefore its position that the applicants had not demonstrated that the respondent was unreasonable in arriving at its decision or that it was guilty of unreasonable exercise of power and irrationality in arriving at its decision. To the contrary, the respondent's decision was made within the law after review of all material placed before it and importantly in line with its mandate to uphold competitive

and cost effective public procurement processes.

137. It was therefore asserted that the applicants had not demonstrated that the respondent in arriving at its decision was guilty of any illegality, impropriety of procedure and irrationality to warrant the variance of the orders of the respondent. It was the Respondent's case that the applicants were actually challenging the merits of its decision albeit disguised as a judicial review application which ought to challenge the procedure of arriving at a decision.

138. It was therefore urged that the applications lack merit and should therefore be dismissed with costs to the respondent.

### **Interested Party's Case**

139. In opposition to the application the Interested Party, **Machiri Limited**, averred that the said applications seek to challenge the merits of the decision of the respondent and not the process followed in making the said decision yet this is not remedy available under judicial review. Accordingly the said application ought to be dismissed *in limine* as judicial review is limited to the decision making process rather than the merits of the decision.

140. It was however admitted that **Machiri** submitted its bid to the procuring entity vide its letter dated 8<sup>th</sup> June 2016 in which the bid price excluding discount was set out at Kshs 755,759,076.24. In clause F of the said Letter of Bid, the applicant gave a discount of 11% which was to apply on "***all priced Bill Items except Employers inserted provisional sums and contractors' on cost on provisional sums***".

141. Via a letter dated 24<sup>th</sup> June 2016, the Procuring Entity sought confirmation of **Machiri's** bid price and in the said letter the Procuring Entity had computed its bid price at Kshs. 677,371,441.86. **Machiri** responded thereto via letter dated 27<sup>th</sup> June 2016 and confirmed that its bid price was Kshs. 676,990,651.56 and gave the computation thereof. However, the Procuring Entity in a letter of award rejected the said sum on grounds that it amounted to an alteration of **Machiri's** bid and proceeded to award the contract to **Weihai** at KSh. 677,140,472.

142. Dissatisfied with the said award, **Machiri** filed a request for review no 56 of 2016 with the Respondent while the procuring entity responded thereto. Thereafter the matter proceeded for hearing at which the Respondent set out three issues for determination:

- a. whether it had jurisdiction to entertain the request for review before it by dint of section 4 (2) (f) of the Act;
- b. whether the Applicant (Machiri Limited) was entitled to preference
- c. What was the Applicant (Machiri Limited) bid price.

143. By a decision delivered on 22<sup>nd</sup> August 2016, the Respondent held that section 4(2)(f) of the Act only applied to oust the Respondent's jurisdiction where the procurement and disposal of an asset was under bilateral or multilateral agreement between the Government of Kenya and any other foreign government or multilateral agency. However the procurement the subject of these proceedings though being financed by borrowed funds was procurement by private bidders and not the Government. Accordingly it was not procurement under a bilateral or multilateral agreement between the Government of Kenya and any other foreign Government or multilateral agency. Accordingly the respondent had jurisdiction to determine the Request for Review before it. To **Machiri**, this is the proper interpretation of the law and accordingly the Respondent decision cannot be faulted on that ground.

144. On preference, the Respondent held at page 41 that the entitlement to preference and reservation was expressly provided for in the law and being an issue of law it cannot be ousted by provisions of the tender document. This is clearly in tandem with this court's finding in various rulings cited by the

Respondent. The Board therefore held that in spite of the provisions of the tender document preference was applicable being a statutory requirement. It was averred that the Respondent's finding in page 41 of the ruling that **Machiri Limited** is a local company fully owned by Kenyan citizens is a finding of fact hence the Court is not entitled to disturb the same in a judicial review application.

145. It was averred that the Respondent had adequate material before it during the hearing to make the said finding. During the hearing and entire proceedings the Respondent had in its custody the original bid documents of the parties and in the bid document of **Machiri Limited**, it had attached the certificate of incorporation, list of shareholders and directors, the company memorandum and articles of association and audited accounts for last three (3) years. These documents clearly showed that **Machiri Ltd** was a local company whose shareholding was 100% owned by citizens of Kenya in tandem with the Respondent's finding in page 41.

146. On the issue of **Machiri's** Bid price after discount, the board after full hearing and perusal of all original bid documents held as a fact that **Machiri's** discounted bid price was Kshs 676,990,651.56 which was similarly, a finding of fact which the applicant cannot seek to challenge through judicial review application as it was properly made within the boards jurisdiction and after full hearing. The said finding was neither unreasonable, arbitrarily and or *ultra vires* to attract reconsideration by this court exercising its judicial review jurisdiction.

147. It was averred that the Respondent acted within its jurisdiction in finding that the procuring entity having sought a clarification of the bid price from **Machiri Limited** could not then fault or reject **Machiri's** clarified bid price of Kshs. 676,990,651.56. Therefore having determined that **Machiri Limited's** discounted bid price of Kshs 676,990,651.56 was lower than that of successful bidder being **Weihai**, the Respondent clearly acted within its mandate as donated by the Act in setting aside the award by the procuring entity. The Respondent consequently allowed the said request for review; annulled the award of contract to **Weihai** and directed the procuring entity herein to carry of a financial re-evaluation of **Weihai** and **Machiri** noting that **Machiri** offered the lower price and was entitled to preference.

148. In **Machiri's** view, the orders issued by the Respondent directing re-evaluation of the said Bids was clearly within its jurisdiction more so since the tender had a requirement for post qualification technical evaluation of the Bidder with the lowest evaluated Bid price as noted by the Respondent in page 16 of its ruling.

149. In **Machiri's** view, the Respondent correctly applied the mandatory provisions of section 155 and 86 (2) and binding precedents of this court on preference in finding that **Machiri** was entitled to a margin of preference of 20% on its bid. It was asserted that the Respondent clearly addressed its mind to the provisions of the **Public Procurement and Disposal Act** and the tender document and acted within the law in the process of arriving at the said decision and the decision is logically and legally sound. The applicants had therefore not demonstrated how the Respondent acted *ultra vires*, unreasonably, unlawfully, with bias, any error of law or fact, or what extraneous matters the Respondent took into consideration. Consequently, the application had no merits and ought to be dismissed with costs and the Respondent's decision affirmed.

150. It was submitted on behalf of **Machiri** that the substantive law applicable to the procurement in consideration is **Public Procurement and Asset Disposal Act , 2015**. Section 4 of the said Act applies the Act to all state organs and public entities in respect of

- a. Procuring planning ,
- b. Procurement processing
- c. Inventory and asset management
- d. Disposal of assets and

e. Contract management.

151. Section 4(2) exempts applicability of the Act to various activities therein stated and of relevance to these proceedings are provisions of section 4(2)(f) of **PPDA** which exempts from application of the Act in:

***“Procurement and disposal of assets under bilateral or multilateral agreement between the government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations”***

152. The issue for determination was whether the instant procurement was a Procurement and disposal of assets under bilateral or multilateral agreement between the government of Kenya and any other foreign government, agency, entity or multilateral agency. In making this determination the sole consideration is who the parties to the procurement are. A literal reading of this section clearly shows that for a procurement to be exempted under section 4(2)(f), one of the parties must be the Government of Kenya. The other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. The rationale for such provision is clear; the Government of Kenya cannot rely on its procurement Law as against another Government. Such procurement can only be governed by the terms of their bilateral or multilateral agreement.

153. In this case, the Procuring Entity, **Athi Water Services Board**, is a Parastatal created under section 51 of the **Water Act 2002** with perpetual succession and a common seal, with power, in and by its corporate name, to sue and be sued. It's not the Government of Kenya. In the instant procurement, the Government of Kenya was not a party to the procurement and accordingly the Procurement is not exempted under section 4(2) (f).

154. Again the other party in the procurement must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. Neither the second applicant nor the interested parties, who were the bidders before the Board were either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. On this limb also the procurement is not exempted. To **Machiri**, the Ex-parte Applicants' position that since financing was obtained under a bilateral agreement between the Government of Kenya and International Development Bank then procurement using those funds are exempted is not only fallacious but would clearly defeat the purposes of the **Public Procurement and Assets Disposal Act**.

155. It was submitted that the Board applied the literal interpretation of the section to find that the Government of Kenya was not a party to the procurement between parties herein which was strictly between the procuring entity and the private entities. The Board also had the privilege to examine the registration documents of the parties involved in the bidding process to ascertain their nature. The Applicants contention that the Board erred in law is misplaced.

156. On the issue whether local preference was applicable to the tender and whether **Machiri** was entitled to preference, reliance was placed on Article 227 of the Constitution and Part XII- of **Public Procurement and Asset Disposal Act**.

157. To **Machiri**, a clear reading of these provisions shows that it overrides any other provision of the Act or any other Legislation on matters preference. Under Section 155(3)(b) preference shall be given to firms where Kenyans are shareholders and under section 155(4), the threshold for preference shall be above 51 percent. Section 157 (8) (b) provides that a prescribed margin of preference shall be given. The prescribed margin is to be found in section 86(2) which provides as follows

***For the avoidance of doubt, citizen contractors or those entities in which Kenya citizens at least 51 percent shares, shall be entitled to twenty percent of their total score in the evaluation***

158. It was **Machiri's** case before the Board that as a fully owned Kenyan entity it was entitled to a margin of preference under the above sections. The procuring entity opposed that view on the basis that

the tender document specifically provided that no local preference would be applied. Further the procuring entity relied on section 6(1) and contended that the tender document had indicated that no preference shall be applied in the procurement and the said provision should prevail by virtue of section 6(1) of the Act. To **Machiri**, this is clearly erroneous as section 155 has expressly overridden provisions of section 6(1).

159. It was submitted that the procuring entity was not at liberty to opt out of application of the mandatory provisions of the PPDA with respect to preference which could not be ousted due to their very nature. Further, Article 227 enjoins a procuring entity to contract for goods and services in a system that is fair, equitable, transparent, competitive and cost effective. Sub clause 2 envisages the establishment of procurement policies to guide in procurement hence the centrality of preference in procurement cannot be wished away. To add, the procurement process herein was national competitive bidding intended to promote local entities and the best way to do so was to allow a margin of preference to local bids. It was therefore submitted that the mandatory provisions for preference prescribed in section 86(2) and 155(1) & (3), were implied in the tender document notwithstanding the express wishes of the procuring entity and this is due to the very nature and purpose of the provision and appreciating that the instant procurement was under National competitive bidding. In support of this position **Machiri** relied on **JR Misc Application No. 116 of 2016 - R vs. PPRB & 2 Ors, ex-parte Coast Water Services Board & China Henan International Cooperation Group Limited.**

160. Therefore, the Board at page 43 of its decision correctly applied its mind to the above principles in holding that **Machiri** was entitled to a margin of preference applied on its tender sum, in spite of the provisions of clause 33.1 of the Instructions to Bidders. And in further holding at page 44, that the issue of preference is an issue of law and is applicable whether expressly set out in the tender document or not. In this respect **Machiri** relied on **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** in which **JR Misc Application No. 116 of 2016 - R vs. PPRB & 2 ors, ex-parte Coast Water Services Board & China Henan International Cooperation Group Limited** was cited with approval.

161. It was therefore **Machiri's** case that local preference being a mandatory requirement under the law was applicable and ought to be read in the Tender Document and cannot be ousted by a provision in the tender to the contrary.

162. On the issue of the discounted bid price of **Machiri**, it was submitted that **Machiri** had quoted a total tender sum of Kshs. 755, 759, 076. 24 plus a discount of 11% while **Weihai** quoted a price of Kshs. 677, 140, 422 without any discount. The procuring entity sought a clarification and the interested party clarified that its bid price after discount was Kshs. 676, 990, 651. 56. It was the Board's finding that the procuring entity could not later fault the interested party for obliging to its request and clarifying its bid price.

163. According to **Machiri** section 81 of the **PPAAD Act** allows a procuring entity to request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders. This was also provided for in the tender documents. A 'clarification' in its grammatical sense denotes a request for additional information. On the other hand, a 'confirmation' denotes a request to either say 'yes' or 'no'. The procuring entity is only mandated in law to seek the former and not the latter. **Machiri** further pointed out discrepancies in the provisional sum applied by the procuring entity in arriving at Kshs. 677,371,441.86 which it sought the interested party's clarification. If indeed, the procuring entity was certain as to the method of calculation of the interested party's bid, then there would have been no need to seek a clarification. But this was not the case. The procuring entity sought a clarification and the same was given. All that was remaining of the procuring entity was to subject **Machiri's** bid to financial evaluation against other successful bidders. It was **Machiri's** view that a procuring entity has no right to request a confirmation in procurement laws and where the procuring entity is certain on its computation then there would be no basis to seek as a clarification. The Clarification was sought because the Procuring Entity was not certain of the **Machiri's** Discounted Bid price.

164. When the procuring entity therefore elects to exercise its rights under section 81 **PPDA**, then a clarification given subsequently cannot again be faulted as amounting to a correction of the bid document.

To hold this view, would mean that the perceived clarification was a mere academic peregrination intended to disqualify the interested party irrespective of its response and this is outright unlawful. It was therefore contended that the Board was right in finding that the procuring entity ought not to have faulted the interested party for giving a clarification upon its request. According to **Machiri**, the Board's decision was rational not within the meaning of *Wednesbury's* unreasonableness. The impugned decision was lawful in the circumstances of the case, the facts before it and the applicable law and principles.

165. As to whether the Respondent's decision was procedurally sound, it was submitted based on **JR Application 137 of 2015 - JGH Marine A/S Western Marine Services Ltd CNPC North East Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. PPARB in citing Pastoli vs. Kabale District Local Government Council and Others** that the Board accorded each party an opportunity to be heard and considered all documents placed before it by each party as indicated in its ruling. The Board acted within its mandate in directing the procuring entity to subject **Machiri's** bid to financial evaluation among other bids that had been successful in the technical evaluation. It was therefore submitted that the Applicants herein have not demonstrated procedural impropriety in the Board's decision. The Board took into account all the relevant considerations in arriving at its impugned decision.

166. According to **Machiri**, the applicants in essence are challenging the merits of the Board's decision in the disguise of these present proceedings and this is not the purview of this Court. **Machiri** urged the Court not to disturb the finding by the Board which was specially constituted to determine the application of review whose determination is the subject of this proceedings. The Board's jurisdiction in matters of this nature is wider than that of this Court and it is not restricted to consider the documents presented and arguments made before it, as it has investigatory powers to look at the tendering process from the date of advertisement to the date of award. However, this honorable court is limited to considering the Board's ruling to make a determination of whether the decision making process was lawful, rational or flawed. Reliance was placed on **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others [2011] eKLR** where it was held that:

**“The Review Board is a specialized tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board...From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.”**

167. It was sought that these applications be dismissed.

### **Determinations**

168. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.

169. The first issue for determination is whether the Respondent had jurisdiction to entertain the request for review. It was contended that the Respondent wrongly interpreted the provisions of the ***Public Procurement and Asset Disposal Act*** to give itself jurisdiction over the subject tender when it has no such jurisdiction in light of the provisions of section 4(2)(f) of the Act which states expressly that procurements under a multilateral agreements are procurements “to which the Act does not apply”. Section 4 of the said Act provides as follows:

***(1) This Act applies to all State organs and public entities with respect to —***

***(a) procurement planning;***

***(b) procurement processing;***

*(c) inventory and asset management;*

*(d) disposal of assets; and*

*(e) contract management.*

*(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies —*

*(a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an employee, but this shall not apply to persons who are under a contract of service;*

*(b) the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration;*

*(c) acquiring of services provided by government or government department;*

*(d) acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;*

*(e) procurement and disposal of assets under Public Private Partnership Act, 2013; and No. 15 of 2013.*

*(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.*

*(3) For greater certainty, all public procurement are procurements with respect to the application of this Act.*

170. In my view, section 4(2)(f) cannot be considered in isolation to Article 227 of the Constitution which provides that:

*(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.*

*(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following*

*a. categories of preference in the allocation of contracts;*

*b. the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;*

*c. sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and*

*d. sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.*

171. Therefore any public procurement or asset disposal must be undertaken in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In my view the framers of the Constitution were alive to the fact that public procurement necessarily involves an element of taxation

and hence amounts to a burden to the tax payer. Similarly public asset disposal involves diminution of the proceeds of taxation. It is therefore necessary that in both instances the taxpayer be made aware of how his taxes are being spent and how the assets procured with his taxes are being disposed of. For a public entity to procure a financial facility whose repayment is shrouded in mystery and bind the public with its repayment when the process did not comply with the principles under Article 227 of the Constitution would be clearly contrary to the spirit of the Constitution.

172. It is therefore my view that only in exceptional circumstances should a provision of an enactment be interpreted in a manner that excludes public scrutiny since Article 227 of the Constitution embraces all instances where a State organ or any other public entity is contracting for goods or services. To hold that Parliament can through its delegated power enact a law whose effect would be to decide which entities are subject to Article 227 of the Constitution without justification from the Constitution would amount to scuttling the letter and spirit of the said Article.

173. I therefore agree with the Respondent and the interested party herein that a purposeful reading of section 4(2)(f) of the **PPAAD Act** must necessarily lead to the conclusion that for a procurement to be exempted thereunder, one of the parties must be the Government of Kenya while the other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. I also agree at the rationale for such provision is clear must be to avoid the imposition of Kenyan law on another Government and that such procurement can only be governed by the terms of their bilateral or multilateral agreement, which agreements are of course subject to Parliamentary scrutiny. This exception would be justified under Article 2(5) of the Constitution which provides that the general rules of international law shall form part of the law of Kenya.

174. In this case, it is clear that the procuring entity herein is a statutory body duly constituted and established under **Water Act 2002**. It is clearly not the Government of Kenya. That section 6(1) of the **PPAAD Act** does not deprive the Respondent of jurisdiction was appreciated in **Republic vs. Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & Another [2016] eKLR** where this Court found that:

**“The question however, is whether there was a conflict between the provisions of the Act and the conditions imposed by the donors. In my view, even assuming there was such a conflict, section 6(1) does not deprive the Board of the jurisdiction to entertain a matter that falls within its jurisdiction. What section 6(1) provides is that where there is a conflict between the provisions of the Act and the terms and conditions of the donor in instances of negotiated grants or loans the Board in determining the dispute ought to take into account the fact that those terms and conditions supersede the provisions of the Act.”**

175. In my view unless the provisions of the **PPAAD Act** allow for circumstances under which its application is restricted and subject to the Constitution, parties to a tender agreement cannot contract outside the Act since the said Act is a legislation enacted pursuant to the provisions of the Constitution. To paraphrase **Chelashaw vs. Attorney General & Another [2005] 1 EA 33**, rules and laws made under Constitutional powers are superior and stand above those made under say a statute and they should be given more regard and force.

176. It follows that the subject tender was not excepted under section 4(2)(f) hence the Respondent had jurisdiction to entertain the dispute arising therefrom.

177. It is clear that what provoked the proceedings before the Respondent Board and by extension these proceedings was the decision by the procuring entity to disqualify **Machiri** for further procurement proceedings. The facts that led to the said decision are largely not in dispute and a brief recital of the events leading to the said decision may be helpful.

**178. Machiri's** financial Bid was an amount of Kshs 755,759,076.24 on which it offered a discount of 11% to be applied to “all priced Bill items except employer's inserted provisional sums and Contractor's on cost provisional sums.” This bid was, in the Procuring Entity's view, stated in an unclear manner.

However in order to ascertain the net price after the application of the discount the Applicant sought to compute **Machiri's** bid price by applying the 11% discount using the methodology stated by **Machiri** and its computation of **Machiri's** net bid price was Kshs 677,371,441.86. In line with clause 27 of the ITB on clarifications the Applicant sought to clarify and confirm from **Machiri** the net bid price as computed by it using the method provided by **Machiri**. **Machiri**, in response thereto provided information on how its bid price should be computed which if applied would bring its net bid price to Kshs 676,990,651.56 which was Kshs 149,821.00 below the winning bidders bid price of Kshs 677,140,472/-. In its letter of response, **Machiri** stated that in computing the bid price the Applicant should not apply the 11% discount to costs of attendance and overheads but should apply it only on profits and that **Machiri's** profit margin was 10% of the quoted Bid price. It was however the Procuring Entity's position that this additional information was not provided in the **Machiri's** Letter of Bid and was therefore supplemental and additional to the information already provided in the Letter of Bid and could not therefore be admitted at that stage of the procurement as taking it into account would result in a variation of the bid price as quoted in the Letter of Bid. In the result, the Procuring Entity rejected the additional information provided and informed **Machiri** that its bid price was non-responsive and non-compliant.

179. This decision, according to the procurement entity was based on the following reasons:-

- a. **Machiri's** bid price as quoted in the Letter of Bid was ambiguous and fell short of the requirement in the Letter of Bid which required it, as bidder, to provide the exact method of calculations to be used to determine the net price in applying the discount offered;
- b. In contravention of Clause 29.2(b) of the Instructions to Bidders **Machiri's** Letter of Bid contained a material omission which if rectified by the provision of additional information would unfairly affect the competitive position of other Bidders presenting substantially responsive bids, the omission being the information that the 11% discount applied only to profits and that the profit margin to be used was 10%.
- c. **Machiri's** letter dated 27<sup>th</sup> June 2015 which sought to change the net bid price contravened Clause 27 of the Instruction to Bidders which states that "no change, including a voluntary increase or decrease in the price or substance of the bid shall be sought, offered or permitted ..."
- d. **Machiri's** letter dated 27<sup>th</sup> June, 2017 addressed to the Procuring Entity was a disguised attempt to alter the substance of the bid price as quoted by **Machiri** in its Letter of Bid and was motivated by the desire to reduce its bid price to below the bid price of the winning bidder which, given that the tenders had been opened and read out publicly, **Machiri** now knew.
- e. The said mischievous attempt by **Machiri** to alter the substance of its bid price contravenes the peremptory requirements of Paragraph 2.46 of the World Bank Procurement Guidelines as well as Clause 27.1 of the ITB entrenched in the tender document; and
- f. As confirmed by **Machiri's** letter to the Procuring Entity dated 26<sup>th</sup> July, 2016, wherein **Machiri** claimed that even if a profit margin of 5% was applied its (**Machiri's**) bid would still be lower than that of the winning bidder, the profit margin of a bidder was information known to a bidder and therefore could be 5%, 10% or any other figure and therefore the omission to provide this information rendered the letter of Bid ambiguous, subjective and non-compliant with the terms of the tender document.

180. Section 81 of the **PPAAD Act** provides as follows:

- (1) A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.*
- (2) A clarification shall not change the terms of the tender.*

181. It is therefore clear that under the said provision a procuring entity may seek a clarification of the

tender which clarification may assist in the evaluation and comparison of the tenders. Such clarification is however not a passport for the tenderer to change the terms of the tender. In my view a clarification cannot be equated to a confirmation of the procuring entity's view of the tenderer's bid. Where the procurement entity can ascertain the bid, there would be no need for the procuring entity to seek a clarification. However the mere fact that the procuring entity seeks a clarification and a response is given does not bind the procuring entity to the purported clarification if the so-called clarification in fact amounted to change the terms of the tender.

182. It was therefore a misdirection on the part of the Respondent to hold that since the clarification was sought by the procuring entity, the entity had no option but to be bound by whatever response was forthcoming from the procuring entity. As was held in **Reid vs. Secretary of State for Scotland [1999] 2 AC 512**, the decision may be found to be erroneous in respect of a legal deficiency, as for example, through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. In my view to construe the provisions of section 81 of the **PPAD Act** in such a manner as to give a tenderer an unlimited leeway to change the terms of the tender under the pretext of clarifying the bid simply because the procuring entity has sought such clarification would amount an error erroneous mounting to a legal deficiency.

183. In my view, it was necessary for the Respondent to make a finding as to whether **Machiri's** clarification was the kind of clarification contemplated under the aforesaid provision or whether it amounted to change the terms of the tender as was found by the procuring entity. This in my view was a relevant fact. Section 7(1)(f) of the **Fair Administrative Action Act, 2015** provides that one of the grounds for the grant of judicial review orders is the failure to take into account relevant considerations. It is clear from its decision that the Respondent failed to resolve this crucial issue and in effect abdicated from its statutory mandate under section 173 of the **PPAAD Act**. As was held in **Republic vs. Public Procurement Administrative Review Board & 2 others Ex-Parte Microhouse Technologies Ltd [2016] eKLR:**

“It goes without saying that the issue of preference and reservations is one provided for by the procurement laws – see Section 39(8) of PP&DA, 2005 and Regulation 28 of the Public Procurement and Disposal Regulations, 2006. The Board was under a duty to consider the question and make a determination. Its ultimate decision was therefore made without taking this very relevant question into consideration”.

184. This determination would have been sufficient to dispose of these proceedings since section 11(1)(f) of the **Fair Administrative Action Act, 2015** empowers this Court to compel the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right.

185. However, the Respondent proceeded to make orders which the applicants contest in these proceedings. The said orders were that:

- 1. Machiri's Request for Review dated 1<sup>st</sup> August, 2016 and filed before the Respondent and on the same date was allowed.**
- 2. The Procuring Entity's award of the subject Tender to Weihai vide Procuring Entity's letter dated 18<sup>th</sup> July, 2016 was annulled.**
- 3. The Procuring Entity was directed to carry out a Financial Re-evaluation of the Tenders of Machiri and Weihai and award the same taking into account the Respondent's findings and more particularly that Machiri offered the lower price and was entitled to preference.**
- 4. That each party was to bear own costs.**

186. The first issue is whether **Machiri** was entitled to preference as found by the Respondent.

187. Pursuant to the said Article Parliament enacted Part XII of **Public Procurement and Asset Disposal Act** titled *Preferences and Reservations in Procurement* in which it is stated that:

***Pursuant to Article 227 (2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this part.***

188. Section 157(8)(a) of the **PPAAD Act** provides that:

***In applying the preferences and reservations under this section—***

***(a) exclusive preference shall be given to citizens of Kenya where—***

***(i) the funding is 100% from the national government or county government or a Kenyan body; and***

***(ii) the amounts are below the prescribed threshold;***

***(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;***

189. In this case, it is clear that the funding was not 100% from the national government or county government or a Kenyan body. Secondly there was no finding by the Respondent that the amounts were below the prescribed threshold which for the purposes of exclusive preference was above five hundred million shillings.

190. It is clear that in its decision, the Respondent did not stipulate the margin of preference. It is however contended that no Regulations or Guidelines have been prescribed by the Cabinet Secretary pursuant to Section 157(2) hence the Respondent Board cannot enforce nonexistent Regulations. Section 24 of the **Interpretation and General Provisions Act**, Cap 2 Laws of Kenya however provides as hereunder:

***Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not***

***Inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.***

191. It would therefore follow that in the absence of the said Regulations the provisions of the **Public Procurement and Disposal (Preference and Reservations) Regulations, 2011**, would have to be resorted to. I therefore do not find that by merely stating that the margin of preference should be applied, the Respondent stipulated a particular margin. In other words whatever margin of preference to be applied, the procurement entity had to apply the prevailing law and regulations. However, as stated by this Court in **JR Misc Application No. 116 of 2016 - R vs. PPRB & 2 Ors, ex-parte Coast Water Services Board & China Henan International Cooperation Group Limited:**

***“With respect to the need to promote local industry, one of the purposes of the repealed Act in section 2 is to facilitate the promotion of local industry and economic development. Unless it is contended that the only consideration was promotion of local industry, it is my view that the failure by the Entity to promote local industry may in appropriate circumstances be a relevant consideration in the award of tender and the Board may well be entitled to take it into account.”***

192. It follows that the Respondent’s direction to the procuring entity that a margin of preference be applied to **Machiri’s** tender cannot be faulted since the Respondent had sight of the tender documents from which it could determine whether or not **Machiri** was entitled to preference. This Court cannot interfere with that finding of fact. The applicants seem to have misunderstood the exclusive margin of

preference and other margins. This distinction was made in **Republic vs. Public Procurement Administrative Review Board & Another [2008] eKLR** where it was held that:

**“The Board concluded that because the tender was above the prescribed threshold reserved for citizens it held that the Procuring Entity was entitled to ignore the issue of the second margin of preference. In other words the Board failed to distinguish the two categories of statutory margins of preferences namely the exclusive preference upon which the board proceeded to make its holdings and a margin of preference in specified circumstances set out in Section 39(8) (b) (i) and Regulation 28(2) (a) which the Board did not address at all. I find that the second category of preference was a relevant consideration which the Board ignored and instead relied wholly on the Regulation 28(1) (a) cited above.”**

193. Article 227 of the Constitution, in my view, provides the minimum threshold when it comes to public procurement and asset disposal. Being the minimum threshold, it is my view that in public procurement and asset disposal, the starting point must necessarily be the Constitution. Any procurement must therefore, before considering the requirements in any legislation, rules and regulations, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any other stipulation whether in an enactment or in the tender document can only be secondary to the said Constitutional dictates. That Article empowers Parliament to provide for preference but does not make it mandatory for Parliament to do so since the Article employs the word “may”. However where Parliament makes prescription for preference, such prescription ought to be adhered to. My view is reinforced by the decision in **PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** in which the Court held that:

**“To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel.”**

194. It is therefore my view that if a local tenderer does not meet the constitutional threshold it would be wrong to apply the margin of preference in order to enable it clinch the tender. In my view, the consideration of the lowest tender as a form of cost-effectiveness does not infer that the Procuring Entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest. It ought to be emphasised that the ***PPAAD Act*** talks of ***the lowest evaluated price***, as opposed to merely the lowest price. The issue of price must therefore follow an evaluation in accordance with the Tender document. In this case, the tender document required that a detailed qualifying criteria evaluation of the said bid be undertaken before a financial evaluation at which point the issue of pricing would come into play.

195. This does not mean that the issue of preference is peripheral to the award of tenders. The policy behind preferences appears in section 3(i) and (j) of the ***PPAAD Act*** which states that Public procurement and asset disposal by State organs and public entities shall be guided by the values and principles of the Constitution and relevant legislation including promotion of local industry, sustainable development and protection of the environment and promotion of citizen contractors. To buttress this point section 155(1) which falls under Part XII (*Preference and Reservation in Procurement*) provides that:

***Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.***

196. I therefore agree that section 6 of the *PPAAD Act* cannot be relied upon to defeat Part XII of the Act.

197. This policy was appreciated in Republic vs. Public Procurement Administrative Review Board & Another [2008] eKLR where it was held that:

**“The margin of preference consideration was a statutory one and although in the Act the provision is couched in discretionary terms due to the use of the word “may”, in the Regulation 28(2) (a) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement. The Procuring entity was clearly in violation of Regulation 28(2) (a) and so is the Board. This category of preference is also incorporated in the tender documents in mandatory terms.”**

198. My view is reinforced by the decision in PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR in which the Court held that:

**“To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives...Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness.”**

199. This was the position adopted by this Court in Nairobi JR No. 513 of 2015 - Republic –vs. The Public Procurement and Administrative Review Board & 2 Others ex parte Akamai Creative Limited in which the Court held the view that:

**“It is therefore clear that apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest.”**

200. In other words the spirit of the procurement legalisation must of necessity reflect the Constitutional principles relating thereto hence the stipulation that the successful tender shall be the tender with the lowest evaluated price requires that an evaluation be first undertaken and only after the tender passes all the stages of evaluation does the consideration of the lowest tender come into play. Similarly, the consideration of preference can only come into play after an evaluation has shown that the tenderer has surmounted the hurdles under Article 227 of the Constitution. To jump to the preference before satisfying oneself that the constitutional threshold has been met would render the decision to be tainted with illegality which is one of the grounds for issuance of judicial review relief.

201. In this case it was contended that the Respondent’s decision failed to take into account the sequence stipulated in the tender document which was in the following manner:

- a. Evaluation for responsiveness of the Tenders;
- b. Financial Evaluation of the bids of all substantially responsive tenders;
- c. Evaluation for Qualifying Criteria starting with the lowest bid based on documentary evidence submitted by the Tenderers on parameters of experience, historical non-performance, personnel, equipment and financial situation and thereafter making award to the lowest bid who meets the

## Qualifying Criteria.

202. It is clear that in this case, **Machiri's** bid was rejected during the ranking of bids before being subjected to the mandatory Qualifying Criteria. By directing a Financial Re-Evaluation of **Machiri's** bid without subjecting its Tender to Qualifying Criteria, the Respondent was in effect extending preferential and biased treatment to **Machiri**, much to the prejudice of **Weihai** whose Tender had been examined and found to be qualified. I appreciate that in executional circumstances the Board may substitute its decision for that of the procuring entity. This is so because section 173(c) of the *Public Procurement and Asset Disposal Act of 2015*, provides that:

***Upon completing a review, the Review Board may substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.***

203. That the Respondent has the power to substitute its decision for that of the Procuring Entity was appreciated by this Court in **Republic vs. Public Procurement Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] eKLR** when the Court held that:-

**“...this provision [section 98(c)] cannot be read in isolation to the other provisions. In my view the power to substitute the decision of the procuring entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the procuring entity was lawfully permitted to undertake both substantively and procedurally.”**

204. There is however a rider to the statutory powers of the Respondent Board. In substituting its decision for that of the procuring entity, the Board is enjoined to make a lawful decision. This Court while addressing itself on the issue in **Republic vs. Public Procurement Review Board & 2 Others ex-parte MIG International Ltd & Another [2016] eKLR** expressed itself as hereunder:

**“Whereas this court cannot fault the reasoning of the Board on this issue, the Court however finds the Board's decision to award the said tender to the interested party irrational. Having found that there were other bids which ought to have been considered, the Board ought not to have stepped into the shoes of the procuring entity and made a decision awarding the tender to the interested party without considering the bids of the other bidders. The primary duty of considering the bids in order to determine whether they are in accordance with the tender documents rests on the procuring entity and therefore where the entity has not made a decision thereon, the board cannot step in and make that decision. This, in my view is the spirit of the holdings in *JGH Marine A/S Western Marine Service LTD CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises Vs. Public Procurement Administrative Review Board & 2 others (2015) eKLR* and *Republic vs. Public Procurement Administrative Review Board & 3 Others Ex parte Olive Telecommunication PVT Limited (2014) eKLR* in which it was variously held that the board has no power to ignore the express provisions of a tender document and go ahead to award the tender to another bidder, otherwise it crosses its statutory boundaries acts outside jurisdiction. Further, whereas the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the procuring entity totally useless. In other words where the procuring entity has, in the Board's view, unlawfully or unreasonably declined to exercise its statutory mandate as was alleged in this case, the only option is for the Board to direct the entity to carry out the same in accordance with the directions of the Board. It follows that the award to the interested party of the tender NO. KPS/ICB/T/11/2015- 2017 for supply and delivery of motorized vehicle hot stamping foils size 220 X 305m cannot stand.”**

205. In this case the Respondent did not purport to have subjected **Machiri's** tender to Qualifying Criteria in order to move it forward to the stage of Financial Evaluation as it did. No credible or convincing reason was advanced by the Respondent why it decided to by-pass the first stage in the subject procurement in respect of **Machiri**. By doing so, the Respondent clearly discriminated against not only

**Weihai** but also the other tenderers who had passed the ranking stage. In this respect the decision in **Porter and Weeks vs. Magill (House of Lords) [2001] UKHL 67** is to the point. In that case it was held that:

**“In assessing whether there had been bias, the court should take all relevant circumstances into account: The ultimate question is whether the proceedings in question were and were seen to be fair”.**

206. This was the position taken by the Court of Appeal in its majority judgement in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge Civil Appeal No. 79 of 1998 [1995-1998] 1 EA 134** in which **Lakha, JA** it expressed himself as hereunder:

**In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit...There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; “The judge was biased.”**

207. In **Omolo, JA**’s view, once it is accepted that a judge was in fact biased against a party then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic.

208. I associate myself with the decision in **South Bucks District Council & Another vs. Porter [2004] UKHL 33** to the effect that:

**“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”. Disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds.”**

209. The Court in the case of **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728** held that the Procuring Entity’s failure to give reasons for terminating the Applicant’s tender amounted to breach of one of the fundamental principles of natural justice expressed itself as follows:

**“Failure by the 2<sup>nd</sup> Respondent to render reasons for the decision to terminate the applicant’s tender made the decision amenable to review by the Court since the giving of reasons was one of the fundamental tenets of the principle of natural justice.”**

210. In its decision, the Respondent Board also seems to have failed to appreciate that apart from **Weihai** and **Machiri**, there were other bidders to the tender who stood to be adversely affected by being unjustifiably locked out from consideration and without their bids being taken into consideration particularly with respect to the issue of preference before awarding the tender either to **Weihai** or **Machiri** in breach of Article 227 of the Constitution and section 3 of the **Public Procurement and Asset Disposal Act, 2015**.

211. I therefore find that the applicants' applications are merited to that extent.

**Order**

212. In the result I grant the following orders:

**a. An Order of Prohibition prohibiting enforcement, execution and/or implementation of the Respondent Board's decision contained in the decision dated and delivered on 22<sup>nd</sup> August, 2016 in Request for Review Application No. 56/2016 of 1<sup>st</sup> August, 2016: MACHIRI LIMITED =VERSUS= ATHI WATER SERVICES BOARD in respect of tender number AWSB/WASSIP-AF/COMP.1/W-33/2016, PROCUREMENT OF KABETE WATER TREATMENT WORKS TO MOMBASA ROAD WATER TRUNK DISTRIBUTION MAIN.**

**b. An Order of Certiorari removing to this Honourable Court for purposes of being quashed the entire decision of the Public Procurement Administrative Review Board dated and delivered on 22<sup>nd</sup> August, 2016 in the Request for Review Application No. 56/2016 of 1<sup>st</sup> August, 2016: MACHIRI LIMITED =VERSUS= ATHI WATER SERVICES BOARD in respect of tender number AWSB/WASSIP-AF/COMP.1/W-33/2016, PROCUREMENT OF KABETE WATER TREATMENT WORKS TO MOMBASA ROAD WATER TRUNK DISTRIBUTION MAIN, which decision is hereby quashed.**

**c. Pursuant to section 11(1)(h) of the Fair Administrative Action Act, 2015, I hereby direct the 1<sup>st</sup> Applicant herein, Athi Water Services Board to proceed and subject Machiri Limited's tender to Qualifying Criteria taking into consideration the clarifications made by Machiri Limited pursuant to the 1<sup>st</sup> Applicant request. In the event that Machiri Limited's tender passes the said Qualifying Criteria, the 1<sup>st</sup> Applicant, Athi Water Services Board, will then re-evaluate all the tenders that reached the stage of Financial Evaluation and proceed in accordance with the law. If however, Machiri Limited's bid does not pass the Qualifying Criteria Stage, the decision of the procuring entity arrived at earlier will, subject to any challenges under the procurement laws, be upheld.**

213. In the circumstances of this case, each party will bear own costs of these proceedings and those before the Respondent.

214. Orders accordingly.

**Dated at Nairobi this 23<sup>rd</sup> day of January, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Kamau for 1<sup>st</sup> Applicant**

**Mr Agwara for the 2<sup>nd</sup> Applicant**

**Mr Bitta for Mr Maina for the Respondent**

**Mr Njuguna for the interested party**

**CA Mwangi**