



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO. 240 OF 2016
(CONSOLIDATED WITH MISCELLANEOUS APPLICATION NO. 235 OF 2016)

REPUBLIC.....APPLICANT

VERSUS

THE PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD.....RESPONDENT

AND

MAGIC CONTRACTORS LIMITED.....INTERESTED PARTY

EX PARTE:

ATHI WATER SERVICES BOARD.....1ST EX PARTE APPLICANT

MACHIRI LIMITED.....2ND EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By an order dated 15th June, 2016, this Court consolidated JR Nos. 240 and 25 both of 2016 and directed that the same be heard in JR No. 240 of 2016. It was further directed that the 1st ex parte applicant would be Athi Water Services Board while the 2nd ex parte applicant would be Machiri Limited. The Respondent, it was directed would be the Public Procurement and Administrative Review Board while the interested party would be Magic Contractors Limited.

The 1st Applicant's Case

2. According to the 1st ex parte applicant, **Athi Water Services Board** (hereinafter referred to as “Athi Water”) it seeks the following orders:

1. **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 11th May, 2016 in Review Application No. 27 of 20th April, 2016: Magic General Contractors Limited =versus= Athi Water Services Board in respect of tender number BADEA/AWSB/OWSP/GoK/01/2015 for Rehabilitation of Water Supply and Sewerage for Oloitoktok Town Project.

2. An Order of Prohibition prohibiting the Respondent Board from purporting to enforce the Orders contained in its decision dated and delivered on 30th March, 2016 in Review Application No. 17 of 10th March, 2016: Magic General Contractors Limited =versus= Athi Water Services Board or any other orders in respect of tender number BADEA/AWSB/OWSP/GoK/01/2015 for Rehabilitation of Water Supply and Sewerage for Oloitoktok Town Project.

3. The costs of this Application be in favour of the Ex Parte Applicant.

1st Ex Parte Applicant's Case

3. According to the applicant, it on 22nd October, 2015 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. As a Procuring Entity the Applicant 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. It was averred that the Applicant duly carried out pre-bid site visits wherein potential bidders were invited to the project sites and several clarifications sought by the potential bidders duly addressed.

4. According to the 1st applicant, upon the lapse of the tender submission deadline on 3rd December, 2015, it opened the fourteen (14) bids that had been submitted in the presence of bidders' representatives who opted to attend the bid opening and caused to be carried out an evaluation of the bids submitted by the bidders in accordance with the criteria set out in the tender documents, in compliance with the express provisions of section 66(2) of the PPDA. Following the said evaluation, the Applicant duly notified all bidders of the outcome of the tender process vide letters of notification dated 3rd March, 2016 by which decision the subject tender was awarded to M/S Machiri Limited, the 2nd Interested Party herein (hereinafter referred to as "Machiri") on account of having submitted the most responsive bid and taking into account the deviations in tenders as duly provided for in section 64(3)(b) of the Act.

5. It was averred that the tender by the Interested Party herein, Magic Contractors Limited, (hereinafter referred to as "Magic") was disqualified as non-responsive and informed accordingly following which it filed a request for review application to the Respondent Board *vide* Request for Review Application No. 17/2016 of 10th March, 2016. This led to a decision by the Review Board directing the Applicant herein to carry out a financial evaluation of the tender of Magic alongside the other bidders who had made it to the financial evaluation stage notwithstanding that Magic had not been subjected to a technical evaluation.

6. The 1st Applicant averred that it carried out a fresh technical and financial evaluation of the tenders strictly done in accordance with the criteria for evaluation set in the tender document which is expressly entrenched in section 66(2) of the Act but Magic failed the technical evaluation whereupon it filed another Request for Review Application being Application No. 27/2016 of 20th April, 2016. This led to the Respondent Board delivering its impugned decision herein on 11th May, 2016 in which the Respondent Board annulled the decision of the 1st Applicant and instead directly awarded the subject tender to Magic.

7. It was contended that the Review Board in its impugned decision herein purported to use the Request for Review No 27/2016 as an avenue to enforce its decision previously rendered in the Review

Application No. 17/2016 dated 30th March, 2016. However, the 1st applicant contended that the Respondent Board lacks jurisdiction and or the mandate to enforce its own decisions as it purported to do vider the impugned decision of 11th May, 2016. Further, the Respondent Board acted outside its jurisdiction by purporting to use the Request for Review to enforce its previous decision (in Application No. 17 of 2016) through the impugned decision herein (in Application No. 27 of 2016).

8. It was the 1st applicant's case that the said impugned decision as delivered by the Respondent is unreasonable, based on extraneous, irrelevant and unlawful considerations, arbitrary, *ultra vires*, and in excess of jurisdiction conferred on it by the Act on the grounds *inter alia* that:-

i. The Respondent Board has not been vested with the mandate and or jurisdiction to enforce its own decisions but the Board in its decision dated and delivered on 30th March, 2016 purported to enforce its previous decision dated and delivered on 11th May, 2016.

ii. The Respondent Board acted in excess of its powers by purporting to directly award the subject tender to the Magic purely on the basis of alleged "open defiance" on the part of the procuring entity.

iii. The Respondent Board usurped the mandate of the Applicant's evaluation committee and proceeded to purportedly evaluate the financial bid submitted by Magic and abused its powers by permanently barring the Applicant from carrying out its statutory mandate of evaluating tenders in accordance with the tender document as duly entrenched in section 66(2) of the Act.

iv. The Respondent Board acted unreasonably (*in the Wednesbury unreasonable sense*) by directly awarding the subject tender to Magic who had failed the technical evaluation on account of lack of requisite experience among other failures.

v. The Respondent Board acted outside of its jurisdiction in failing to take account of relevant factors in that Magic lacked the technical capacity to undertake the project in the subject tender.

vi. The Respondent breached the Applicant's right to a fair hearing and fair judicial process by determining the Application No 27 of 2016 on the basis of grounds upon which the Applicant had not been given a hearing.

vii. The Respondent acted outside its jurisdiction and in so doing failed to appreciate that its jurisdiction was limited to determining whether or not Magic's bid was subjected to a fair and transparent re-evaluation process as required by the Act.

vii. The Respondent failed to take into consideration relevant factors, in particular that Magic's tender had failed to provide information on its technical capacity to undertake the project in the subject tender which was a mandatory part of evaluation for all bidders who had submitted their respective bids in response to the subject tender.

ix. The Respondent failed to appreciate that its mandate as set out under the Act, is to ensure accountability and transparency in the tender process and to enhance fair competition in the tender process.

x. The Respondent in arriving at the impugned decision made grave errors of law in failing to apply mandatory provisions of the Act which led to its awarding the tender to Magic.

xi. In reaching its decision, the Respondent made grave errors of law and fact by refusing to take into account relevant factors in that certain pages were missing from Magic's Bill of Quantities which were mandatory requirements for the tender evaluation.

xii. The impugned decision of the Respondent Board is tainted with bias as it affords Magic undue

preferential treatment which has not been afforded to other bidders that participated in the subject tender.

xii. In reaching its decision, the Respondent made grave errors of law and fact which breached the legitimate expectations of the Applicant for a fair judicial process and thereby rendered the said decision illegal.

xiv. The respondent Board acted unlawfully and in breach of the Applicant's legitimate expectations by applying the provisions of the newly enacted **Public Procurement and Asset Disposal Act, 2015** to justify its decision that the form of tender was the only relevant consideration in the financial evaluation of Magic's tender which provisions do not govern the subject tender and could not lawfully have been resorted to by the Applicant's tender committee in evaluating the tender.

xv. In the said decision the Respondent Board breached the Applicant's legitimate expectation that the Respondent would apply its mind to the relevant law and facts and would not act out of improper motives specifically anger at Applicant Board for alleged "open defiance."

9. The applicant therefore averred that the Respondent Board's actions are *ultra vires*, unlawful, arbitrary, malicious, capricious, influenced by improper motives, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations, against the Applicant's lawful, legitimate and rightful expectation and a breach of the rules of natural justice.

10. It was submitted on behalf of the 1st applicant that preliminary examination of the fourteen bids were timeously concluded taking into account a number of checklists that required mandatory compliance by the bidders. Out of the total of fourteen bids submitted, ten (10) bids were found responsive to the mandatory requirements of the tender documents and were therefore recommended by the Applicant's tender evaluation committee for detailed technical and financial evaluation (Post-qualification evaluation). However, Magic's tender was among those found to be non-responsive under the tender document and did not therefore proceed to the subsequent evaluation stages. On the other hand the ten bids that were found to be responsive by the Applicant's Technical Evaluation Committee and which successfully went through the Preliminary Evaluation Stage as provided under rule 47 of the **Public Procurement and Disposal Regulations 2006**, (the Regulations) thereafter proceeded for the detailed technical and financial evaluation stage as provided under rule 49 of the Regulations.

11. It was disclosed that during the detailed post-qualification evaluation the Applicant's Tender Evaluation committee encountered a number of arithmetic errors in the bids submitted by the ten (10) bidder's technical and financial evaluation which arithmetic errors were corrected in accordance with clause 5.5 of the Instructions to Tenderers and in exercise of the mandate entrenched in section 63(1) of PPDA, 2005 and the Public Procurement and Disposal General Manual. Following the correction of arithmetic errors in the financial proposals the Applicant's Tender Evaluation Committee proceeded to carry out a post-qualification evaluation pursuant to section III of the Evaluation and Qualification criteria and in compliance with Clause 8.1.1 of the Instructions to Tenderers whose purpose was to ascertain that the bids were substantially responsive and met the qualifying criteria set out in Section VIII (Evaluation of Tenders and Qualification Criteria) of the Tender document. All the ten bids were subjected to the technical evaluation and out of the ten bidders only three were found to have been substantially responsive to the tender document which was done based on financial resources, general and specific experience, personnel and firm's equipment and the 1st Applicant's tender evaluation committee therefore made recommendations for award of the subject tender to Machiri Limited at the disclosed bid price of Kenya Shillings Eight Hundred and Eighty Seven Million, One Hundred and Seventy Three Thousand, Six Hundred and Forty Two and Seventy Five Cents (Kshs 887,173,642.75/=) and all the bidders were notified accordingly.

12. However, Magic being dissatisfied with the outcome of the tender, filed a request for review application to the Respondent Review Board vide Review Application No. 17 of 2016 which led to a decision by the Respondent Review Board dated 30th March, 2016 in which the Respondent Board

annulled award of the subject tender to Machiri and ordered that the 1st Applicant herein undertake a financial evaluation of the Magic's tender alongside the three other tenderers who had succeeded in the technical evaluation and also to carry out a re-evaluation of the said bids. Following the above decision of the Review Board, the Applicant with a view of subjecting Magic's bid to a financial evaluation, subjected it to a re-evaluation on the technical requirements and the Interested Party's tender was found unsuccessful in the technical evaluation for the reasons *inter alia* that the Interested Party lacked the requisite mandatory experience, competence and qualifications required under the Tender Document to implement the project.

13. In the 1st applicant's view, the 1st Applicant fully complied with the directions and the above ruling of the Board and regularly concluded the financial and the re-evaluation process and Machiri once again emerged as the lowest evaluated bidder and was therefore awarded the Tender. However, Magic was once again aggrieved by the above outcome of the tender evaluation process and proceeded to file another request for review Application No. 27/2016 of 20th April, 2016 which led to the Respondent Board delivering the impugned decision herein on the 11th May, 2016.

14. According to the 1st Applicant, the Respondent Board's impugned decision as delivered on 11th May 2016 is plainly illegal and unlawful as the Respondent Board purported to directly award the subject Tender to the Interested Party without carrying out any financial evaluation and/or complying with section 66 of the PPDA 2005 or the various decisions of this Honourable Court made in respect to the issue which decisions are binding on the Board. To the 1st Applicant, the Respondent Board in arriving at its impugned decision mainly proceeded on the misconceived belief that the Board needed to punish the 1st Applicant for allegedly not following its ruling and orders of 30th March 2016, without realizing that such punishment (if merited) cannot in law amount to a direct award of a tender to bidder whose tender has not been evaluated as required by law and the Tender Document.

15. To the 1st applicant, the Respondent Board in its impugned decision acted unlawfully by irregularly ignoring the evaluation criteria for the subject tender in breach of the peremptory provisions of section 66(2) of PPDA. In addition, a perusal of the Boards impugned decision and the reasoning thereto clearly demonstrates that the Board not only acted without jurisdiction but also arrived at an irrational and unreasonable decision which contravenes the purpose and the objective of the procurement law particularly section 2 of the PPDA 2005 as read together with Article 227 of the Constitution. It was therefore submitted that the said decision of the Board is unlawful and incapable of being performed without the 1st Applicant breaching the law and ought to be set aside as a matter of course.

16. According to the 1st Applicant, it is common ground that the subject procurement proceedings were commenced under the repealed PPDA 2005 and as such by virtue of section 1 of the Third Schedule to the **Public Procurement and Asset Disposal Act 2015** (PPAD Act 2015), the provisions of the PPDA 2005 apply to these proceedings. It was contended that the PPDA 2005 established the Respondent as a statutory body under section 25 of the said Act with the sole mandate to operate as an administrative Review Board over disputes arising from the public procurement processes and its review jurisdiction under the said Act is set out at section 93(1) of the Act which provides as follows:-

Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

17. Section 98 of the Act provides as follows:-

Upon completing a review the Review Board may do any one or more of the following:-

- a. Annul anything the procurement entity has done in the procurement proceedings, including annulling the procurement proceedings;***
- b. Give directions to the procuring entity with respect to anything to be done or redone in***

the procurement proceedings;

c. Substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

d. Order the payment of costs as between parties to the review.

18. It was submitted that the Respondent in excising the above jurisdiction is carrying out a quasi-judicial function and is as such bound by the rules of Natural Justice. In this case Magic filed its first Review Application No. 17 of 2016 on 10th March 2016, which application was heard by the Respondent Board and a decision made by the Respondent Review Board on 30th March, 2016 in which the Respondent Board held as follows;-

a. The Applicant's Request for Review dated 10th March, 2016 be and is hereby allowed.

b. The Procuring entity's decision awarding the tender the subject matter of the Request for Review to the successful bidder be and is hereby annulled.

c. The procuring entity's decision declaring the Applicant's tender as unsuccessful as communicated vide the procuring entities letter dated 3rd March, 2016 is hereby set aside and annulled and the procuring entity is directed to subject the Applicant's tender to financial evaluation alongside those of the three bidders who made it to the financial evaluation stage.

d. The procuring entity shall complete the re-evaluation process including the making of the award of the subject tender within Fourteen (14) days from the date hereof and shall inform and provide the secretary of the Board with the evidence of compliance with the Board's orders within Fifteen (15) days from today's date.

e. The Board hereby directs that in carrying out the financial re-evaluation exercise, the procuring entity shall act in strict compliance with the provisions of section 66(4) of the Act and within the parameters set out under Regulation 50 of the Public Procurement and Disposal Regulations 2006.

f. In view of the nature of the orders made above, each party shall bear its own costs of this Request for Review.

19. In the 1st applicant's view, from the above decision of the Respondent Board, it is clear that the Respondent Board appreciated that in carrying out the said re-evaluation, the 1st Applicant was legally bound to comply with the provisions of section 66 of the PPDA and Regulation 50 of the Regulations 2006 and section 66 of the PPDA 2005 expressly provides as follows;-

(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

(3) ...

(4) The successful tender shall be the tender with the lowest evaluated price.

20. Regulation 50(1) of the Regulations 2006 on the other hand provides as follows:

Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each

tender.

21. Clause 4.1 of the tender document stipulated the tender documents while clause 6 provided for the completion of the tender documents by the tenderers. Clause 7.4 of the Tender Document expressly provided that any Tender Document not completed in accordance with the instructions to tenders will not be considered, while clause 8 provided for the tender evaluation criteria.

22. It was the 1st applicant's position that the foregoing, it is clear that both the PPDA Act and the Regulations made thereunder mandatorily obligated the 1st Applicant to strictly evaluate the tenders according to the criteria set out in the Tender Document and to only subject tenders which had successfully gone through technical evaluation for Financial Evaluation as mandatorily provided under Regulation 50. To the 1st applicant, it is not in dispute that Magic's tender was not fully completed and as such the same was originally rejected and not subjected to technical evaluation under the Tender Document and this, it was submitted is confirmed by the Board at page 29 of its ruling of 30th March 2016, wherein the Board observed as follows:

Board has also considered the evaluation report and finds that a total of 14 firms submitted their bids after which the procuring entity carried out a first preliminary examination of the bids to ascertain if all the required documentation had been submitted. During this first preliminary examination, eleven parameters were examined and the Applicant was determined responsive during this stage of examination.

Upon completion of the first preliminary examination, the procuring entity carried out a second preliminary examination to determine what it called substantial responsiveness. All bids that had passed through the first preliminary examination were subjected to this second stage and it is at this point that the Applicant's tender was declared none (sic) responsive on the ground that the Applicant had submitted an incomplete Bill of Quantities and was not therefore subjected to the next stage of evaluation. Four other bidders were declared non-responsive and ten firms were recommended to proceed to the next stage of evaluation.

23. To the 1st applicant, following the above decision of the Respondent Board as delivered on 30th March 2016, the 1st Applicant was required to admit Magic's tender for re-evaluation since the 1st Applicant's decision to reject the same and not to subject it to technical evaluation was set aside vide the said ruling of the Respondent Board. In complying with the above decision, the 1st Applicant was required under section 66 of the PPDA as read together with Regulation 50 of the Regulations and the Tender Document to subject Magic's tender to technical evaluation and thereafter proceed to evaluate its Financial Bid. According to the 1st applicant, the requirement to subject bids to a full technical evaluation before embarking on a financial evaluation is a cardinal rule of procurement processes as it is the only way through which the procuring entity will ensure that it obtains value and the successful bidder have the necessary competence and ability to carry out the works especially where the works in issue are those highly sophisticated technical projects like the one subject of the procurement proceedings herein. It was therefore submitted that the 1st Applicant complied with the Respondent/Board's ruling and the law and subjected Magic's Tender to the necessary technical evaluation as required by the law and the Tender Document and Magic's tender failed the technical evaluation as it did not have the expertise and the specific experience required to carry out the project as required under the Tender Document.

24. It was therefore submitted that Magic's bid regularly failed the technical evaluation and could therefore not be subjected to financial evaluation. The outcome of the evaluation was communicated to the Interested Party who did not contest the same but alleged that the 1st Applicant had failed to comply with the ruling of the Board as delivered on 30th March 2016. Magic therefore filed the subject Review Application No. 27/2016 of 15th April 2016 with the Respondent Board alleging that the 1st Applicant in subjecting its bid to the technical evaluation as required under section 66 of the Act and Regulation 49 and 50 of the Regulations contravened the ruling of the Respondent Board and failed to comply with the said ruling as delivered on 30th March 2016. According to Magic, the ruling of the Board allegedly spared

its bid from any technical evaluation and the only evaluation the 1st Applicant was to carry out on the same was the financial evaluation with a view of determining whether its financial bid was the lowest. The Board heard parties on the said matter and rendered its impugned decision herein on 11th May 2016. It was submitted that in the said decision, the Board identified only 2 issues for determination being:-

a. Whether the Applicant, procuring entity complied with the Board's orders and directions in Review No. 17 of 2016 given on 30th March 2016 in carrying out the re-evaluation of the Applicants tender.

b. Arising from 1 above what orders should the Board make in the circumstances of the case.

25. It was the 1st applicant's view that from the foregoing issues as framed by the Board, it is clear that the Respondent Board did not seek to hear parties on the subject Request for Review Application No. No. 27/2016 of 15th April 2016 but instead converted the hearing into contempt proceedings where it only sought to determine whether or not its ruling of 30th March 2016 was complied with. In the 1st applicant's submission, in determining the above issue No. 1, the Respondent Board erroneously proceeded to purport that its decision of 30th March 2016 only required the 1st Applicant to carry out financial evaluation of Magic's bid which assertion by the Board is irrational and contradicts its own decision of 30th March 2016 as it is trite law that the subject tender must be subjected to technical evaluation before proceeding to Financial Evaluation. It was submitted that in asserting the foregoing, the Respondent Board misdirected itself and erroneously held as follows:

On the issue of compliance with the Board's decision the Board has looked at the letter of notification to the Applicant dated 14th April 2016. It is clear from the said letter and this was conceded by the procuring entity at the hearing that it did not carry out a financial evaluation of the Applicant's tender.

This was itself a breach of the decision of the Board given on 30th March 2016.

Turning to the other three additional grounds for the Applicant's disqualification contained in the letter of 14th April 2016, the grounds relate to aspects which don't fall within the financial evaluation which is the only aspect of the evaluation process which the Board directed the procuring entity to carryout. Unless the Board's decision was reversed as stated above the procuring entity ought to have confined itself within the four corners of the Board's decision.

26. In the 1st applicant's view, the above holding of the Board is not only illegal but the same is irrational since the 1st Applicant cannot lawfully carry out the financial evaluation of the Interested Party's bid without subjecting it to a technically evaluation as required under section 66 of the Act and Regulation 50 and in purporting to shield Magic's bid from technical evaluation, the Board acted contrary to sections 2 and 66 of the PPDA Act 2005 and further contravened its own decision of 30th March 2016 wherein the Board having established that Magic's Bid was not subjected to technical evaluation and proceeded to order the 1st Applicant to subject the said bid to evaluation in accordance to section 66 of the Act and regulation 50 of the Regulations which mandatorily requires the 1st Applicant to subject bids to technical evaluation under regulation 49 before subjecting them to financial evaluation.

27. According to the 1st applicant, in complying with the Board's ruling of 30th March 2016, it was duty bound to comply with the obtaining procurement laws and regulations which as observed by the Board required the Interested Party's Bid to be subjected to a technical evaluation before subjecting it to a financial evaluation. It was submitted that the Respondent Board could not lawfully and/or regularly require the 1st Applicant not to subject Magic's bid to a technical evaluation prior to carrying out the financial evaluation as such an act would not only prejudice the other bidders whose bids were regularly subjected to technical evaluation before any financial evaluation but would also contravene regulations 16, 49 and 50 of the Regulations. It was therefore the 1st applicant's view that the finding that the

Applicant in subjecting Magic's bid to technical evaluation in compliance with the evaluation criteria as set out in the Tender Document as read together with section 66 of the Act and Regulations 16, 49 and 50 of the Regulations, before subjecting the same to financial evaluation, contravened the Board's ruling is irregular and irrational as the same is illegal and avails Magic to a selective and preferential treatment through a strange evaluation criteria neither founded on the Tender Document nor envisioned by section 2 and 66 of the Act and Regulation 49 and 50 of the Regulations. It was submitted that in deliberately purporting to selectively interpret and apply its ruling of 30th March 2016, the Board acted unlawful and unreasonably by finding and holding that the 1st Applicant, Procurement Entity ought to have contravened all the salient procurement rules and the PPDA Act by only carrying out a financial evaluation on the Interested Party's bid without subjecting it to a technical evaluation process to determine the suitability of its bid and whether or not the Interested Party had the capacity to provide the required services under the tender document. To the 1st applicant, it had no mandate in law and/or under the subject Tender Document to evaluate bidders financial bids before subjecting them to technical evaluation to determine the technical competence of the bids hence the Respondent acted illegally and irrationally in holding that the 1st Applicant ought to have only subjected the Interested Party's bid to financial evaluation without carrying out technical evaluation on the same.

28. It was submitted that the Respondent Board having found and held in its ruling of 30th March 2016 that the Interested Party's tender was not subjected to a technical evaluation as required under the tender document and regulation 49 of the Regulation could not lawfully purport to require the Applicant to only carry out financial evaluation on the same without subjecting the tender to technical evaluation contrary to section 66 of the PPDA as read together with regulation 49 and 50 of the Regulations.

29. The 1st Applicant submitted that this Honourable Court has repeatedly held that the Respondent Board can only require the 1st Applicant to act within the procurement law and the regulations made thereunder. However should the Respondent Board require the Procuring Entity to act outside the law and breach the PPDA and the Regulations made thereunder as is the case herein, then such requirement of the Respondent Board would be ultra vires and in excess of its jurisdiction and relied on **Republic –vs- The Public Procurement and Administrative Review Board, The Attorney General, Daniel Outlets exparte Numerical Machining Complex Limited (Nai JR No. 261 of 2015).**

30. It was therefore urged that the impugned decision of the Board be set aside for being illegal and unlawful.

31. According to the 1st Applicant, the Respondent Board through its impugned decision herein, awarded the subject tender directly to Magic in a bid to punish the Applicant for allegedly failing to comply with its ruling of 30th March 2016 and in arriving at the said decision the Respondent Board stated as follows:

“Turning to the orders sought by the Applicant, the Board notes that the Applicant inter-alia seeks for a direct award of the tender to it. This prayer was based on the contention that the procuring entity failed to comply with the Board's order directing it to carry out a financial evaluation of the tenders even after having been accorded an opportunity to do so. It was the Applicant's further case that having failed to act, there was no other way of forcing the procuring entity to do so and that this is one of the cases which required the Board to act decisively and intervene in order to ensure respect for the law and in order to preserve the integrity of the procurement process.

The Board has considered the parties submissions on the nature of the reliefs to be granted. The Board is also alive to the fact that the making of a direct award is a drastic remedy. As the High Court stated in the case of Republic –vs- The Public Procurement and Administrative Review Board, The Attorney General, Daniel Outlets exparte Numerical Machining Complex Limited (NAI JR NO. 261 of 2015) a direct award should ordinarily not be made if a tender has not gone through the process of financial evaluation.

As already stated in this decision however, the Board directed the procuring entity in the

Request for Review No. 17 of 2016 to carry out a financial evaluation of the Applicant's tender. The procuring entity failed to challenge that decision and also failed to carry out a financial evaluation of the Applicant's tender."

32. The Board then proceeded to make the following orders:-

(a)...

(b)...

(c) In the exercise of the powers conferred upon it by the Act the Board substitutes the decision of the procuring entity and awards the said tender to the Applicant M/s Magic General Contractors Limited at its tender price of Kshs. 868,021,884.

(d)The procuring entity be and is hereby directed to issue a letter of award and complete this procurement which is long overdue within Fourteen (14) days from the date hereof.

(e)...

33. It was the 1st Applicant's case that though the Board has powers to substitute its decision to that of the Procuring Entity, in so doing the Board must act within the law. However in the subject proceedings it is not in dispute that the direct award of the tender by the Board to the Interested Party was carried out without the Board subjecting the said tender to any technical and/or financial evaluation. According to the 1st Applicant, the Board having determined for argument sake that the 1st Applicant did not carry out financial evaluation of the Interested Party's bid could not lawfully proceed to award the tender to Magic without subjecting the same to financial evaluation. Therefore in purporting to award the subject tender directly to Magic without carrying out any technical and/or financial evaluation on Magic's bid, the Board acted in excess of its jurisdiction and arrived at a decision which is *void ab initio*.

34. It was submitted that the Review Board acted *ultra vires* section 98(c) of the PPD Act which donates to it the power to substitute its decision for that of the Procuring Entity. The power to substitute the procuring Entities decision with that of the Review Board could only be exercised lawfully within the ambit of section 66(2) of the PPD Act which prescribes that evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used. The Board was therefore accused of having acted against the law in failing to carry out any evaluation on the Magic's bid within the law to warrant any lawful award of the tender as purported in the ruling which was contrary to the express finding by this court in **Republic vs. Public Procurement Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] eKLR** that:-

"63. If I understand the Respondents correctly they seem to be relying on the provision of section 98(c) which donated to the 1st 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. Section 66(2) of the Act made it mandatory for evaluation and comparison of bids using procedures and criteria set out in the Tender Document. This is reiterated under Regulation 16 of the Regulations. As was held in 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 (supra):

"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.”

64. In this case the impugned decision was taken before the Financial Evaluation was undertaken. Regulation 50(1) of the Regulations provides that:

Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

65. 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 1st 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.

66. 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. See Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

67. Whereas the powers of the 1st Respondent in exercising its powers of review are wide, the same can only be exercised within the framework of an existing request for review. Any attempt to exercise powers outside that ambit would in my view amount to assuming jurisdiction which it does not possess.”

35. It was submitted that whereas the Review Board had wide powers when determining a review application before it, it could only exercise its powers of review within the law and what the tender documents provided and that failure to do so and taking into account extraneous matters that were not provided for by the tender document and the law made the decision by the Review Board *ultra vires*. Further, the decision by the Review Board was also inconsistent with Article 227 of the Constitution which stipulates that procurement matters in Kenya must, as a matter of public policy, set to achieve the goals of competitive bidding which is also transparent and cost-effective. In other words, the taxpayer should get value for money and not be exposed to the more expensive tender. In the present case, it was submitted that the 1st Respondent chose to award the tender directly to Magic without subjecting its bid to competitive bidding as required under Article 227 of the Constitution. However, the Respondent Board could only proceed to award the Tender directly to Magic if its bid was successfully subjected to both technical and financial evaluation.

36. It was further submitted at the Boards powers under section 98 of the Act are not available for punishing parties who the Board views to have disobeyed its directions as is the case herein and such an action by the Board amounts to abuse of statutory powers. It submitted that even if the Board had regularly found that its directions had not been complied with by the Applicant, awarding the tender directly to Magic in contravention of Article 227 of the Constitution, section 64, 66 of the PPDA and Regulations 49 and 50 of the Regulations was not a lawful and/or efficacious mode of punishing the Procuring Entity as such form of punishment is not envisaged in the Act. In support of this submission the 1st applicant relied on Republic vs. Public Procurement Review Board & 2 Others ex-parte MIG

International Ltd & Another [2016] eKLR.

37. To the 1st applicant, the above decision represents the proper position of the law and is binding upon Respondent Board who was a party in all the matters cited above and has never challenged any of those findings. It is therefore unlawful for the Board to disregard the above findings and proceed to award the tender herein to Magic without complying with Section 66 and Regulations 49 and 50 of the Regulations. Further, the Board having determined that there were other bidders whose bids the Procuring entity was to evaluate together with that of the Interested Party could not lawfully wish away those bidders and directly award the subject tender to Magic.

38. According to the 1st Applicant, during the hearing of the Review Application before the Respondent Board, it was not in dispute that the 1st Applicant had procured the funds to carry out the subject project from the Arab Bank for Economic Development in Africa (BADEA) hence the subject tender was for a project financed by a development partner BADEA, under a loan agreement whose terms mandatorily required the 1st Applicant to seek the approval of the financier, BADEA before making any award. This fact was known to the Respondent Board who captured the same in its impugned decision as follows:

“The Government of Kenya represented by Athi Water Services Board (AWSB), has received funding from the Arab Bank for Economic Development in Africa (BADEA) for implementation of the Rehabilitation of Water Supply and Sewerage for Oloitokitok Town Project.

...

The team commenced the evaluation exercise on 6th December, 2015 and concluded the report on 27th January 2016.

The report was forwarded to the Financier, BADEA, for review and approval. The Bank issued a No Objection letter on 17th February 2016.

The Tender Committee awarded the tender to M/S Machiri Ltd which was in concurrence with the evaluation teams recommendation and BADEA’s No. Objection letter.”

38. From the foregoing, it was submitted that the Respondent Board was fully aware that the 1st Applicant could not award the subject tender to any bidder without seeking approval from the BADEA as required under the Loan Agreement which expressly provided as follows;-

(C) The Borrower shall furnish to BADEA copies of the bidding documents and shall make such modifications in the said documents as may be requested by BADEA...After receipt and evaluation of the bids, a detailed report on evaluation and comparison of the bids received, together with the recommendation for award, will be presented to BADEA for approval.

39. It was submitted that the Respondent Board in arriving at its impugned decision herein to directly award the subject tender to the Interested Party and ordering the 1st Applicant to “issue a letter of award and complete the procurement within 14 days”, failed to take into account a material consideration being that, on account of the mandatory conditions of the Loan Agreement between the Government of Kenya and BADEA, the 1st Applicant herein could not issue a letter of award and complete the procurement process without receiving the approval of BADEA which approval the 1st Applicant is not in control of and could NOT therefore guarantee. The Respondent further failed to take into account the fact that under the Loan Agreement, BADEA required a detailed report on evaluation and comparison of the bids received together with the recommendation for award for its approval and as such the Interested Party’s bid could not be approved for award without undergoing both technical and financial evaluation as directed by the Board. To the 1st Applicant, it was material for the Respondent to determine whether or not the 1st Applicant could lawfully be compelled to award and enter into a contract under the subject

tender with the Interested Party without seeking BADEA's approval. In failing to consider such a very important and relevant issue, the Respondent failed to appreciate the consequence its decision would have in the entire procuring process and the relationship between the Government of Kenya and BADEA and whether or not BADEA would still be willing to release funds for the project in the absence of its approval which is a mandatory term of the Loan Agreement.

40. It was the 1st Applicant's submission that having failed to take into account such a relevant consideration as demonstrated above, the Respondent arrived at a totally erroneous and unlawful decision. This is so because it is trite law that a relevant factor must be taken into account by authorities such as the Respondent herein in exercising its powers vested in it by law. Actions or decisions of administrative authorities are amenable to being quashed if they are shown to have been based on irrelevant or extraneous considerations, or where it can be proved that relevant consideration were ignored, as in the case now before Court. In this respect the 1st Applicant relied on *Halsbury's Laws of England* for the position that:

“A discretionary power must be exercised for proper purposes which are consistent with the conferring statute. The exercise of such a power will be quashed where, on a proper construction of the relevant statute, the decision maker has failed to take account of relevant considerations or has taken account irrelevant considerations. In some statutes, some or all of the relevant considerations may be express; where the statute is silent or the express considerations are not exhaustive, the courts will determine whether any particular consideration is relevant or irrelevant to the exercise of the discretion by reference to the implied objects of the statute.”

41. It is therefore the Applicant's submission that the Respondent acted unreasonably in failing to take into consideration the fact that the evidence before it showed that the 1st Applicant could not lawfully award the subject tender to the interested Party in the absence of an approval from BADEA. In ignoring all of the above factors, the 1st Respondent acted wholly unreasonably and irrationally in the circumstances and its decision was purely erroneous both factually and legally. To the 1st Applicant, a public body like the Respondent herein has a duty to act reasonably and rationally and Parliament naturally expects of every authority vested with power to act reasonably and within the law in exercising such powers as acting irrationally and unreasonably and without taking account of relevant factors renders an authority's action *ultra vires*, null and void. In support of this position the 1st Applicant relied on the decision of **Gicheru, Omollo and Shah, JJA, in R v. The Commissioner of Coop. Ex p. Kirinyaga Tea Growers Coop. Savings and Credit Society Ltd. [1999]1 EA 245** where they rendered themselves as follows:

“There is no other apparent reason why he ordered the inquiry. If the Commissioner ordered the inquiry because of the complaint of Kiromo, and as we have said we think that was the most likely reason, then the Commissioner was clearly abusing his statutory powers because he is not allowed to order an inquiry on the application of only one member. We are, accordingly, satisfied that the Commissioner's exercise of his undoubted powers under Section 61 was unreasonable in the circumstances of this case...It is axiomatic that statutory powers can only be exercised validly, if they are exercised reasonably. No statute ever allows any one on whom it confers power to exercise such power arbitrarily, capriciously or in bad faith. We have said enough, we think, to show that this appeal must be allowed.”

42. In the 1st Applicant's view, for the Respondent Board to directly award the subject tender to Magic without subjecting Magic's bid to any technical and/or financial evaluation and competitively comparing the same with the other bids and in the absence of an approval by BADEA, is so irrational that no rational tribunal properly considering the facts could make such a finding. It was submitted that any power conferred by the legislature in any public authority must be exercised in good faith or *bona fides* and where the exercise of power is masked in matters as demonstrated here above, the resulting act will be unlawful and *ultra vires*. Support for this position was sought from the decision of **Wendoh, J** in Misc. Civil Application No. 53 of 2010; **Zhongman Petroleum & Natural Gas Group Company Ltd vs. The**

Public Procurement and Administrative Review Board and 3 Others where the Learned Judge considered the rival arguments and held inter alia as follows;-

“The Review Board had jurisdiction to enter into inquiry on the request for review. It also had jurisdiction to hear the Preliminary Objection raised by the 1st Interested Party but should have investigated whether the request was lodged on time and whether the alleged breach Reg. 73 was substantive and given reasons for its determination. By failing to consider these relevant issues and failing to give reasons, the Respondent fell into error and breached the rules of natural justice of a fair hearing. Under the provisions of Judicial Review and this Court has the power to intervene and quash the decision of the Board and direct the Board to hear the application on the merits of their request for review. Judicial Review remedies are discretionary in nature. In this case in exercise of the courts discretion, it has taken into account the fact that procurement matters are meant to be determined without undue delay in order to realize the objects of the PPD Act. However, the bodies charged with decision, making like the Review Board are urged always to bear in mind the objects of the Act, the statutory provisions that gives them power and rules of fairness.

43. This Court was therefore urged to issue the order sought herein since the 1st Ex-parte Applicant had sufficiently demonstrated that the Respondent Board in arriving at the impugned decision failed to take into account relevant consideration and as such the Board in so doing arrived at an erroneous decision both legally and factually. In the said applicant’s view, it has clearly come out that the Respondent Board having elected to directly award the subject Tender to Magic, failed to carry out any technical and/or financial evaluation on the said bid contrary to the trite requirements of section 66 of the PPDA and Regulations 49 and 50 of the Regulations. Further, it contended that it had been sufficiently demonstrated that the purported award of the tender to the Interested Party by the Respondent Board was carried out in abuse and misuse of the Board’s powers under section 98 of the Act as the Board made the said award as means of punishing the Procuring Entity on the ill-conceived belief that the Procuring Entity had disobeyed its orders.

2nd Applicant’s Case

44. The 2nd Applicant’s case was in substance similar to that of the 1st applicant save for the extra prayer of mandamus seeking to compel the 1st Applicant to enter into the contract with the 2nd Applicant in respect of the subject tender.

45. It was however submitted on behalf of the 2nd Applicant that a decision or act may be quashed by reason of procedural impropriety; that is when there is failure on the part of the decision maker to act fairly either by not observing the rules of natural justice or to act with procedural fairness towards one to be affected by the decision, or by failing to adhere and observe procedural rules expressly laid down in the instrument by which such authority exercises jurisdiction to make a decision. This submission was 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 **Patoli vs. Kabale District Local Government Council and Others**. Further in **Council of Civil Service Unions vs Minister of state for Civil Service (1984) 3 All ER 935** procedural impropriety was espoused to include the failure to give reasons.

46. According to the 2nd Applicant, the Respondent annulled the award of tender by the 1st Applicant to the 2nd Applicant and made a direct award of the tender to the interested party without conferring any reasons for the said annulment but simply laid the basis of its finding on the fact that the procuring entity failed to comply with its earlier directive to subject the interested party’s bid to a financial evaluation. To the 2nd Applicant, the Respondent is duty bound to give reasons for its decisions more so where the same amounts to substitute a legal act properly within the law as was in this case and failure to give such reasons amounts to procedural impropriety and renders the decision null and void and ought to be quashed.

47. It was submitted that regulation 47 requires the evaluation committee to conduct a preliminary evaluation of all bids and thereafter pursuant to regulation 48 the procuring entity is to reject those that are unresponsive. Regulation 49 further requires the evaluation committee to subject the preliminary successful bids to technical evaluation and the procuring entity would then reject those found unresponsive. Finally the evaluation committee must conduct a financial evaluation of the bids to determine the lowest ranked bid in tandem with section 66(4) of the PP&DA which mandates the procuring entity to award the contract to the successful bidder with the lowest evaluated price. In this case the 2nd Applicant's and Magic's bids were subjected to the preliminary, technical and financial evaluation. The 2nd Applicant's bid was found to be compliant and fully responsive while Magic's bid was on the other hand found unresponsive at the technical evaluation stage even upon re-evaluation. Among other bidders, the 2nd Applicant was the successful bidder with the lowest evaluated price and as such the 1st Applicant proceeded to make an award to the 2nd Applicant. The Respondent however proceeded to directly award the tender to Magic on the basis that the 1st Applicant failed to carry out a financial evaluation of the interested party's bid as directed on 30th March 2016 and annulled the award of tender to the 2nd Applicant without conferring any reasons for the same.

48. It was submitted that the Respondent in making a direct award to the interested party failed to consider the following relevant facts and acted illegally in:

- a. that the 2nd Applicant's bid had been subjected to all evaluation stages and found successful with the lowest evaluated price;
- b. that the 1st Applicant had rejected the interested party's bid;
- c. that Magic's bid was not evaluated successfully pursuant to regulation 47, 49 and 50 and section 66(4) of PP&DA;
- d. that Magic's bid was not available for an award upon determination of the request for review;
- e. that the 1st Applicant's failure to comply with its earlier directive did not in any way nullify the award to the 2nd Applicant's and even if it did, the Respondent ought to have demonstrated the same before annulling the award.

49. In its submissions, the 2nd Applicant relied on **R vs. PPARB & 2 Others exparte MIG international Ltd & Another [2016]** and **Zacharia Wagonza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR** that:

“concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration.”

50. The 2nd Applicant's case was that pursuant to section 66(4) which requires the procuring entity to make an award to the successful bidder with the lowest evaluated price the court in **R vs. PPARB exparte MIG International Ltd & 2ors while citing Patoli vs District Local Government Council and Others [2008] 2 EA 300** held that:

“it follows that after the evaluation was conducted, the procuring entity was still obliged to award the tender to the lowest bidder as long as the said bidder was successfully evaluated. To fail to consider these criteria would amount not only to the failure to consider a relevant factor but to the failure to adhere to the statutory instrument under which the body concerned exercises its authority”.

51. It was emphasised that the Respondent in making the direct award failed to take into account the fact that the 2nd Applicant's bid was successful and with the lowest evaluated price and its rights were directly jeopardized by nullifying its bid. The Respondent in striving to penalize the 1st Applicant for failure to perform its directive, failed to consider the fact that the 2nd Applicant was an innocent third party to that directive, by having the award of tender to it annulled without any reason despite its bid being fully compliant and the lowest. The 2nd Applicant's bid ought not to have suffered due to the 1st Applicant's inaction. The Respondent clearly overstepped its mandate. It was further submitted that the Respondent's impugned decision presupposes that it stepped into the 1st Applicant's shoes and conducted a financial evaluation of the interested party's bid by merely looking at the 2nd Applicant's quoted sum and concluding that the interested party was the lowest. Without pre-empting what is entailed in a financial evaluation, the Respondent was clearly outside its jurisdiction.

52. To the 2nd Applicant, the purview of section 100 of PP&DA empowers the Respondent to do that which the procuring entity is allowed to do by law. The power of the Respondent to substitute the decision of the 1st Applicant cannot be unlimited and it can only be exercised with respect to what the 1st Applicant was lawfully permitted to undertake both substantively and procedurally. Section 66(2) of the Act, it was contended makes it mandatory for evaluation and comparison of bids using procedures and criteria set out in the Tender document and this was held in the **Republic v Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex Limited [2016] eKLR.**

53. It was submitted that by annulling the said award and directly awarding the same to Magic, this was clearly not in exercise of any of the Respondent's powers as conferred under section 173 and was beyond the scope of its powers to substitute the procuring entity's decision with its own, bearing in mind, that the Respondent can only do that which the 1st Applicant is legally authorized to do.

54. It was therefore submitted that the Respondent acted illegally contrary to the express provisions of the law, took into account irrelevant factors and its impugned decision arrived at is unlawful and ought to be quashed.

55. According to the 2nd Applicant, it is trite law that the procuring entity must ensure that all bids have been taken through a preliminary, technical and financial evaluation pursuant to regulation 47, 48, 49 and 50 and where any is found unresponsive, the same must be rejected and section 66(4) of the PP&DA further mandates the procuring entity to make an award to the successful bidder with the lowest evaluated price. In this sense, logic would dictate that the tender herein would only be awarded to the party whose bid fell within the prescribed threshold. However the Respondent in arriving at its decision awarding the tender to the interested party whose bid was against the above threshold was clearly in defiance of logic hence it can only be concluded that the Respondent failed to apply its mind to the fact that Magic's bid was rejected as unresponsive and purporting to carry out a financial evaluation of the same against the 2nd Applicant's sum was illegal and irrational. Further, the Respondent was also irrational in exempting the interested party from technical evaluation, proceeded to subject the bid to financial evaluation and made the award to the interested party. This notwithstanding the fact that there were other bidders such as the 2nd Applicant whose bid had actually been evaluated through all stages and that the 1st Applicant had evaluated the interested party's bid and found it unresponsive. It was submitted that if the Respondent applied its mind to the regulations 47, 48, 49 and 50 together with section 66(4) of the PP&DA it would not have arrived at its impugned decision.

56. In the Applicant's view, the Respondent should strive to uphold the principles and values of fairness, equity, transparency, competitiveness and cost-effectiveness as well as the statutory aim in section 2 of the Act of promoting integrity and fairness of procurement procedures, increasing transparency and accountability in procurement procedures and increasing public confidence in procurement procedures.

Respondent's Case

57. In opposition to the application, the Respondent averred that on 20th April, 2016, Magic filed a Request for Review before the Respondent challenging the award of the Tender No. Contract No. BADEA/AWSB/OWSP/GOK-01/2015 for the Rehabilitation and Augmentation of Oloitoktok Water Supply and Sanitation Project. Immediately after receiving the Request for Review from Magic, the Respondent served a copy on the 1st *ex parte* Applicant and notified it of the pending Review and the suspension of the procurement proceedings in accordance with section 168 of the **Public Procurement and Asset Disposal Act**.

58. It was averred that during the hearing the 1st *ex parte* Applicant filed a notice of Preliminary Objection dated 27th April, 2016 challenging the Request for review and after determining the said objection which was dismissed, the Respondent then proceeded to hear and determine the same on its merits. According to the Respondent, upon considering the submissions of the parties and the documents before it in the Request for Review, the Respondent identified two issues for determination, namely:

1. Whether the procuring entity complied with the Board's orders and directions in Review No. 17 of 2016 given on 30th March, 2016 in carrying out the re-evaluation of the Applicant's tender.
2. Arising from 1 above what orders should the Board make in the circumstances of this case.

59. It was averred that the Respondent only took into consideration facts that were presented before it and were relevant in deciding the above issues and that its decision was based on its findings that:

- a. That the Board upon considering the dispute before it, directed the procuring entity to carry out a financial evaluation of the Applicant's bid and conclude the entire process within a period of 14 days from the date of the said decision;
- b. That in the absence of any challenge to the said decision the decision remains final and binding on the procuring entity which has no option but to obey the same;
- c. That if the procuring entity was dissatisfied with the said decision or found any error of law on the face of the decision, then the only option open to the procuring entity or the successful bidder was to challenge the decision by way of judicial Review or an appeal to the High Court;
- d. That on the procuring entity's assertion that it wrote a letter seeking clarification of the Board's decision, the Board is again of the respectful view that a decision of the Board cannot be set aside, varied or corrected on the basis of a letter and the only remedies available to an aggrieved party is either to apply for judicial review or lodge an appeal with the High Court an option that both the procuring entity and the successful bidder failed to take;
- e. That under order No (c) of the Board's decision given on 30th March, 2016, the Board specifically stated that the Applicant be subjected to financial evaluation while order No. (d) gave the time within which the financial evaluation was to be undertaken namely within a period of fourteen (14) days from the date of the Board's order. Order No. (d) cannot therefore be read in isolation from order No. (c);
- f. That the procuring entity did not carry out a financial evaluation of the Applicant's tender which was a breach of the decision of the Board given on 30th March, 2016;

60. It was therefore averred that the Respondent made a Decision on 11th May, 2016 and gave the following orders:-

- a. The Applicant's Request for Review dated 20th April, 2016 and which was filed with the Board on the same day be and is hereby allowed.
- b. The award of the Tender No. BADEA/AWSB/OWSP/GOK-01/2015 for the augmentation of

Oloitoktok Water Supply and Sanitation to M/s Machiri Limited be annulled.

c. In exercise of the powers conferred upon it by the Act the Board substitutes the decision of the procuring entity and awards the said tender to the Applicant M/s Magic General Contractors Limited at its tender price of Kshs. 868,021,884.

d. The procuring entity be and is hereby directed to issue a letter of award and complete this procurement which is long overdue within fourteen (14) days from the date hereof.

e. Since costs follow the event, and in view of the procuring entity's conduct in this matter which has been set out in this decision the Board directs that the procuring entity shall pay the costs of this Request for Review to the Applicant and that the said costs shall be agreed upon failing which the Applicant is at liberty to file its Bill of Costs with the Board for assessment.

61. The Respondent's position was that in making its decision, it considered all documents of evidentiary value placed before it by the parties and the submissions of the parties on each of the issues raised in the Request for Review and that its decision was made within its mandate, and the specific sections of the law on which the Board's decision was based have been expressly stated in the Board's decision. To the Respondent, the Applicants have not demonstrated in any way that the decision of the Respondent was outside the scope of the law governing it and that the Board took into account irrelevant considerations, or failed to accord the Applicant a right to be heard in breach of Article 50 of the Constitution. The Board expressly considered all the documents and submissions filed by the Applicants and all other parties to the Review in arriving at its decision by upholding the principle of natural justice.

62. It was further contended that the Applicants have not demonstrated that the Board was unreasonable in arriving at its decision or that the Board was guilty of unreasonable exercise of power and irrationality in arriving at its decision. The decision by the Board is grounded in law after review of all material placed before it and importantly in line with its mandate to uphold efficient public procurement processes. In addition, the Applicants have not demonstrated that the Board in arriving at its decision was guilty of any illegality, impropriety of procedure and irrationality to warrant the variance of the order of the Board.

63. The Respondent therefore was of the view that the applications lack merit and should be dismissed with costs to the Respondent.

64. In its submissions the Respondent reiterated the foregoing and argued that the present application is unmeritorious as it seeks to challenge the merits of the said decision albeit disguised as a judicial review application.

65. According to the Respondent, in its ruling delivered on 30th March 2016, it directed the 1st applicant to *inter alia* subject the tender of the interested party herein to financial evaluation alongside those of the three bidders who made it to the financial evaluation stage. The 1st applicant was further directed by the Respondent to act in strict compliance with the provisions of section 66(4) of the repealed Act and within the parameters set out under the Regulation 50 of the Public Procurement and Disposal Regulations 2006. No appeal or judicial review proceedings were ever filed with respect to the Respondent's decision of 30th March 2016 by any of the parties therein who might have been aggrieved by that decision.

66. It was submitted that the **Public Procurement and Asset Disposal Act No. 33 of 2015** came into force on 7th January 2016. The said Act at section 182(1) repealed the **Public Procurement and Disposal Act of 2005**. Section 1(1) of the 2015 Act in the Third Schedule that deals with Transitional Provisions provides:

(1) Procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act.

(2) For the purposes of subparagraph (1), procurement proceeding commences when the first

advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.”

67. The Respondent also cited section 8 of the Third Schedule, on administrative review etc. for existing proceedings which provides as follows:

“Parts III and XV of this Act shall apply, with necessary modifications, with respect to procurement and disposal proceedings commenced before the commencement date of this Act.”

68. It was submitted that the first advertisement in respect of the procurement in question was done on 22nd October 2015 and this was before the commencement of the 2015 Act hence the applicable law to the procurement in question is the repealed Act. However, the request for review no. 27 of 2016 that led to the impugned decision herein was filed before the Respondent on 20th April 2016 after the new Act had come into force. In the circumstances, Part XV of the 2015 Act was applicable to that request for review which part provides for Administrative Review of Procurement and Disposal Proceedings. It was therefore contended that in light of the above, both the repealed Act and the 2015 Act are applicable and part XV of the 2015 Act was correctly applied to the request for review no. 27 of 2016 filed before the Respondent.

69. It was submitted that since neither an appeal nor judicial review proceedings were instituted to challenge its decision delivered on 30th March 2016, the same remained final and binding on the parties to those proceedings since section 175(1) of the ***Public Procurement and Asset Disposal Act of 2015*** provides that:

A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board’s decision, failure to which the decision of the Review Board shall be final and binding to both parties.

70. The Respondent in support of its case relied on **Republic versus Public Procurement Administrative Review Board & 3 Others ex parte Fursys Kenya Limited [2014] eKLR.**

71. It was submitted that in the present case, the Respondent expressly stated in its orders of 30th March 2016 that the tender of the interested party herein was to be subjected to financial evaluation alongside those of the three bidders who made it to the financial evaluation stage and that this is distinguishable from the ***Fursys Case*** where this Court noted as follows at paragraph 66:

“I do not therefore agree that the re-evaluation was only restricted to financial re-evaluation otherwise the board would have expressly stated so. Under section 100(2) of the Act that decision was final and could only be revisited, as I have stated hereinabove to the limited extent that the 1st interested party failed to comply therewith. Otherwise if the 1st interested complied with the decision, under section 100 the Respondent had no powers to revisit the same.”

72. It was submitted that the impugned decision in Request for Review Number 27 of 2016 delivered on 11th May 2016 inevitably arose out of the non-compliance of the earlier decision of the Board delivered on 30th March 2016. Indeed the Respondent noted that the 1st applicant’s advocate acknowledged that notwithstanding the Board’s finding the procuring entity had declared Magic’s tender as unsuccessful based on the same grounds in the re-evaluation process. He further conceded that the procuring entity had acted in error on that account. The Respondent relied on **Republic versus Chairman, Retirement Benefits Authority Appeals Tribunal ex parte Local Authorities Pensions Trust (Laptrust) [2013] eKLR** where the Court stated as follows at paragraphs 36 and 37:

“Accordingly, I find nothing wrong in the Tribunal entertaining the proceedings whose effect was to ensure that its earlier decision was given effect since it had the power to give effect to

its decision. No provision of the rules should be so construed as to preclude a court from giving effect to its decision. To the contrary, any court must have the power to give effect to its decisions. See Peter Mburu Echaria vs. Priscilla Njeri Echaria Civil Appeal No. 75 of 2001 [2007] 2 EA 139; Mawji vs. Arusha General Store Civil Appeal No. 19 of 1969 [1970] EA 137.

In my view what the Respondent was doing was to simply give effect to its earlier decision and if it went wrong that would not be a ground for interference. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review.”

73. It was the Respondent’s submission that it had power to enforce its orders in the decision delivered on 30th March 2016 in Review Application No. 17 of 10th March 2016.

74. Based on section 173(c) of the *Public Procurement and Asset Disposal Act of 2015*, the Respondent contended that it had the power to grant the orders it issued since the said provision 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.

75. The Respondent further relied on the holding by the Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR in which it was observed that:

“The Review Board is a specialized statutory 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. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. 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.

In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.”

76. The Respondent submitted that the orders of judicial review are discretionary and relied on Republic versus Minister of Agriculture & 2 Others ex parte Equatorial Nuts Processors Limited & 3 Others [2013] eKLR in which this Court expressed itself at paragraph 26 as hereunder:

“Accordingly, even if I were to find that the application was merited the law is that the decision whether or not to grant the remedy of judicial review is discretionary. In Republic

vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and hence the Court will refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.”

77. It was the Respondent’s submission that in the circumstances of this case, even this Court were to find that the requisite grounds exist for the grant of judicial review remedies, the Court should decline to exercise its discretion in favour of the applicants based on the 1st *ex parte* applicant in disregarding the Respondent’s decision of 30th March 2016 which inevitably led to the present proceedings hence the 1st applicant should not be made to benefit from its wrongdoing by a decision in its favour.

78. It was however the Respondent’s position that from the foregoing, and based on the facts, the law and the judicial authorities cited above, this court ought to decline to grant the judicial review remedies sought and dismiss the present application with costs to the Respondent.

Interested Party’s Case

79. In opposition to the application the Interested Party, **Magic Construction Limited**, averred that it bid for the award of Tender No. **BADEA/AWSB/OWSP/GOK-01/2015** for the Rehabilitation and Augmentation of Oloitoktok Water Supply and Sanitation Project (“the Tender”) as advertised by the Procuring Entity on 22nd October, 2015 and upon the conclusion of the evaluation process, the Interested Party was notified that its bid was unsuccessful due to what the Procuring Entity 2nd Applicant termed as the Tender being “not successful technically”.

80. It was averred that being dissatisfied with the 1st Applicant’s thereon, the Interested Party filed Application No. 17 of 2016 before the Respondent herein and in its decision dated 30th March 2016, the Respondent allowed the Interested Party’s Request for Review on the following grounds *inter alia*:

i. That based on the provisions of clauses 1.1, 1.2, and 1.5 of the Preamble to the Bills of Quantities, the Bills of Quantities was a basic completeness check only and further that under Clause 1.6 of the Preamble to the Bills of Quantities, the fact that a bidder had omitted to price some item this could not affect the substantial responsiveness of a its (Interested Party’s) Tender.

ii. That the Respondent further explained the implication of failing to fill in an amount namely that such a bidder would not be paid for the omitted item when executed but those items would be covered by other rates or prices inserted in the Bills of Quantities.

iii. That the 2nd Applicant acted in error by treating the issue of examination and evaluation of Bills of Quantities as a criteria for substantial responsiveness of the Interested Party’s bid and that the Bills of Quantities ought to have been evaluated at Financial Evaluation Stage and that omission of a page ought not to have been resulted in the Tender being declared unsuccessful.

81. It was averred that in its determination, the Respondent made the following orders:-

- i. That the 2nd Applicant's decision awarding the tender to the 1st Applicant was annulled.
- ii. That the decision of the Procuring Entity declaring the Interested Party's tender as unsuccessful was set aside and the 2nd Applicant directed to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage;
- iii. That the re-evaluation process and the making of the award of the subject tender by the 2nd Applicant be completed within Fourteen (14) days from the date of the Ruling and that the Board Secretary shall provide the Board Secretary with the evidence of the compliance with the Board's orders within Fifteen (15) days from the date of the Ruling;
- iv. That in undertaking the Financial Re-evaluation exercise, the 1st Applicant was required to act in strict compliance with section 66 (4) of the **Public Procurement and Asset Disposal Act** and within parameters set out under Regulation 50 of the **Public Procurement and Disposal Regulations of 2006**;
- v. That every party was to bear its own cost

82. It was the interested party's case that the 1st applicant was under a statutory duty to comply with the decision of the respondent hence it was legitimately expected that in compliance with the decision and orders of the Respondent dated 30th March 2016 the 2nd Applicant would do the following :-

- i. That the 2nd Applicant would subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage.
- ii. That in undertaking the Financial Re-evaluation exercise, the 2nd Applicant would strictly comply with section 66 (4) of the **Public Procurement and Asset Disposal Act** and Regulation 50 of the **Public Procurement and Disposal Regulations of 2006**;
- iii. That in the alternative, it was legitimately expected that in the event that the 2nd Applicant, or any other party, failed to agree with the directions of the Board, it was expected that in full compliance with the law, such a party would have referred the matter to the High Court in line with section 100 (2) of the Act.

83. It was disclosed that on 14th April 2016 the 2nd Applicant wrote to the Interested Party informing them that their bid had been disqualified the following reasons.

- i. The interested Party's bid was incomplete; the Bills of Quantities for Ablution Blocks-Page 107 &112 were missing and it did not include Page 1 of Bill No 3-Oloitoktok town distribution pipeline R5-R6;
- ii. On specific experience, the Applicant did not attach completion certificates and projects citing not similar to the proposed works;
- iii. The Applicant did not attach any evidence to demonstrate required experience on laying of water pipe mains of Diameter 200 mm of approximately 10km in length;
- iv. On specific experience on laying of sewer pipes of diameter 450 mm for approximately 10 km the Applicant did not attach completion certificates and that the alleged works were only repair points of repairs;
- v. The Applicant's firm did not meet the criteria for 'bulk earthworks excavations of 5000m³ per month.

84. According to the interested party, the 1st Applicant completely disregarded the orders and directions of the Respondent and instead acted in defiance and contempt of the Respondent's orders of 30th March, 2016 by purporting to undertake a Technical Evaluation of the Interested Party's Tender instead of carrying out a financial evaluation as ordered. To the interested party, in its decision of 30th March, 2016 the Respondent, besides considering the rival arguments of the parties, had scrutinized the tender documents particularly the requirements therein.

85. It was contended by the interested party that the 1st Applicant's actions were a demonstration of lack of objectivity and by insisting on the incompleteness of the Bills of Quantities even after the second evaluation despite the detailed findings of the Respondent on this issue was an indication that the Respondent was keen on achieving a collateral purpose. To it, the only option as rightly indicated the Respondent in its decision of 11th May was to seek review the decision of the Respondent to before the High Court.

86. The interested party averred that the 1st Applicant had not offered any explanation, even though it conceded during the hearing in Application No. 27 of 2016 that its actions had been in contravention of and in blatant contempt the Respondent's decision of 30th April 2016.

87. According to the interested party, section 176(m) of the **Public Procurement and Asset Disposal Act** provides that a person who contravenes a lawful order of the Authority given under Part IV or the Review Board under Part XV commits an offence and is liable to the sanctions stipulated in subsection 176(2) of the said Act. In its view, contrary to the averments of the First Applicant, the decision of the Respondent of 11th May 2016 was not a review of its earlier decision of 30th May 2016 but was a review of its decision as communicated 14th April 2016 based on its Re-evaluation of the Interested Party's bid following the orders of the Board issued on 30th May 2016 hence the Interested Party was therefore legally entitled to seek Review of the 2nd Applicant's decision dated 14th April 2016 and the Respondent had the requisite jurisdiction to hear and determine Application No. 27 of 2016.

88. The interested party asserted that the decision of the Board dated 11th May, 2016 was lawful and made in exercise of the powers of the Board under section 98 of the **Public Procurement and Asset Disposal Act** where the Board correctly substituted the decision of the Procuring Entity with that of the Board upon finding failure in evaluation on the part of the Procuring Entity. According to the interested party, the said decision of 11th May, 2016 was not issued as a punishment to the Procuring Entity as insinuated by the Procuring Entity but was issued pursuant to exercise of the legal mandate of the Board namely administrative review of the decision of the Procuring Entity upon application by an aggrieved party.

89. The interested party further alleged that **Mr. Charles Njuguna's** conduct in the proceedings by representing the 1st and then the 2nd Applicant in Application No. 17 of 2016 and Application No. 27 of 2016, violated the provisions of confidentiality in section 44 of the **Public Procurement and Disposal Act** and greatly compromised the conduct of the re-evaluation process and subsequent proceedings to the prejudice of the Interested Party. Apart from other issues which in my view go to the merit of the 1st Applicant's decision and which in my view are not relevant to these proceedings, the interested party averred that orders issued by the Respondent had to be complied with and failure to do so by a procuring entity and any decision made contrary to the directions and orders of the respondent board is deemed null and void and of no effect in contravention of section 100(3) of the **Public Procurement and Asset Disposal Act**.

90. The interested party argued that as the 2nd applicant is still in contempt of the orders of the respondent, this court should not exercise any discretion in its favour and should instead dismiss the application with costs.

91. It was submitted by the interested party based on the decision of **Majanja, J** in **Royal Media Services & 2 Others vs. Attorney General & 8 Others [2013] eKLR** as upheld by Supreme Court in

Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR that collateral challenge to a decision ought not to be permitted. The interested party also relied on **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex Parte Fursys Kenya Limited [2014]**.

92. It was the interested party's case that pursuant to section 98(c) of the ***Public Procurement and Disposal Act*** the decision of the Respondent Board made on 11th May 2016 was within its statutory mandate and lawful hence there is therefore no basis for the grant of the orders of certiorari on the ground of ultra vires.

93. The Interested Party submitted that since there has been an inordinate lapse of time since the advertisement for tender bids was made in October 2015 and closed in December 2015 and as the Respondent made a rational decision on the review applications this Court should uphold the decision by the Respondent and to dismiss the two judicial review applications.

94. In view of the protracted delay the Interested Party submitted that this is one case where the High Court should direct the 1st Applicant to proceed with the signing of the contract with the Interested Party forthwith based on the Court of Appeal decision of **Echaria vs. Echaria [2007] 2 EA 139** at page 157.

95. The Interested Party urged this Court to consider the importance of the project to the members of the public. The project seeks to rehabilitate and augment the Oloitoktok water supply and sanitation. The Interested Party submitted that it is therefore in the public interest that the Decision of the Respondent Board be upheld and the project commences and relied on **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board And Another [2007] eKLR** where the Court of Appeal set out principle of public interest in the following terms:

“We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable”

96. The interested party also cited the holding in **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** where the court held as follows:

“We only emphasize that nothing would serve public interest better than adhering to the law on procurement and its objectives, as well as keeping delay in public procurement at the bare minimum. We have considered the instant application and the importance of the subject project to future generations.”

97. It was the interested party's case that the Applicants had not laid any basis to warrant the grant of the orders of *certiorari* and prohibition and relied on **Halsburys Laws of England**, Fourth Edition, Reissue volume 1(1) page 137 Para.128; **Kenya National Examination Council vs. Republic exparte Geoffrey Gathenji Njoroje and 9 Others [1997] eKLR**, and submitted that for the Order of Certiorari to be issued by the Court, the Court should establish that the decision being sought to be quashed was made without or in excess of jurisdiction or where the rules of natural justice were not complied with. With respect to the order of prohibition it submitted that the same does not lie in law as the decision of 31st March 2016 has taken effect and been enforced and the order of Prohibition sought by the 2nd Applicant has no basis. It is an injunction disguised as an order of Prohibition. That is not within the scope of Judicial Review.

98. With respect to the allegation that the Respondent's decision of 11th May 2016 was unreasonable, the

Interested Party submitted that the complaint by the Applicants is without any factual or legal basis and relied on **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited** (supra) where it was held that;

“With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In our view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.”

99. To the interested party, the Respondent’s decision was reasonably arrived at as a result of the 1st Applicant disobeying the directions made on 30th March 2016. The complaints by the Applicants not only lack merit but have not passed the wednesbury unreasonableness threshold or test as defined by this court since the decision was not outrageous in defiance of logic or moral acceptable standards.

100. On the issue of conflict of interest the interested party relied on **Uhuru Highway Development Ltd vs. Central Bank Ltd [2002] 2 EA 654** where the Court of Appeal held as follows:

‘We are satisfied that the real mischief or real prejudice were not rightly anticipated...we have no doubt whatsoever in our minds that in the particular circumstances of this case, mainly due to the role played by Counsel in bringing about the first and second Plaintiffs to agree to sign the charge, he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There will no doubt be prejudice.’

101. From the foregoing, the Interested Party submitted that the two applications for judicial review are without merit and should be dismissed with costs.

Determinations

102. 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.

103. Section 100(1) of the repealed ***Public Procurement and Disposal Act*** provided as follows:

A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board’s decision.

104. This was reflected in section 175(1) of the ***Public Procurement and Asset Disposal Act of 2015*** which provides that:

A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board’s decision, failure to which the decision of the Review Board shall be final and binding to both parties.

105. The dispute before me revolves to a large extent around the interpretation of the Respondent’s decision made in Review Application No. 17 of 2016 on 30th March, 2016. According to the applicants by the said decision the Respondent Board held as follows:

- a. The Applicant's Request for Review dated 10th March, 2016 be and is hereby allowed.*
- b. The Procuring entity's decision awarding the tender the subject matter of the Request for Review to the successful bidder be and is hereby annulled.*
- d. The procuring entity's decision declaring the Applicant's tender as unsuccessful as communicated vide the procuring entities letter dated 3rd March, 2016 is hereby set aside and annulled and the procuring entity is directed to subject the Applicant's tender to financial evaluation alongside those of the three bidders who made it to the financial evaluation stage.*
- d. The procuring entity shall complete the re-evaluation process including the making of the award of the subject tender within Fourteen (14) days from the date hereof and shall inform and provide the secretary of the Board with the evidence of compliance with the Board's orders within Fifteen (15) days from today's date.*
- e. The Board hereby directs that in carrying out the financial re-evaluation exercise, the procuring entity shall act in strict compliance with the provisions of section 66(4) of the Act and within the parameters set out under Regulation 50 of the Public Procurement and Disposal Regulations 2006.*
- f. In view of the nature of the orders made above, each party shall bear its own costs of this Request for Review.*

106. Whereas the interested party agrees that this was the determination, the interested party however contended that the said determination was based on the following grounds:

- i. That based on the provisions of clauses 1.1, 1.2, and 1.5 of the Preamble to the Bills of Quantities, the Bills of Quantities was a basic completeness check only and further that under Clause 1.6 of the Preamble to the Bills of Quantities, the fact that a bidder had omitted to price some item this could not affect the substantial responsiveness of a its (Interested Party's) Tender.**
- ii. That the Respondent further explained the implication of failing to fill in an amount namely that such a bidder would not be paid for the omitted item when executed but those items would be covered by other rates or prices inserted in the Bills of Quantities.**
- iii. That the 2nd Applicant acted in error by treating the issue of examination and evaluation of Bills of Quantities as a criteria for substantial responsiveness of the Interested Party's bid and that the Bills of Quantities ought to have been evaluated at Financial Evaluation Stage and that omission of a page ought not to have been resulted in the Tender being declared unsuccessful.**

107. It is true that in the letter dated 10th March, 2016, the 1st Applicant informed the interested party that the reason why the latter's bid was unsuccessful was because the interested party submitted an incomplete Bills of Exchange. It is clear that the reason why the interested party's bid failed the technical evaluation was due to the said reason. The Respondent considered this issue and expressed itself as follows:

“The Board therefore finds that the procuring entity acted in error in treating the issue of examination and the evaluation of the Bills of Quantities at the preliminary evaluation stage or as a criteria for determining the substantial responsiveness of the Applicant's bid. An examination and an evaluation of the rates, prices or the sums in the Bill of Quantities ought to have been done at the financial evaluation stage and the omission of an item from the Bill of Quantities including missing pages ought not to have resulted in a bidder being declared unsuccessful technically. The Board therefore holds that the procuring entity ought not to have declared the Applicant's bid as unsuccessful on that ground and ought to have evaluated

the price set in the Applicant's Bill of Quantities at the financial stage and if it found that the Applicant had omitted to price any items then the said items ought to have been deemed to have been covered by the rates inserted in the Bills of Quantities."

108. It was this finding that informed to a large extent the decision of the Board made on 30th March, 2016.

109. From this finding it is clear that the Board was of the view whether rightly or wrongly that the decision to lock out the interested party at the stage of technical evaluation had no basis and that the interested party ought to have proceeded to the financial evaluation stage. As to whether this finding was correct cannot be the subject of these proceedings for the simple reason that the said decision was not challenged and pursuant to section 100(1) of the PPDA or section 175(1) of the PPADA the decision acquired the status of finality.

110. The applicants have however based their arguments in support of the 1st Applicant's decision to undertake the technical evaluation on the determination by the Respondent that:

"The Board hereby directs that in carrying out the financial re-evaluation exercise, the procuring entity shall act in strict compliance with the provisions of section 66(4) of the Act and within the parameters set out under Regulation 50 of the Public Procurement and Disposal Regulations 2006."

111. In Republic versus Public Procurement Administrative Review Board & 3 Others ex parte Fursys Kenya Limited [2014] eKLR this Court held that:

"..where a Court or Tribunal has nullified the first process and ordered that either a fresh process be undertaken or that the process be undertaken in accordance with specified directions, the body or authority to which the directions are directed is not entitled to ignore the law or directions in its fresh undertaking. If it does so a party aggrieved would still be properly entitled to move the body which made the directions or gave the orders for the nullification of a process not undertaken in compliance with the directions or orders and would not by that mere fact fall foul of the doctrine of *res judicata*. Therefore, if in the first decision made by the Review Board, the decision of the 1st interested party was nullified and directions given on how to carry out the Tender and the 1st interested party in purporting to comply therewith fell foul of the said directions, the 2nd interested party would not be barred from moving the Respondent once again to have the second decision by the 1st interested party nullified since the second challenge arose out of the changed circumstances given rise to by the decision of the Board which circumstances arose after the first decision of the 1st interested party. To contend therefore that the 2nd interested party ought to have appealed against the second decision of the 1st interested party is to miss the point...It is therefore my view that taking into account the contentions made by the 2nd interested party the Respondent was properly entitled to and had jurisdiction to entertain the second challenge."

112. In this case the 1st Applicant had carried out a technical evaluation and made its decision which decision the Respondent found to have been wrongfully arrived at in light of the facts as presented before the Board. Whereas it is true that only in executional circumstances should the Board substitute its decision for that of the procuring entity, 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.

113. Similarly, section 98(c) of the repealed Act empowered the Board to:

Substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings.

114. 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.”

115. In other words what this Court was saying is that whereas the Respondent has the power to substitute its decision for that of the procuring entity such power must be lawful. In this case no challenge was taken to the lawfulness of the said decision and the issue cannot be competently raised in these proceedings.

116. I therefore agree with the Respondent and the interested party that the 1st Applicant had no business revisiting the issue of the technical responsiveness of the interested party's bid and was bound to proceed and carry out a financial evaluation of the tender of the interested party alongside the other bidders who had made it to the financial evaluation stage. The Applicants cannot contend at this stage that it was unlawful for the 1st Applicant to carry out a financial evaluation of the interested party without carrying out the latter's technical evaluation since the interested was, whether rightly or wrongly, given a clean bill of health in terms of its technical evaluation by the Respondent and that stage had been overtaken without any challenge.

117. The next issue however is whether the Respondent could lawfully award the tender to the interested party in the circumstances of this case. 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.”

118. After purporting to carry out a re-evaluation pursuant to the decision of the Respondent of 30th March, 2016, the 1st Applicant on 14th April 2016 wrote to the Interested Party informing the latter that

its bid had been disqualified the following reasons.

- i. The interested Party's bid was incomplete; the Bills of Quantities for Ablution Blocks-Page 107 &112 were missing and it did not include Page 1 of Bill No 3-Oloitoktok town distribution pipeline R5-R6;
- ii. On specific experience, the Applicant did not attach completion certificates and projects citing not similar to the proposed works;
- iii. The Applicant did not attach any evidence to demonstrate required experience on laying of water pipe mains of Diameter 200 mm of approximately 10km in length;
- iv. On specific experience on laying of sewer pipes of diameter 450 mm for approximately 10 km the Applicant did not attach completion certificates and that the alleged works were only repair points of repairs;
- v. The Applicant's firm did not meet the criteria for 'bulk earthworks excavations of 5000m³ per month.

119. It is clear that the 1st Applicant did not carry out the financial evaluation as directed by the Respondent. The Respondent itself appreciated this when it found that the procuring entity declined to carry out a financial evaluation. This Court in **Republic –vs- The Public Procurement and Administrative Review Board, The Attorney General, Daniel Outlets exparte Numerical Machining Complex Limited - Nai JR No. 261 of 2015** expressed itself on the issue as follows:

“In this case the impugned decision was taken before the Financial Evaluation was undertaken. Regulation 50(1) of the Regulations provides that:

Upon completion of the technical evaluation under Regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

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 1st 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.”

120. The Respondent did not purport to have evaluated the bids made by the interested party, let alone the other bids in order to arrive at the decision that the interested party was the one who deserved to be awarded the tender. Article 227 of the Constitution provides that:

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.

121. This Court has held before that Article 227(1) provides the minimum threshold that any public procurement must meet. This Court has appreciated that Parliament is empowered to enact legislation to prescribe a framework within which policies relating to procurement and asset disposal are to be implemented and may in so doing provide for categories of preference in the allocation of contracts; the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination; sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and 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. Pursuant to the said power, Parliament enacted the repealed ***Public Procurement and Disposal Act*** (Cap 412A) Laws of Kenya, and the current ***Public Procurement and Asset Disposal Act***, No. 33 of 2015. Section 2 of the repealed Act provided that:

The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives—

- (a) to maximise economy and efficiency;***
- (b) to promote competition and ensure that competitors are treated fairly;***
- (c) to promote the integrity and fairness of those procedures;***
- (d) to increase transparency and accountability in those procedures; and***
- (e) to increase public confidence in those procedures;***
- (f) to facilitate the promotion of local industry and economic development.***

122. Section 3 of the ***Public Procurement and Asset Disposal Act***, on the other hand provides as follows:

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- (a) the national values and principles provided for under Article 10;***
- (b) the equality and freedom from discrimination provided for Under Article 27;***
- (c) affirmative action programmes provided for under Articles 55 and 56;***
- (d) principles of integrity under the Leadership and Integrity Act, 2012, No. 19 of 2012;***
- (e) the principles of public finance under Article 201;***
- (f) the values and principles of public service as provided for under Article 232;***
- (g) principles governing the procurement profession, international norms;***
- (h) maximisation of value for money;***
- (i) promotion of local industry, sustainable development and protection of the environment; and***
- (j) promotion of citizen contractors.***

123. It is however my view that in public procurement and disposal, the starting point is the Constitution. A procurement must therefore, before any other consideration is taken into account whether in the parent legislation or the rules and regulations made thereunder, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words any legislative consideration which does not espouse these ingredients can only be secondary to the said Constitutional dictates. In my view, cost-effectiveness for example 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. 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.”

124. 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.”

125. In other words the spirit of section 66(4) of the repealed Act which provided that the successful tender shall be the tender with the lowest evaluated price required that an evaluation be first undertaken and only after the tender passed all the stages of evaluation would the consideration of the lowest tender come into play.

126. In this case, the Respondent advanced no reason why it decided to award the tender to the interested party and to no other bidder. 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.”

12. 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 2nd 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.”

128. From the decision arrived at by the Respondent, it would seem that the Respondent’s decision was informed by the fact that the procuring entity, the 1st Applicant, failed to challenge its decision and also failed to carry out a financial evaluation of the applicant’s tender in spite of the Board’s order and

directions. In other words the Respondent's decision seemed to have been informed by the need to penalize the 1st Applicant. In my view, the exercise of judicial or quasi-judicial authority must not be based on anger but must be devoid of emotions, whim or caprice. It must be based on facts and not rustic justice. Here the Constitution and the legislation provide guidance on what ought to be considered. Punishment of the procuring entity is not one of the grounds for awarding a tender and to take that as the primary motive amounts to taking into account an irrelevant matter and failing to take into account a relevant one. As was held in Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55:

“A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore. The considerations that a decision-maker is bound to consider or bound to ignore in making the decision are determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they must be determined by implication from the subject matter, scope and purpose of the statute”

129. The law is clear that a Tribunal must in arriving at its decision ask itself the right question. In Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090, the Court expressed itself as follows:

“The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law...It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void.”

130. In this case, in deciding which bidder ought to be awarded the tender, the conduct of the procuring entity is not one of the grounds which the Respondent is required to take into account especially where the other bidders have nothing to do with that conduct.

131. It was further contended that that the 1st Applicant had procured the funds to carry out the subject project from the Arab Bank for Economic Development in Africa (BADEA) and that the award of the subject tender was subject to the approval of the financier, BADEA. The Respondent has not commented on this. In Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006, the Court held:

“If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a ‘determination’ within the meaning of empowering legislation was accordingly a nullity...Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law...It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

132. I have considered the issues raised in this application and it is my view and I so hold that the Respondent's decision awarding the subject tender to the interested party cannot be upheld. In its decision the Respondent failed to appreciate that its decision directing the 1st Applicant to carry out a financial evaluation of the tender of the interested party alongside the other bidders who had made it to the financial evaluation stage had not been complied with hence the stage for the award of the tender had not

been reached. Its decision was therefore prematurely arrived hence the decision amounts to irrationality.

133. Secondly, the said decision failed to appreciate that there were other bidders who stood to be adversely affected without their bids being taken into consideration before awarding the tender to the interested party in breach of Article 227 of the Constitution and section 3 of the **Public Procurement and Asset Disposal Act, 2015**.

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

Order

135. In the result, an order of certiorari is hereby issued removing to this Honourable Court for purposes of being quashed the decision of the Public Procurement Administrative Review Board dated and delivered on 11th May, 2016 in Review Application No. 27 of 20th April, 2016: Magic General Contractors Limited =versus= Athi Water Services Board in respect of tender number BADEA/AWSB/OWSP/GoK/01/2015 for Rehabilitation of Water Supply and Sewerage for Oloitoktok Town Project, to the extent that the Respondent awarded the said tender to the interested party M/s Magic General Contractors Limited and directed the 1st Applicant to issue a letter of award and complete the procurement within fourteen (14) days from the date of the decision, which decision is hereby quashed.

136. For avoidance of doubt the 1st Applicant, if minded to proceed with the tender and subject to the provisions relating to termination of the tender, is hereby directed to subject the Interested Party's tender to Financial Evaluation alongside those of three bidders who made it to the financial evaluation stage.

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

138. Orders accordingly.

Dated at Nairobi this 9th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Agwara for the 1st Applicant

Mr Njuguna for the 2nd Applicant

Mr Maina for the Respondent

Mr Ouma for Mr Kamau for the interested party

CA Mwangi