REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION & JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 552 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY OR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT NO. 33 OF 2015

IN THE MATTER OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REPUBLIC……...APPLICANT

AND

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD..…..……..….RESPONDENT

AND

PARITY PERFORMANCE

COMPLIANCE LIMITED…….....…….1ST INTERESTED PARTY

COUNTY GOVERNMENT OF KISUMU.....2ND INTERESTED PARTY

EX PARTE:

INTERNATIONAL RESEARCH AND DEVELOPMENT ACTIONS LTD

JUDGEMENT

Introduction

1. By a Notice of Motion dated 17th November, 2016, the ex parte applicant herein, **International Research and Development Actions Ltd**, seeks the following orders:

1. **That the honourable court do issue an order of Certiorari to remove into the high Court**

and quash the decision by the respondent delivered on 7/11/1016

2. That an order of mandamus be directed at the respondent to undertake afresh the hearing and determination and to consider all evidence and legal provisions regulating the tender in question and legal provisions regulating procurement.

3. That costs of and incidental to this application be provided for.

4. That such further and other reliefs/orders that this honourable court may deem just and expedient to grant

Applicant's Case

2. According to the ex parte applicant, on or about 19th July 2016, the 2nd Interested Party, the County Government of Kisumu (hereinafter referred to as "the County Government") advertised Tender No. CGK/G&A/001/2016-2017 for Consultancy Services for the Design, Development and Implementation of an Electronic Human Resource Management System. Pursuant to the said advertisement, the Applicant on the same day obtained a copy of the Standard Tender Document and submitted its bid.

3. It was averred that the Tender Document/Notice specified, *inter alia*, that "Tenders must be accompanied by a bid in the form of bankers cheque or bank guarantee of 2% of the total bid sum and must be delivered to the County Secretary Government of Kisumu P.O. Box 2738 – 40100 Kisumu, 9th Floor or dropped in the Tender Box on 2nd Floor of County Offices on or before Tuesday, 2nd August 2016, 12.00 noon. It also provided for the parameters that were to be adhered to by bidders and the County Government.

4. The applicant averred that on or about 1st August 2016, it lodged its technical and financial proposal for consideration by the County Government and that the bids were opened by the County Government on 3rd August 2016 where it was expected that all shortlisted applicants would attend. According to the applicant, the Tender Checklist clearly showed each Bidder's Bid bond amount and revealed that whilst the 1st Interested Party, **Parity Performance Compliance Limited's** (hereinafter referred to as "**Parity**") financial bid was indicated, in its documents and those of the County Government, as 13,995,400/=, what it disclosed as 2% of its bid price showed that its actual financial bid was Kshs. 25,000,000/=. The applicant was apprehensive that **Parity** may have received confidential information and thereafter doctored its bid.

5. The applicant averred that on 22nd August 2016, the County Government's Tender Evaluation Committee considered various technical bids and concluded that **Prestige Management Solutions Limited**, **Parity Performance and Compliance Limited** and **International Research and Development Action Limited**, the applicant, attained the required pass mark of 55% and were therefore allowed to proceed to the financial evaluation stage.

6. It was the applicant's case that on 23rd August 2016, the County Government's Tender Evaluation Committee considered the financial bids of the above three bidders who had passed the technical evaluation stage and on 8th September 2016, notified the Applicant that it was the successful bidder. The letter required the Applicant to accept formally and provide a performance bond of 0.5% of the contract sum within 14 days from the date of the letter. On 10th September 2016, the Applicant accepted the tender and enclosed the requested performance bond. Subsequently, parties entered into a contract that was executed by both parties on 28th September 2016.

7. Under clause 3.3 of the Contract, the Applicant was to prepare and submit an Inception Report on or before 3rd October 2016. It was to also acquire hardware and provide a software progress development report on or before 17th October 2016. It was revealed that the Applicant has since prepared and submitted the Inception Report, acquired hardware and software and provided a Progress Report as

required by the Milestones contained at Clause 3.3 of the Contract. Further, the Applicant has already expended significant sums of money for purposes of ensuring that it meets the timelines and provide quality services which money was spent both on the hardware and human resource that was required to prepare reports and acquire both the hardware and software. Having completed the required milestones within the provided time, the Applicant invoiced the 2nd Interested Party on 10th October 2016 for the agreed 30% of the Consultancy Fees being Kshs. 3,861,582/= .

8. However, on 18th October 2016, **Parity** lodged a Request for Review before the Respondent Board and the applicant was notified of this development only on 1st November 2016 and that the 2nd Interested Party had comprehensively responded to the issues raised therein. The applicant immediately instructed its Advocates to file a preliminary objection since the Request for Review had been filed out of time. In the meantime, it also requested for documents from the 2nd Interested Party to enable it properly instruct the Applicant's Advocates. Thereafter, the hearing of the Request for Review was conducted on Friday, 4th November 2016 and in its decision delivered on Monday 7th November 2016 at about 3:00pm, the Respondent annulled the Award to the Applicant's successful bid and ordered that the same be awarded to **Parity** within seven (7) days of the date of the decision.

9. The applicant averred that a hard copy of the Award was only released to them on Thursday, 10th October 2016 with the consequence that the Applicant had less than four (4) days to lodge a challenge before this Court. To the applicant, this was in contravention of rules of natural justice and was intended to defeat section 175(1) of the ***Public Procurement and Asset Disposal Act*** (hereinafter referred to as "the Act") which grants aggrieved parties fourteen (14) days within which to move the High Court for Judicial Review orders. It was further contended that the Respondent, in its decision, failed to consider various pertinent issues including that the County Government complied with the evaluation and Award criteria provided for in the Tender Document and law, that it complied with section 86 of the Act, that it had not settled its indebtedness with the Kenya Postal Corporation, that **Parity**'s financial bid may have been doctored and that the Applicant had already commenced works and will suffer immense damage and losses.

10. The applicant deposed with regard to the specific issues raised by the Respondent, that:

a) The Tender Document did not provide that the tender would be awarded to the bidder with the highest combined technical and financial score and/or as provided by sections 86(1)(b) and 127 of the Act as decided by the Respondent at page 20 of its Ruling. In fact, the Award Criteria was as provided under Clause 26 of the Tender which provided that *"Subject to paragraph 10, 23 and 28 the Procuring entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the **lowest evaluated tender**, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily."* This was an express requirement of the Tender and not a new requirement as alleged by **Parity**;

b) Indeed, the last paragraph of the Ruling at page 21 clearly states that **"The Award ought to have been given pursuant to Section 86(1) (a)"** which provides that the successful tender shall be the one who meets any one of the following as specified in the tender document- **(a) the tender with the lowest evaluated price;"** At the second paragraph of page 23 of the Ruling, the Respondent reiterates the correct position which is that the award ought to have been made in accordance with section 86(1) (a) of the Act. This is the only criteria specified in the tender document, at Clause 26, as the Award Criteria. Unfortunately, it immediately contradicts itself by a finding that the award ought to have been made to the bidder with the highest technical score;

c) At page 22 of the Ruling, the Respondent made various observations regarding the professional opinion by **Mr. Titus Odhiambo Owiti**, the County Government's Head of Supply Chain Management. The Respondent failed to consider the provisions of section 84 (1) which provides that ***"The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a***

signed professional opinion to the accounting officer on the procurement or asset disposal proceedings";

d) Section 84(3) provides that ***"in making of a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in sub-section (1)."*** Whilst sections 84(1) and 84(3) are couched in mandatory terms, section 84(2) is only optional;

e) It is clear that contrary to the Respondent's extremely flawed reasoning at page 22 that "*the Board notes that the role of the head of procurement function in the evaluation process is limited to providing a professional opinion to the accounting officer on the procurement proceedings* ***in the event of dissenting opinions between tender evaluation and award recommendations***, the head of procurement must actually provide his/her professional opinion in compliance with section 84(1) and that the opinion must be considered by the accounting officer who is mandated with awarding the tender in accordance with section 84(3) of the Act;

f) From the tabular representation, it is clear that with the Applicant having had scored 85% as compared to that of **Parity**'s 89.1, both bidders had demonstrated that their bids were substantially responsive. However, regarding the lowest price, it is clear that the Applicant's price was the lowest. On this basis, the County Government was bound to award the tender to the Applicant;

g) The professional opinion provided by **Mr. Titus Odhiambo Owiti**, which is in accordance with section 84(1) of the Act, did not vary the Award as alleged. The Award by the County Secretary, who is the County's accounting officer and final decision maker is only bound to consider that the said professional opinion is in accordance with Clause 26 of the Tender Document, sections 84 (1) (2) and 86(1) (a) of the Act;

h) With regard to notification, it has now emerged that the County Government wrote letters to all bidders though unfortunately, the same were not delivered since it had not settled its bills with the Kenya Post Office. This flaw by the County Government should not be unfairly visited on the Applicant; and

i) Additionally, whilst **Parity** later indicated that its financial bid was for Kshs. 13,995,400/-, at the opening of the tender, it clearly showed that 2% of its bid price was Kshs. 500,000/-. This translates to approximately Kshs. 25,000,000/. It is clear that there were unscrupulous changes to the tender documents contrary to specific provisions of the Tender Documents and the Act.

11. Based on the foregoing the applicant submitted that he Respondent misunderstood and misapplied the law thereby arriving an illegal Ruling. In support of this position the applicant relied on **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, at paragraph 165 where the Court, *inter alia*, held as follows:

> **"This Court cannot countenance illegalities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role to do so."**

12. It was submitted based on the requirements of Article 227 of the Constitution which provides for fairness, equity, transparency competitiveness and cost-effectiveness were contravened by the Respondent's insistence on awarding the tender to the highest bidder, 1st Interested Party herein, despite clear provisions at clause 26 of the Tender Document, sections 84, 85 and of the ***Public Procurement and Asset Disposal Act*** and evidence showing that it was the Ex-parte Applicant whose bid was substantially responsive.

13. It was in addition submitted that the Respondent's decision that the Tender be awarded within 7 days contravenes the Ex-parte Applicant's right of appeal as provided under section 175 of the ***Public Procurement and Asset Disposal Act***.

14. The applicant submitted that the contradictions in **Parity**'s financial bid were not taken into account by the Respondent and that this defeated the Ex-parte Applicant's legitimate expectation as defined by **Lord Diplock** in **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935.**

15. To the applicant, based on Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935, it had enumerated several illegalities that this Honourable Court ought not to countenance. In its view, the attempts to raise preliminary objections v*i*a an affidavit and is not supported by any law as this contravenes settled law on preliminary objections and **Parity**'s own averment that an affidavit should not contain matters of law save when it is clear that it is based on the advice from a party's Advocate.

2nd Interested Party's Case

16. The 2nd interested party, the County Government of Kisumu, supported the application.

17. According to the County Government, it received a copy of the respondent's decision on 11th November, 2016 which decision had not been effected as at 14th November, 2016 when these proceedings were drawn to its attention.

18. According to the County Government, the 2ndinterested party evaluated the presented bids awarded the tender the subject matter of the suit herein, pursuant to the criteria stated in the tender document which decision was based on the fact that the applicant presented the lowest bid based on the financial bids received from the three bidders that passed the technical evaluation stage.

19. It was averred that in awarding the tender the County Government adhered to the doctrines of fairness, equity, transparency, competitiveness and value for money as a matter of public policy and that the applicant's bid had the lowest evaluated price and resulted in a saving of Kshs. 1,123,460.00 compared to the bid by **Parity**. In its view, **Parity**, just like any other bidder, by executing the Form of tender, understood that the County Government was not bound to accept the lowest or any tender it may receive.

20. The County Government asserted that the expeditious and cost effective implementations of the project under the tender is critical to it for purposes of enhancing the efficiency and productivity of its civil servants and that the 1st interested party herein among other tenderers was bound by the terms of the tender.

21. It was disclosed that the contract between the applicant and the County Government was executed on 28th September, 2016, well within the tender validity period of 120 days from 3rd August, 2016 which was within 14 days of the notification.

22. The County Government averred that prior to commencement of review proceedings at the respondent, the applicant had commenced work under the contract by preparing the inception report and invoiced the 2nd interested party for 30% of the project work that is Kshs 3, 861, 582.00 hence it was in the interest of public policy that taxpayers money by put to efficient use by way of full implementation of the contract between the applicant and the County Government.

Respondent's Case

23. The Application was opposed by the Respondent, the Procurement Board.

24. According to the Respondent, it received **Parity**'s Request for Review in the matter of Tender No. CGK/G&A/001/2016-2017 for Consultancy Service for the Design, Development and Implementation of an Electronic Human Resource Management System filed on 18th October, 2016. It subsequently heard all parties who attended the hearing, considered their submissions, determined the application for review

and delivered its ruling on 7th November, 2016 by which it allowed the request for review by the Applicant.

25. It was further averred that pursuant to section 173 of the ***Public Procurement and Asset Disposal Act, 2015*** the Respondent annulled the said Tender award and ordered the Procuring Entity (the County Government) to comply with the recommendations of the tender evaluation committee and to complete the procurement process in accordance with the law within 7 days of the date of the Board's decision.

26. It was the Respondent's position that in arriving at the above decision, it was alive of all facts raised by the parties and was well informed of all the provisions of the law applicable to the raised facts and issues, including the provisions of the Constitution of Kenya, 2010, the Act, and other legislation.

27. With respect to the applicant's allegation that it had less than four days to challenge the Board's decision in this Court after the Board released a hard copy of its decision on 10th November, 2016, the Respondent averred that it delivered its ruling on 7th November, 2016 which provided up to 21st November, 2016 for the Applicant to file its application at the High Court. The Applicant therefore had more than ten (10) days from 10th November, 2016 to file its application with the High Court.

28. According to the Respondent, the decision by the Board was reasonable, rational and lawful hence the Applicant's application was made in bad faith, had no merit and was only calculated to harass the credibility of the Respondent's mandate and functions, while ultimately eroding the public's confidence in procurement procedures and processes.

29. To the Respondent, it has continued to uphold procurement procedures as required by law and has promoted the integrity and fairness of these procedures and processes, and has not flouted any law nor acted in excess of their powers.

30. It was submitted on behalf of the Respondent that this application is fatally defective and or incompetent and the same ought to be struck out with costs to the respondent and this submission was based on the provisions of Order 53 Rule 1(2) of the ***Civil Procedure Rules 2010*** In this case, it was averred that the applicant's Statement was devoid of the grounds upon which the present applicant was based and the Respondent supported this position by relying on **Monica Karimi Njiru vs. Egerton University [2011] eKLR** where it was held that:

> **"The statement should contain nothing more than the name and description of the applicant, the relief sough, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit"**

31. Further reliance was placed on **Joseph Kiarie Watenga t/a Front Bench Auctioneers vs. Chief Magistrate Court Kiambu & Another [2016] eKLR** where it was held:

> **"It is however clear that the applicant did not set out the grounds of his application as required under Order 53 Rule 1(2) of the Civil Procedure Rules. The only grounds however appear in paragraphs 21 to 24 of the statement… In my view a party is not entitled to raise issues in the submissions which are not grounded on the statement"**

32. According to the Respondent, it is now trite law that judicial review proceedings are concerned with the decision making process and not the merits of the decision and that the High Court's jurisdiction in judicial review is circumscribed by the provisions of the ***Law Reform Act*** which confers to the court the jurisdiction to issue any of the three judicial review orders; section 8 of the Act provides that the High court shall not issue any of the orders in the exercise of its civil or criminal jurisdiction, it goes further to state that the orders will be issued in any case where the High Court in England is by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938, of the United Kingdom empowered to make an order of Mandamus, Prohibition or Certiorari the High Court shall have power to make like order.

33. It was submitted that the foregoing has led to the development of fairly well settled criteria for issuance of the orders; these include illegality, impropriety of procedure and irrationality (the three "I's") as restated in **Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43** and **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. The Respondent further cited in its support **Municipal Council of Mombasa vs. Republic & Umoja Constultants Ltd [2002] eKLR** where it was held as follows:

> "**judicial review is concerned with the decision making process, not with the merit of the decision itself: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant maters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or here was not sufficient evidence to support the decision"**

34. In the respondent's submission, this application seeks to question the merits of the decision delivered on 7th November 2016 and not the process arrived at in making the said decision and relied on **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** where it was held that;

> **"the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power"**

35. Based on **Seventh Day Adventist Church (East Africa) Limited vs. Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR**, ***Halsbury's Laws of England,*** Fourth Edition, Reissue Volume page 137 para.128, and **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] e KLR** the Respondent drew the boundaries for reviewing the decisions of the Review Board.

36. In the Respondent's view, this Application is an appeal disguised as a Judicial Review Application and should not be entertained and relied on **Republic vs. Kenya Power & Lighting Company Limited & Another [2013]e KLR** .

37. It was further contended that it is important to appreciate that judicial review orders of certiorari, mandamus and prohibition are public law remedies and the court has the ultimate discretion to either grant or not to grant the remedies to the successful applicant. In the circumstances of this case, the Respondent urged the Court to decline the issuance of the orders sought since courts while exercising their judicial review jurisdiction have been alive to considerations of public interests in declining the issuance of judicial review even where a party has made out a case of issuance of orders of judicial review.

38. It was therefore argued that the application herein does not meet the basic tenets of Judicial Review and should be dismissed in its entirety with costs to the respondent.

1st Interested Party's Case

39. On the part of the 1st interested party, **Parity Performance Compliance Limited,** it was averred that it is not illegal for a bidder to submit a bid bond that is higher than 2% of its financial bid and further that the Applicant is estopped from complaining against the **Parity**'s bid bond as it submitted a bid bond of Kshs. 280,000.00 representing 2.18% of its bid price of Kshs. 12,871,940.00.

40. Parity averred that the Applicant had not justified its apprehension nor annexed any evidence to demonstrate that **Parity** received confidential information and that it doctored its financial bid. Further the applicant had not adduced any evidence to demonstrate it reported the disclosure of confidential information by the County Government to **Parity** to the police or to the Public Procurement Regulatory Authority for necessary action and was therefore complicit and or an accomplice.

41. It was **Parity**'s case that there was no evidence to demonstrate how the County Government notified the Applicant of the existence of the award letter dated 8th September, 2016 and averred that it was not notified of the outcome of the tender process. It was therefore its view that the contract entered into on 28th September, 2016 between the County Government and the Applicant was clandestine, unfair, unlawfully and un-procedural and was not binding on the County Government as no evidence was annexed to demonstrate that one **Humphrey O. Nakitari** the County Secretary was designated an accounting officer or that he was authorised by the accounting officer to sign it. Further, the contract was incompetent as the Applicant had annexed no evidence to demonstrate that it had submitted a performance security.

42. It was **Parity**'s position that by opting to file only a preliminary objection to the Request for Review, the Applicant took a gamble and thereby squandered its opportunity to present all its evidence to the Respondent for its consideration prior to making the decision subject hereof. It was therefore contended that the applicant had not demonstrated how the Respondent violated the Act and Tender No. CGK/G&A/001/2016-2017 or the provisions thereof. To **Parity**, **t**he Respondent heard all parties before it and duly considered all the material before it and made the decision subject hereof in exercise of its statutory powers and that the Applicant did not suffer any prejudice as it was able to file the application herein within 4 days of receipt of the typed Award.

43. It was asserted that the Respondent considered the evaluation criteria in the tender document and the Evaluation Committee recommendation that the tender be awarded to **Parity** who had scored the highest combined score and that in so doing the Respondent duly considered the evaluation and award criteria provided in the tender document.

44. Parity questioned why or how the County Government awarded the tender to the Applicant without regard to the recommendation for contract award by the Evaluation Committee.

45. It was averred that there was no material placed before the Respondent to demonstrate that the County Government had any outstanding debts with the Kenya Postal Corporation or the relevance of the averment. To **Parity**, it was undisputed by the Applicant that the tender was for procurement of consultancy services whose evaluation and award criteria was on the basis of the proposal with the highest combined score and the Applicant could not rely on typing errors to by the Respondent to impose a different criteria.

46. It was contended that there was no evidence of the notification of the award and that the 1st Interested Party's tender bid amount of Kshs. 500,000.00 was not in issue before the Respondent and it therefore did not hear the parties on the same. In any case the Applicant had not demonstrated the prejudice or hardship it suffered as a result of **Parity**'s submission of a tender bid of Kshs. 500,000.00 and given that the Applicant itself submitted a bid bond of Kshs. 280,000.00 which represented 2.18% of its bid price of Kshs. 12,871,940.00.

47. It was therefore **Parity**'s case that the Applicant failed to demonstrate how the Respondent's order contravened the law or was unfair or the loss or damage it would suffer if the notice of motion is not allowed.

48. Parity took the view that the Chambers Summons dated 14th November, 2016 was incompetent as it did not disclose the Applicant and or the *ex-parte* Applicant and that the Statement dated 14th November, 2016 was incompetent as it contained facts and was signed by the advocates as opposed to the Applicant. In addition, the Statement dated 14th November, 2016 was incompetent as it did not disclose any grounds

on which judicial review orders of certiorari and *mandamus* could issue. **Parity** also took issue with the fact that the Motion was intituled as the Chamber Summons and that the Verifying Affidavit was fatally incompetent as it did not verify the facts relied on.

49. In sum **Parity**'s position was that the application herein was fatally incompetent and lacked merit and ought to be struck out and dismissed with costs.

50. It was submitted on behalf of **Parity** that power to issue orders of *Certiorari* is provided for in Article 23(3)(f), 47(3) and 165(6)&(7) of the Constitution of Kenya, 2010 read with Section 7(1)(a) of the ***Fair Administrative Action Act, 2015*** and that the grounds upon which an order of *Certiorari* can issue are now provided under Section 7(2) of the ***Fair Administrative Action Act, 2015***. In this case however, the Ex-Parte Applicant's Statement does not contain any grounds upon which the application is based. However, from its submissions it alleges that the Respondent's decision is tainted with illegality, procedural impropriety and irrationality which submissions are not supported by any fact or evidence.

51. It was therefore submitted that there was no illegality in the Respondent's decision as it accorded with section 86(1)(b) and 127 of the ***Public Procurement and Asset Disposal Act, 2015*** which provides that the evaluation and award criteria in procurement of consultancy services is the highest combined score. To **Parity**, in procurement of consultancy services, emphasis is more on the consultant's technical capacity to render the services and that the Respondent correctly found on facts that the 1st Interested Party was technically more qualified than the Ex-parte Applicant who scored 55 points viz-a-viz the 1st Interested Party's 61.50 points. In support of its submissions **Parity** relied on **Henry Asava Mudamba vs. Institute of Certified Public Accountants of Kenya [2015] eKLR**, **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR** and submitted that the Ex-parte Applicant had not established any grounds for issuance of the order of *Certiorari*.

52. As regards the order of mandamus, it was submitted that the relief can only issue if the Respondent failed to carry out its public duty to hear and determine the dispute. However, the Respondent discharged its duty imposed by law when it heard and determined the matter in the merits. It cannot therefore be compelled to perform a duty having complied with Section 28(1) and 167(3) of the ***Public Procurement and Asset Disposal Act, 2015***.

53. According to **Parity**, the *Ex-parte* Applicant's Statement does not state the ground upon which the application is based. The Statement only contains facts which renders it incompetent and the same ought to be struck out and reliance was placed on **Monicah Karimi Njiru vs. Egerton University [2011] eKLR** and **Joseph KiarieWatenga t/a Front Bench Auctioneers vs. Chief Magistrate Court Kiambu & Another [2016] eKLR**.

54. It was further submitted that since the Chamber Summons and the Notice of Motion were wrongly intituled the Ex-parte does not deserve costs of the suit if it was to succeed and reliance was placed on **Rahab Wanjiru Njuguna vs. Inspector General of Police & another [2013] eKLR**.

55. It was therefore argued that the Notice of Motion lacks merit and ought to be dismissed with costs.

Determinations

56. I have considered the application, the affidavits both in support of and in oppositions thereto, the submissions filed in support thereof and the authorities relied thereupon.

57. It is important to deal with the competency of these proceedings first. Order 53 Rule 2 of the ***Civil Procedure Rules*** provides as follows:

> ***An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.***

58. In this case, it is clear that the applicant set out what in its view were the grounds upon which the relief were sought. These grounds included the violation of the provisions of the ***Public Procurement and Assets Disposal Act***, the Tender, the failure to consider pertinent issues, illegality of the decision and errors of the law as well as contravention of the Constitution. These in my view are grounds for instituting judicial review proceedings. Accordingly I am unable to find that the application is incompetent on that score.

59. It was contended that the challenge before the Respondent was taken after the contract had been entered into. Under section 167(4) of the ***Public Procurement and Asset Disposal Act***, where a contract is signed in accordance with section 135 of the Act, the matter shall not be subject to the review of procurement proceedings under subsection (1). It is therefore clear that under that provision, the jurisdiction of the Respondent is only removed where a contract is signed in accordance with section 135 of the Act. Section 135(3) provides that:

> ***The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.***

60. Section 87 of the said Act provides:

> ***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***
>
> ***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***
>
> ***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

61. It is therefore clear that under the current procurement legal regime, for the notification to be valid, it must be made to both the person submitting the successful tender and all other persons submitting tenders. Any contract entered into before this provision is complied with cannot be said to be valid for the purposes of section 135 as read with section 167(4) of the ***Public Procurement and Asset Disposal Act.***

62. A similar provision under the repealed ***Public Procurement and Disposal Act*** was the subject of **Republic vs. Public Procurement Administrative Review Board & 2 Others ex parte Team Engineering Spa [2014] eKLR**. where this Court expressed itself inter alia as follows:

> **"As was held in** *Republic vs. Public Procurement and Administrative Review Board ex parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] eKLR***, the burden of proof on the issue of notification lies on the Procuring Entity. The applicant having denied notification, it was upon the Procuring Entity to prove on the standard of balance of probability that the applicant was duly notified of the decision of the Procuring Entity. To contend that the applicant ought to have adduced evidence from its computer that it did not receive the notification would not only amount to shifting the onus of proof but to compel the applicant to prove a negative… The decision of the Respondent not to entertain the request for review seems to have been based on section 93(2)(c) of the Act. As rightly submitted by the applicant, for the Respondent to be said to have been deprived of jurisdiction, the contract must have been signed in accordance with section 68 of the Act… It is therefore important to determine whether the contract in question was signed in accordance with section 68 as the mere fact that a contract has been signed does not necessarily deprive the Respondent of the jurisdiction to entertain the request for review. In**

other words before the Respondents makes a determination that it has no jurisdiction to entertain the request by virtue of section 93(2)(c) of the Act, it has the duty to investigate whether the contract in question was signed in accordance with section 68 of the Act and the failure to do so in my view will amount to improper deprivation of jurisdiction and in my view improper deprivation of jurisdiction is as bad as action without or in excess of jurisdiction… Therefore a contract can only be entered into within the period provided for in the notification under section 67(1) of the Act. However, whatever period of notification specified, the same can only be valid if the period stipulated is at least fourteen days from the date of giving of that notification."

63. After analysing the evidence before it, the Respondent found, rightly in my view that the applicant approached the Board within time. I agree with the respondent that a person who seeks to strike out a request for review must demonstrate that the contract was signed after a period of at least 14 days after notification has been served on the successful bidder and that the law also imposes a duty on the procuring entity to ensure that the unsuccessful bidder(s) are notified of the outcome of its/their tenders at the same time that the successful bidder is notified. I further agree that it is therefore not enough for a party to appear before the Board and raise a preliminary objection on the validity of a Request for Review merely because a contract has been signed without demonstrating that this was done in accordance with the relevant legal provisions.

64. Before dealing with the other issues raised in these applications, it is important to revisit, the circumstances under which this Court will exercise its judicial review jurisdiction. This Court in the exercise of its judicial review jurisdiction exercises a constitutional power bestowed upon it by Article 165(6) of the Constitution which provides as follows:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

65. Therefore judicial review is a constitutional supervision of subordinate courts and public authorities exercising judicial and quasi-judicial functions where there is a challenge to the legal validity of their decision, actions and inactions whether undertaken, threatened or not. This constitutional mandated is restated in Article 47 of the Constitution codifies the right to fair administrative action, a clear indication that the right to fair administrative action is nolonger a mere discretion but has been elevated to a constitutional right under the Bill of Rights which is expressed in Article 19(1) as *an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies*. The purpose of judicial review is therefore to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

66. That fairness is an ingredient of proper administrative action was appreciated by the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court held inter alia that it is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair. Pursuant to the ***Fair Administrative Action Act, 2015***, a statutory instrument enact pursuant Article 47(3) of the Constitution, "administrative action" is defined under section 2 thereof to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

67. The same section defines 'administrator" as "a person who takes administrative action or who makes an administrative decision." Section 3 on the other hand provides:

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

68. One of the purposes of judicial review is therefore to ensure that the individual receives fair treatment. This power does not, however, encompass the power to determine whether having accorded a fair treatment, the Tribunal reaches, on a matter which it is authorised by law to decide for itself, a conclusion which is correct in the eyes of the Court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

69. It is therefore clear that the fairness of the decision of the Respondent is one of the grounds upon which judicial review relief may be granted. The power however does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case, unless the decisions are claimed to be irrational or violate the principle of proportionality. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

70. The rationale for this is that Courts do recognize that generally Tribunals are specialised and in most cases have the technical knowledge of all the matters concerning the dispute between the parties before them hence the Courts ought not to interfere with their decisions on matters of merits. Therefore Tribunals ought to be given the necessary latitude to operate and manoeuvre, as long as they operate within the lawful bounds, to hear and determine the disputes falling within their jurisdiction. This was appreciated in **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others [2012] eKLR** where it was held:

> **"The Review Board is a specialised 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 the 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."**

71. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 - Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

72. What then is the role of the Review Board when determining a request for review? That the Board has wide powers was appreciated in **Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Ltd & 2 Others** (supra). This was the position adopted in **Republic vs. Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, in which the Court expressed itself as follows:

> **"Before dealing with the issues raised it is important for the Court to deal with the scope of the request for a review undertaken by the Respondent under the Act. In our view a review is not an appeal. Section 93(1) of the Act provides:**
>
> > ***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.***
>
> **"Administrative review" is defined by *Black's Law Dictionary*, 9th Edition at page 1434 inter alia as "*review of an administrative proceeding within the agency itself*" while *Ballentines Law Dictionary* at page 13 defines "administrative proceeding" as "*a proceeding before an administrative agency, as distinguished from a proceeding before a court. Compare judicial proceeding*". What then is expected of the Respondent in exercising its jurisdiction on a request for review? A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6 where it was held:**
>
> ***"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."***
>
> **The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker…"Review" is defined in *Black's Law Dictionary*, 9th Edition at page 1434 *inter alia* as "*Consideration, inspection, or reexamination of a subject or thing.*" *Ballentines Law Dictionary* on the other hand defines the same word at page 482 *inter alia* as "*A reevaluation or reexamination of anything.*" Clearly a review is much wider in scope than an appeal.**

73. Therefore since the Respondent's jurisdiction in the exercise of its powers of review are wider, it may well be entitled to consider the legality and constitutionality of the decision made by the Procuring Entity and make appropriate orders since as appreciated by the parties herein, section 98 of the Act, confers wide

powers to the Respondent including annulling anything done by the Procuring Entity in the procurement proceedings, or indeed annulling the procurement proceedings in their entirety; giving directions to the Procuring Entity with respect to anything to be done or redone; or substituting its decision for any decision of the Procuring Entity. It is therefore my view that if the Respondent reasonably found that the criteria adopted by the Procuring Entity would not achieve the principles under Article 227 of the Constitution, it could as well exercise its powers under section 98 of the Act.

74. I have considered the findings of fact made by the Respondent and I am unable to interfere with the same sitting as a judicial review court. As was appreciated in **Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] e KLR** the Respondent drew the boundaries for reviewing the decisions of the Review Board as follows:

> **"…the 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of 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.**
>
> **The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction".**

75. I was similarly held in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** that:

> **"The Board considered all the arguments of the Applicant and made findings on each of these issues. The Board may have been wrong in its decision but this Court would be usurping the statutory function of the Board were it to substitute its own views for those of the Board."**

76. It must however be remembered that the Board's powers are not unlimited. 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 [2015] eKLR**:

> **"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."**

77. It was similarly appreciated in **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex Parte Olive Telecommunication PVT Limited [2014] eKLR** that:

> **"Whereas we appreciate that 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 PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE."**

78. The Board, in my view while has wide powers of review ought not to make a determination whose

effect would amount to a decision totally different from the one which the procuring entity set out to achieve by commencing the tender process.

79. Section 135(2) of the Act provides as hereunder:

> ***An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.***

80. It therefore follows that the contract must be based on the tender document. In fact this Court has held that where the terms of the tender document are said to be vague and incapable of being acted upon, the Review Board cannot rely on such document to award the tender to any of the bidders.

81. In this case, the Respondent found that the tender evaluation committee recommended an award to the firm with the highest combined technical and financial score namely **Messrs Parity Performance & Company Ltd**, the 1st interested party herein. The Respondent then proceeded to find that the award criteria in the tender document was that the tender would be awarded to the bidder with the highest combined technical and financial score. To the Respondent, the award ought to have been given pursuant to section 86(1)(a).

82. Section 86(1) of the Act provides as follows:

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

83. It is therefore clear that for a bidder to be successful, the bid must meet any one of the specifications in section 86(1). However, the decision is not arbitrarily taken since the provision requires that the choice of the particular limb under section 86(1) must be in accordance with the tender document. It therefore behoves the Procuring Entity to ensure that whatever criteria it adopts, the same must also be in line with the terms of the tender document. In this case, the Respondent found that the award ought to have been given pursuant to section 86(1)(a). That provision expressly mentions that the tender be one with the lowest evaluated price. This was clearly in tandem with the award criteria in clause 26.1 of the tender document which states that:

> ***Subject to paragraph 10, 23 and 28 the Procuring entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily.***

84. In my view, the Respondent was enjoined to ensure that the decision of the tender evaluation committee complied with the Constitution, the Act and the tender document. 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."

85. 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."

86. In other words since the spirit of the Act provides that the successful tender shall be the tender with the lowest evaluated price, it is necessary that an evaluation be first undertaken and only after the tender passes all the stages of evaluation does the consideration of the lowest tender come into play.

87. It is clear from the decision of the Respondent that the decision of the tender evaluation committee was based on the finding of the tenderer with the highest combined technical score as opposed to the lowest evaluated tender.

88. In my view by not correcting the patently wrong decision by the tender evaluating committee the Respondent fell into error and sustained a decision which was unlawful. As recognised hereinabove, the Court may intervene where the decision is found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some *misconstruction of the terms of the statutory provision which the decision maker is required to apply*. Therefore whereas the Respondent's factual determinations may not be faulted in these proceedings, its application of the law vis-à-vis the tender document must necessarily be a matter for determination by this Court.

89. 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."

38. 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"**

90. The Applicant further took issue with the Respondent's interpretation of section 84 of the Act. The said section provides as follows:

> ***(1) The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.***
>
> ***(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.***
>
> ***(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1).***

91. According to the Respondent the role of the head of the procurement in the evaluation process is limited to providing professional opinion to the accounting officer in the event of dissenting opinions between tender evaluation and award recommendations. Here there is no evidence that there were dissenting opinions. With due respect if the Respondent's view was that the opinion of the head of the procurement is only to be taken into account where there are dissenting opinions, that interpretation would be clearly incorrect since section 84(3) does not condition the taking into account of the said opinion on the existence of dissenting opinions. However taking into account such opinion does not necessarily amount to being bound by the same. The said phrase was explained in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

> **"To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion..."Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."**

92. It is therefore clear that the accounting officer is duty bound to consider the said opinion. He however is at liberty not to follow it after considering the same. He however cannot just disregard it on the ground that there were no dissenting opinions. I however agree with the Respondent that the head of the procurement cannot unilaterally vary the award recommendation of the tender evaluation committee.

93. It was contended that the Board's failure to furnish the applicant with the decision in good time after the delivery of the decision violated the Applicant's rights. In my view, Article 47 of the Constitution requires that parties to administrative proceedings be furnished with the decision and the reasons therefor within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid. However, since these proceedings were instituted within time nothing of substance turns on the

said issue.

94. It is however my view that a party to whom insufficient or inadequate notice is given ought to raise the issue with the judicial or administrative body concerned and seek for time to adequately prepare. Section 4(4)(d) of the ***Fair Administrative Action Act*** provides that an opportunity be afforded for a person to request for an adjournment of the proceedings, where necessary to ensure a fair hearing. It is therefore upon the person seeking time to request for adjournment of the proceedings. In **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR,** the court held the view that;

> **"The petitioners have argued that they were not accorded a fair hearing as they did not receive the letters inviting them for the disciplinary hearing, and that they were invited by way of short text messages (SMS). I have considered the letters inviting the petitioners for the hearings. The letters are addressed to the petitioners at addresses to which other letters from the respondent to the petitioners contained in the replying affidavit are addressed. It would perhaps have been prudent for the respondent to obtain a certificate of posting or some other evidence of delivery of the letters, but in the end, I am not satisfied that the petitioners' claim in this regard has merit, for two reasons. First, I note that the respondent took the further step of inviting the petitioners to the hearings by way of short text messages and telephones. More importantly, I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing."**

95. In **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** this Court expressed itself on the same issue as follows:

> **"That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so."**

96. Having considered the issues herein, it is my view and I hold that the Respondent's decision, in so far as it awarded the tender to the 1st interested party in contravention of the terms of the tender document committed an error. In the premises I find merit in the Notice of Motion dated 17th November, 2016.

Order

97. In the premises the order which commends itself to me and which I hereby make pursuant to section 11 of the ***Fair Administrative Action Act***, No. 4 of 2015 is that the 2nd Interested Party proceeds to consider the bids of the ex parte applicant herein and the 1st interested party in accordance with the terms of the tender document and the law and arrive at a decision within 21 days from the date of service of this order.

98. Each party will bear the costs of these proceedings.

99. Orders accordingly.

Dated at Nairobi this 6th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiruri for Mr Owino for the applicant

Mr Gachuba for the 1st interested party

Miss Nyabando for Mr Adipo for the 2nd interested party

CA Mwangi