



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPL. NO. 393 OF 2015**

**IN THE MATTER OF AN APPLICATION BY KENYATTA NATIONAL HOSPITAL FOR A  
JUDICIAL REVIEW ORDER OF CERTIORARI**

**IN THE MATTER OF A DECISION AND ORDER DATED 22<sup>ND</sup> OCTOBER, 2015 OF THE  
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, AND THE PUBLIC  
PROCUREMENT AND DISPOSAL ACT NO. 3 OF 2005**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

***EX-PARTE: KENYATTA NATIONAL HOSPITAL***

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 11<sup>th</sup> November, 2015, the ex parte applicant herein, **Kenyatta National Hospital**, seeks the following orders:

**1. That this Court be pleased to grant to the applicant an order of certiorari for purposes of quashing the decision made on the 22/10/2015 by the Public Procurement Administrative Review Board in Public Procurement Administrative Review Board application Number 49 of 2015- Protecht Limited vs. Kenyatta National Hospital.**

**2. That costs of this application be provided for.**

**Ex Parte Applicant's Case**

2. According to the applicant, the Respondent herein, the Public Procurement Administrative Review Board (hereinafter referred to as “the Board”) on 22<sup>nd</sup> October, 2015 allowed the interested party’s application for review against which the applicant has instituted these proceedings.

3. It was averred that by way of newspaper advertisement on the 3<sup>rd</sup> June 2015, the applicant requested for proposals for tender No. KNH/T/11/2014-2015 for Enterprises Risk Management Consulting and on the 12<sup>th</sup> June, 2015, the applicant’s office of the Chief Executive Officer by way of a letter of the same date appointed members of the Tender Processing Committee (hereinafter referred to as “the TPC”) whose mandate was to process the tender and whose would be presented to the Tender Committee (hereinafter referred to as “the TC”) for final award/direction. The TPC would in its preliminary examination examine the tenders with a view to determine whether they are complete, identify any errors and ascertain whether documents have been duly filled in.

4. It was averred that on 18<sup>th</sup> Jun, 2015 the applicant at the tender opening acknowledged receipt of the bidders’ tender document and the tender opening register together with the tender opening minutes were duly recorded. To the applicant the aforesaid letter of appointment restrict the TPC’s time to fourteen days to evaluate the tenders from the date of its appointment and to issue its report by the 20<sup>th</sup> June, 2015. It was disclosed that on the 30<sup>th</sup> June, 2015 the TPC wrote to its appointing authority for an extension of the deadline on the basis that some of its members were not available due to their engagement in other duties assigned by the applicant and the chief executive officer granted the extension and the deadline for the submissions of the report by the TPC was enlarged to 10<sup>th</sup> July, 2015. However, the TPC’s report was finally ready by the 7<sup>th</sup> July, 2015 and it recommended that the tender committee award the tender to the interested party. On the 15<sup>th</sup> July, 2015 the applicant’s Tender Committee having been appointed by the office of the chief executive officer on 26<sup>th</sup> June, 2015 to make the final decision and approval of the tender award, if any, and upon receipt of the TPC’s report ordered the TPC to re-evaluate the entire process and to also seek for confirmation from the Kenya Revenue Authority on the contents of bidder number 2’s Tax Compliance Certificate which appeared to have unusually covered a period of more than 12 months.

5. It was averred that upon receipt of the re-evaluated report dated 16<sup>th</sup> July, 2015 prepared by the TPC, the TC deliberated on it and further conducted its own comprehensive evaluation of all the tender documents submitted by all the bidders and on 5<sup>th</sup> August, 2015 made a determination to the effect that the interested party’s bid was not responsive and that the reasons for failing bidder number 2, M/s. KPMG were not proper for the following reasons.

a. The Tender Committee observed that the interested party had not satisfactorily filled the confidential Business Questionnaire Form; specifically part 3 (a) had not been complied with.

b. The Tender Committee also observed that the interested party had not certified audited accounts for the year 2011.

c. The reasons for failing bidder number 2 were not sufficient since print outs from the Kenya Revenue Authority website could be considered conclusive with the advent of the iTAX regime.

d. That other bidders, numbers,1, 3 and 6 were failed because they had not certified their audited accounts and bidders number 2 and 4 for not duly filling their confidential Business Questionnaire and therefore for the purposes of uniformity, fair and equal treatment as dictated by the **Public Procurement and Disposal Act, 2005** the interested party’s failure to certify its audited accounts and to duly fill the confidential business questionnaire caused its bid to be considered non-responsive as such the omission was material in determining whether the bid was successful or not.

6. It was averred that on the 13<sup>th</sup> July, 2015 the TC had prior to evaluating all the bidders’ technical proposals sought for confirmation from the applicant’s Finance Department on whether there were

sufficient funds that would cater for the consultancy and the TC was advised that the available funds as was stated in the budget for the 2015/2016 was Kshs 9,000,000 (Nine Million Kenya Shillings) only for the full consultancy which was not sufficient against the applicant's quotation of Kshs 27,148,430.00. At this point, the TC noted in its minutes that the available budget of Kshs 9,000,000/= for the financial year 2015/2016 was insufficient as against the bidder's financial proposal as aforesaid, further, the Tender Committee nevertheless, found the applicant's proposal to be non-responsive because the TPC had selectively applied the criteria of evaluation to some bidders and not others even after being requested to re-evaluate the process.

7. It was averred that the communication on the cancellation of the referred to herein was made to the interested party and to all other bidders by telephone and they were invited to collect the written notice which the interested party collected on the 22th September, 2015 but declined to sign on the register.

8. It was therefore averred that the decision of the Board was *ultra vires* and unlawful as it lacked the jurisdiction to hear and determine the application for review after the cancellation of Tender No. KNH/T/11/2014-2015 considering that the respondent terminated the procurement proceedings pursuant to section 36(6) of the **Public Procurement and Disposal Act** No. 3 of 2005.

9. According to the Applicant, although the decision made by the Board was read in the presence of the parties on the 22<sup>nd</sup> October, 2015 it was only made available to the applicant on the 4<sup>th</sup> November, 2015 by the secretary to the board after numerous enquiries from the applicant's advocates. To the Applicant, the Board's order that the applicant must enter into negotiations with the interested party and file a report within 15 days from the date of its decision will greatly prejudice the applicant since the applicant is a public entity that relies on funds drawn from the consolidated fund and the prudent use of public funds is demanded by the provisions of the constitution particularly Article 227(1) which provides for a cost effective procurement process for maximum economy and efficiency. As is stands, the applicant had only Kshs 9,000,000 (Nine Millions Kenya Shillings) available for the tender consultancy against the interested party's financial bid of about Kshs 27,148,420.000 (twenty Seven Millions Kenya One Hundred and Forty Eight Thousand Four Hundred and Thirty Shillings) and it is highly likely that if the interested party is awarded the tender it will have to greatly compromise the quality of its services during the one year consultancy starting from 2015 to 2016 thereby exposing tax payers' money to great risk and huge loss which may even attract investigations by the Ethics and Anti-Corruption Commission against the applicant's public officers.

10. It was the Applicant's case that the Board took into account matters that it ought not to, that a **Mr. Timothy Kimathi** who appeared on the hearing day without having been served with any documents by either party claimed to be an officer from MACL, and on the Board's own motion was asked whether he received any notice of the cancellation of tender by the applicant to which he informed the board that MACL did not and the Board in its findings relied on the said **Mr. Timothy Kimathi's** comments to buttress the interested party's assertion that notices of the cancellation were not served upon bidders thereby not giving the applicant sufficient time and occasion to respond to the new evidence which eventually was relied on by the Board in making its decision of the 22<sup>nd</sup> October, 2015 and thus the applicant was not accorded a fair hearing.

### **Respondent's Case**

11. On behalf of the Respondent, it was contended that its decision was based on the fact that there was no evidence that the procuring entity notified the bidders of the termination as provided under section 36(2) of the Act hence the Board had the jurisdiction to hear and determine the matter on merit.

12. To the Respondent, the action of the tender committee prescribing a criteria not provided in the tender documents went against the Act and the Regulations. Further the Tender Committee had a pre-determined outcome which is contrary to the spirit of the Act and regulations.

13. It was therefore contended that the decision was within the mandate of the Board hence the application is in bad faith, unmerited and only calculated to discredit the Board's credibility.

## **Interested Party's Case**

14. On the part of the interested party, **Protecht Limited**, it was averred that by way of public advertisement in the Kenyan media on 3<sup>rd</sup> June 2015, the Applicant requested for proposals for Enterprise Risk Management **TENDER NO. KNH/T/111/2014-2015** (hereinafter referred to as “**the request**”) and advised that the tender closing date was 18<sup>th</sup> June 2015 at 10.00AM. In response to the request, **Protecht** submitted a valid bid for the tender and pursuant to clause 4.3 of the Tender Document, the tender was separated to Technical and Financial Proposals with the weight of Technical bit of the tender being 80 while that of Financial weight being 20. Further, it was provided that the minimum technical score required for a tenderer to pass was 60 points.

15. It was averred that by the letter dated 30<sup>th</sup> June 2015, the Applicant informed **Protecht** that the Technical Evaluation exercise was complete and in the same letter, **Protecht** was invited for the opening of its financial submission on Tuesday 7<sup>th</sup> July 2015, which **Protecht** duly attended. According to the interested party, during the opening of the financial submission, it established that **Protecht** was the only bidder remaining in the process as all the other bidders had been disqualified for failing to meet some or all the conditions set in the tender. It was therefore its legitimate expectation and a legal requirement, following the opening of the financial submission, that within a reasonable period, the final outcome would be announced shortly thereafter. However, **Protecht** waited for communication of the final outcome of the tender to no avail and due to the uncertain state of affairs brought about by the Applicant, **Protecht** filed before the Board Review Application No. 49 of 2015 and requested the Board for relief.

16. To the interested party, it was aggrieved by the above status as it did not know what transpired as the financial proposal was supposed to be evaluated as soon as possible and negotiations, if any, called in accordance with the tender document. **Protecht** further submitted:

- a. It was at a risk of suffering loss or damage due to the Applicant's actions or inactions.
- b. It had not been advised of any termination of the tendering process whatsoever by the Applicant.
- c. It had not been informed whether its tender was accepted or was unsuccessful;
- d. The state of affairs precipitated by the Respondent was un-called for.
- e. The Applicant expected that its proposal will be the successful proposal as no other candidate had their financial submission opened.
- f. It expected the Applicant to comply with the **Public Procurement and Disposal Act** and the Regulations in the tender.
- g. The only responsive tender, which was competitive and beneficial and economical to the Respondent and therefore expected a positive outcome.
- h. Failure to communicate any outcome is prejudicial and a mockery of tendering process.

13. It was **Protecht's** case that the Applicant's decision not to legally evaluate the bid offends the spirit of the **Public Procurement and Disposal Act 2005** which requires public entities to establish practices in order:

- 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.

14. **Protecht** alleged that the Applicant had failed to adhere to the requirements set out in section 2 of the Act and gave particulars including:

- a. Failing to promote competition or ensure that competitors are treated equally and fairly.
- b. Failing to communicate the outcome or properly evaluate **Protecht's** proposal.
- c. Failing to award the tender, terminate or reject all bids had occasioned an unequal and unfair treatment of **Protecht** who was the only bidder still in the race.
- d. The Applicant's actions cast doubt on the integrity of the entire process and will result in loss of public confidence in the law contrary to section 2(c), (d) and (e) of the Act.

15. In **Protecht's** view the Applicant had breached Article 227 of the Constitution in that the Applicant's actions were not fair, equitable, transparent or competitive and that under sections 93 and 98 of the **Public Procurement and Disposal Act**, the Board had been conferred with wide jurisdiction and mandate to review tender processes. **Protecht** further submitted that the evaluation of tenders is a critical process and the Review Board should scrutinize the entire evaluation processes and the tender documents to ensure the same conformed with the law. **Protecht** invited the Review Board to undertake such a review and grant the following orders

- a. Set aside and nullify the Applicant's decision not to award TENDER NO. KNH/T/111/2014-2015.
- b. Review all records of the procurement process relating to TENDER NO. KNH/T/111/2014-2015 and be pleased to substitute the decision of the Review Board for the decision of the Applicant and award the Tender to **Protecht**.
- c. The Applicant be ordered to negotiate and sign a contract with **Protecht** in accordance with the Tender and the decision of the Review Board.
- d. The Applicant be ordered to pay the costs of and incidental to those proceedings; and
- e. Such other or further relief or reliefs as the Review Board deemed just and expedient.

17. According to the interested party, in line with the rules of natural justice, the Review Board served the Applicant with the Application and required the Applicant to provide a response. To the interested party, proceedings before the Review Board are strictly regulated. In particular, section 96 of the Act provides in mandatory terms that the parties to a review include the person who requested the review, the procuring entity, if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person, such other persons as the Review Board may determine. Given the mandatory terms of the said section 96, the Review Board was bound to invite all persons who had submitted bids and wished to participate to make representation and/or file any documents. The Board therefore invited other bidders to participate in the proceedings if they had submitted a bid and as a consequence of which, **Mr. Timothy Kimathi** representing MACL and **Mr. Omosa Wilson** representing Audit & Corporate Governance Centre turned up during the hearing.

18. It was averred that prior to setting the Application down for hearing, the Board ensured that all persons with an interest in the outcome of Application were notified so as not to suffer any prejudice by being locked out. On its part, the Applicant herein filed an appropriate defence, including a preliminary objection in opposition to the Application the hearing date was communicated in good time and during the hearing, both the Applicant and the Interested Party were ably represented by counsel of their choice.

Indeed, counsel for the Applicant was accompanied with a team of 4 others including officials of the Applicant, while **Mr. Timothy Kimathi** represented MACL with **Mr. Omosa Wilson** representing Audit & Corporate Governance Centre.

19. It was disclosed that from the submissions made before the Review Board, the defence and other responses filed by the Applicant, it was obvious that the Applicant's defence was that it had terminated the tender pursuant to section 36 of the Act and therefore argued that the Review Board had no jurisdiction to entertain the matter before it. However, after a full hearing, the Review Board made a decision requiring the Applicant to award the tender to **Protecht**. The Applicant is now aggrieved by that decision and hence this suit.

20. It was the interested party's case that though the Applicant herein is challenging the decision of the Review Board made on 22<sup>nd</sup> October 2015 on various grounds appearing on the application, judicial review is not an appeal from a decision, but a review of the manner in which the decision was made and hence is concerned not with the decision, but with the decision making process. Therefore a court exercising judicial review jurisdiction does not sit on judgment on the correctness of the decision itself. This application was however contended to be a blatant appeal disguised as a judicial review application only in name. Therefore whereas the Applicant is convinced that the Review Board did not make a correct decision, that is not the purpose of judicial review and the Applicant's grievances can only be examined if it elected to file an appeal as allowed under the Act.

21. It was the interested party's case that in any case, the Applicant had not proved that it was not accorded fair treatment and that the Review Board is authorised by law to decide for itself. The decision does not have to be correct in the eyes of the court or the Applicant but nevertheless it is a valid decision of the Board. It was averred that whereas the Applicant informed the Review Board that the tender had been terminated under section 36 of the Act, there was no evidence of the same. It was however **Protecht's** position that it had never received any notification of termination of the procurement proceedings regarding the subject tender pursuant to section 36 of the Act or any other provision whatsoever. Furthermore, **Protecht** submitted that it had not been informed of the outcome of the tender by phone or at all as alleged by the Applicant and that in any case, section 37 of the Act only provides for written communication. Since the interested party's position was corroborated by other bidders including **Mr. Kimathi**, who was completely independent of the Applicant and **Protecht**, the Applicant failed to adduce any evidence before the Review Board that section 36 had been complied with hence the firm view by the Review Board that for one to invoke the provisions of section 36, that person ought to first comply with that section.

22. According to the interested party, it was found that indeed the Applicant had in fact advertised a similar tender on 9<sup>th</sup> September 2015 which was closed on 29<sup>th</sup> September 2015 and bids were opened immediately. This was despite the fact that **TENDER NO. KNH/T/111/2014-2015** has not been terminated and/or any notification issued.

### **Determinations**

23. Having considered the application, the affidavit in support of the application, the grounds of opposition and the submissions filed herein, this is the view I form of the matter.

24. The applicant's main contention before this Court and before the Board was that the tender having been terminated, the Board had no jurisdiction to entertain the request for review. Section 36 of the Act (now repealed) provided as follows:

***(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.***

***(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.***

*(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.*

*(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.*

*(5) The procuring entity shall not be liable to any person for a termination under this section.*

*(6) A termination under this section shall not be reviewed by the Review Board or a court.*

*(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.*

*(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.*

25. This provision was dealt with in Republic vs. National Social Security Fund Board of Trustees [2015] eKLR where this Court expressed itself as follows:

**“It is clear that the above provision does not require that the notification of the termination of the tender precedes the termination itself. What the section requires is that each person who submitted a tender, proposal or quotation be notified of the termination thereof and on request by such a person furnish the reasons therefor. However it is expressly stated that in the event of such termination the procuring entity shall not be liable therefor. It is therefore clear that the applicant cannot question the decision by the Respondent to terminate the tender. Whereas the Respondent was under a statutory obligation to furnish the applicant with the reasons for the termination of the Tender, the consequences for the failure to do so, in my view, do not encompass the quashing of the decision to terminate the tender under the aforesaid provision. This however, does not mean that the applicant may not have recourse in law for the omission by the Respondent to be notified of the same. My view, however, is that such recourse cannot be by way of an application for *certiorari* as the applicant seeks in this application. Whereas it was alleged that the Respondent did not afford the applicant an opportunity of being heard before terminating the tender, as I have said no legal provision has been cited in support of the contention that a notice was a prerequisite to such termination. The provision simply says that the notice of termination be given *promptly*. That the Respondent is empowered by the Act to terminate the tender at any time without entering into the contract is not in doubt. There is no material placed before me to show that the decision to terminate the said tender was irrational. In the premises the orders sought herein cannot issue since the applicant has not shown that the decision to terminate the said Tender violated any of the principles warranting the grant of judicial review orders.”**

26. Section 37(1) of the Act is however clear that:

***If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing.***

27. In my view a reading of section 36 together with section 37(1) shows that after a tender has been terminated, the Procuring Entity is under a legal obligation to promptly notify each person who submitted a tender, proposal or quotation of that fact and the notice is required to be in writing. Where a contract is properly terminated, the issues of legitimate expectation does not arise since a party cannot by relying on the principle of legitimate expectation successfully invoke the supervisory jurisdiction of this Court for an order whose effect would be to perpetuate an illegality.

28. In Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No.

743 of 2006 [2007] KLR 240 it was held that:

**“ Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way...”**

29. In Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530 it was held:

**“The general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims.....Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve justice, weigh the relative “strength of expectation” of the parties. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn.....A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus where he does not put all his cards face up on the table it would not be entitled to rely on the representation. In this case any legitimate expectation has clearly been taken away firstly by the conduct of the applicant and the provisions of the Statute Act and therefore there is no discretion.”**

30. It follows that the concept of legitimate expectation cannot operate against the law. Legitimate expectation as the phrase indicates must be legitimate and cannot be based on actions which are patently illegal. As was held in Republic vs. Kenya Revenue Authority & Another ex parte Krones LCS Centre East Africa Limited [2012] eKLR:

**“Legitimate expectation can only operate inside and not outside the law. One can only rely on legitimate expectation when the law has been complied with. Where taxes have not been paid then the Applicant cannot rely on the principle of legitimate expectation to avoid payment of taxes.”**

31. In this case however, to the extent that the Applicant contends that it notified the parties by phone, there was no valid notification. Accordingly, the Board’s decision that based on the material before it, there was no evidence that the Procuring Entity had terminated the tender cannot be faulted.

32. That then brings me to the options available to the Board. In my view 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 section 98 of the Act, confers wide powers upon 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. In so exercising its powers it must be guided by the principle of proportionality and where its decision is clearly disproportionate to the mischief it seeks to cure, this Court may well be entitled to

invoke its judicial review jurisdiction and rectify the anomaly. Under Article 227(1) of the Constitution it is required 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. To put in place a system by which the Court's ability to determine whether public procurement complies with the constitutional dictates is crippled would be to render the Constitutional provisions ineffective and would defeat the very principles of procurement decreed under the Constitution. It behoves the Court to investigate whether the principles of the Constitution have been adhered to in a particular process of public procurement.

33. It is now recognised that like all legal remedies, judicial review continues to enlarge the categories of its sphere of influence. Proportionality for example is considered to be one of the grounds upon which judicial review relief may be granted. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn in R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights. Therefore in deciding on what action to take an authority ought to apply the principle of proportionality. Accordingly I associate myself with the position taken in **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** where it was held that:

**“Clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards.”**

34. In **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR**, the Court of Appeal held at paras 55-58:

**55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**

**56. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an**

administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i) and (iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in *Section 11* of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah (*supra*) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e) and (h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

35. 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 & Co. Limited and Others [2012] eKLR. 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*, 9<sup>th</sup> 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*, 9<sup>th</sup> 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.

36. 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.”**

37. 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.”**

38. The Board, in my view while has wide powers of review ought not to make a determination whose effect would be at variance with the letter and spirit of the Constitution and legislation. It must be noted that Section 2 of the ***Public Procurement and Disposal Act, 2005*** is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. The said Act also had other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. Therefore to compel the procuring entity to enter into a contract in contravention of the principles underlying public procurement would be to defeat the purpose for which the Act was enacted.

39. In this case, it was contended that the available funds, as per the budget for the 2015/2016 was Kshs 9,000,000.00 (Nine Million Kenya Shillings) only for the full consultancy which was not sufficient against the applicant’s quotation of Kshs 27,148,430.00 and that this was the reason for termination of the tender. In my view this was a material fact to be taken into consideration by the Board in order to ensure

that its decision did not violate the constitutional and legislative principles relating to public procurement. It seems that this fact was not given weight to by the Board. As this Court held in Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR:

**“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.”**

40. As this Court held in Republic vs. Public Procurement Administrative Review Board & 2 Others Ex Parte MIG International Limited & Another [2016] eKLR:

**“In failing to consider whether the Procuring Entity had the funds appropriated to it sufficient to contract the Interested Party at their quoted prices, the Board failed to consider a material factor and if the allegation that the decision of the Board amounts to directing the Procuring Entity to contract outside the funds appropriated for the tender is true, the direction may well amount to an illegality.”**

41. Having considered the material placed before me in this application, it is my view that the decision of the Respondent Review Board contravened the proportionality principle and also failed to take into account relevant considerations

### **Order**

42. It follows that this application succeeds, the Respondent’s decision is hereby quashed and the Respondent is hereby directed to re-hear the request for review taking into account whether the interested party’s quoted prices were within the funds appropriated by or available to the Procuring Entity towards the said tender and make a determination thereon. Based on the outcome of the said decision, the Board is at liberty to make appropriate orders under section 98 of the Act.

43. As the dispute remains unresolved, there will be no order as to costs.

**Dated at Nairobi this 4<sup>th</sup> day of October, 2016**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Olando for Mr Tolo for the applicant***

***Miss Maina for the Respondent***

***Mr Makokha for Mr Nyaanga for the interested party***

**CA Mwangi/Gitonga**