



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**J.R. MISC. APPLICATION NO.137 OF 2015**

**JGH MARINE A/S WESTERN MARINE SERVICES LTD**

**CNPC NORTHEAST REFINING & CHEMICAL ENGINEERING**

**CO.LTD/PRIDE ENTERPRISES.....APPLICANT**

**VERSUS**

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

**AND**

**CIVICON LTD.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA PIPELINE COMPANY LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGEMENT**

1. Through the Notice of Motion application dated 11<sup>th</sup> February, 2015, the Ex Parte Applicant **JGH MARINE A/S WESTERN MARINE SERVICES LTD CNPC NORTHEAST REFINING & CHEMICAL ENGINEERING CO.LTD/PRIDE ENTERPRISES** pray for orders as follows:
  - a. An Order of certiorari to remove to this Honorable court for the purposes of being quashed, the Respondent's entire decision delivered on 21<sup>st</sup> April 2015 (impugned decision) with respect to Tender No. SU/QT/786N/14 for the Construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport Nairobi, (Greenfield) (the tender) allowing the 1<sup>st</sup> Interested Party's Request for Review No. 18/2015 of 24<sup>th</sup> March 2015 and directing the Kenya Pipeline Company Limited to consequently enter into a contract with the 1<sup>st</sup> Interested Party.
  - b. An Order of certiorari to remove to this Honorable Court for the purposes of being quashed any and all contracts/agreements entered into between the 1<sup>st</sup> Interested Party and Kenya Pipeline Company Limited (2<sup>nd</sup> Interested Party) consequential to the Respondent's entire decision delivered on 21<sup>st</sup> April 2015 with respect to Tender No. SU/QT/786N/14 for the Construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport Nairobi, (Greenfield).

- c. **An Order of Mandamus directed at Kenya Pipeline Company Limited requiring it to immediately enter into a contract with the Applicant as the best evaluated bidder for the performance of the Tender No. SU/QT/786N/14 for the Construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport Nairobi, (Greenfield).**
- d. **That the Honorable Court be pleased to give further Orders and directions as it may deem fit and just to grant.**
- e. **That the costs for and incidental to this suit be provided for.”**

2. The application is grounded upon the statutory statement and the Verifying Affidavit of Anders Dahl filed together with the chamber summons application for leave on 24<sup>th</sup> April, 2015.
3. The Respondent, the Public Procurement Administrative Review Board (hereinafter referred to as the “Review Board”) is a statutory body created under the provisions of Section 25 of the Public Procurement & Disposal Act, 2005 (PP&DA) and mandated to review procurement proceedings. The subject of these proceedings is the decision of the Review Board delivered on 21<sup>st</sup> April, 2015 in Request for Review No. 18 of 2015.
4. Civicon Ltd is the 1<sup>st</sup> Interested Party and was one of the participants in a tender floated by the 2<sup>nd</sup> Interested Party, Kenya Pipeline Company Limited (hereinafter referred to as the Procuring Entity or in short the PE). The PE declared the Ex Parte Applicant herein the successful bidder but the 1<sup>st</sup> Interested Party moved to the Review Board for review and the ruling delivered on 21<sup>st</sup> April, 2015, the decision of the PE to award the tender to the Ex Parte Applicant was set aside. The tender was instead awarded to the 1<sup>st</sup> Interested Party.
5. According to the Verifying Affidavit of the Ex Parte Applicant’s Regional Manager, Anders Dahl, the Ex parte Applicant is a Consortium/Partnership. The consortium submitted its bid in respect of tender No. SU/QT/786N/14 for the Construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport Nairobi (Greenfield). The Tender Document consisted of two parts namely the Technical Proposal and the Financial Proposal. Clause 3.17.1 of the Tender Document required a tenderer to seal the Technical Proposal and the Financial Proposal in separate envelopes duly marked Technical Proposal and Financial Proposal.
6. Further, that in accordance with Clause 3.5.2 of the Tender Document, the tenderer was expected to examine and understand all instructions, conditions, terms, specifications and drawings in the Tender Document. Under Clause 3.23, tenders that were not substantially responsive to requirements of the Tender Document were to be rejected.
7. On the issue of responsiveness, Clause 3.23.1 required that prior to the detailed evaluation of tenders; the PE was to determine whether each tender was substantially responsive to the requirements of the Tender Document. According to Clause 3.23.2, a substantially responsive tender was one which conformed to all the terms, conditions and specifications of the Tender Document without material deviation or reservation. A material deviation or reservation would be one which affected in any substantial way the scope, quality, completion timing or administration of the works to be undertaken by the successful tenderer, or limits the PE’s rights or the tenderer’s obligations under the contract.
8. It was deposed on behalf of the Ex Parte Applicant that on the issue of evaluation and comparison of tenders, clause 3.26.1 stated that the PE would evaluate only tenders determined to be substantially responsive to the requirements of the Tender Document in accordance with clause 3.23. Further, that on the issue of technical evaluation criteria, the PE was to carry out technical evaluations of the bids first, which were to be scored based on the evaluation criteria given in the Tender Document. Only tenderers who garnered at least 50% in each of the seven evaluation categories and attained an overall score of 75% were to qualify to have their financial proposals opened and evaluated. The bidders were requested to carefully read the qualification criteria and furnish authentic and complete information in response.
9. It was also averred that the method for award of the tender was clearly provided for at Clause 3.27. Clause 3.27.2 further provided that subject to clause 3.27.3 the PE would award the tender to the tenderer who was determined to be substantially responsive to the Tender Document and who had the highest evaluated combined weighted score subject to possessing the capability and

- resources to effectively carry out the contract works. Clause 3.27.4 emphasized that the successful tender would be the tender with the highest evaluated combined weighted score.
10. According to the Ex Parte Applicant's Regional Manager, at the end of the both technical and financial evaluation process, their consortium scored 98.50 on the technical evaluation and 86.66 on the financial evaluation; this was based on the criteria set out in the Tender Document and the overall score was 94.95. The Tender Processing Committee of the PE recommended the award based on the overall score and notified the Ex parte Applicant of the award on 18<sup>th</sup> March, 2015.
  11. Being dissatisfied with the award of the tender to the Ex Parte Applicant, the 1<sup>st</sup> Interested Party filed Request for Review No. 18 of 2015 with the Respondent on 24<sup>th</sup> March 2015. On 21<sup>st</sup> April, 2015 the award of the tender to the Ex Parte Applicant was nullified and the PE directed to award the tender to the 1<sup>st</sup> Interested Party. It is the Ex Parte Applicant's case that the Respondent disregarded the aggregation of the technical and financial scores by the PE in order to arrive at the successful bidder. It is the Ex Parte Applicant's contention that strict compliance with a tender document is what Section 66(2) of the Public Procurement & Disposal Act (PP&DA) and Rule 16(5)(a) and (7)(a) of the Public Procurement & Disposal Regulations, 2006 demands.
  12. The first ground upon which the Ex Parte Applicant prays for relief is illegality/unlawfulness/want of jurisdiction. The Ex parte Applicant contends that in nullifying the award, the Respondent, faulted the PE for proceeding with the evaluation by aggregating the scores in the technical and financial proposals in order to arrive at the successful bidder. As such, the Review Board's decision disregarded the fact that aggregation of the technical and financial scores by the PE in order to arrive at the successful bidder was in strict compliance with the criteria set out in the Tender Document. It was also in compliance with Section 66(2) of the PP&DA and Rule 16(5)(a) and (7)(a) of the Public Procurement and Disposal Regulations 2006 as amended in 2013 (herein after referred to as the Regulations) which demand strict compliance with a tender document. The Ex Parte Applicant asserts that the Review Board effectively ruled that the PE should have disregarded its tender document and awarded the tender based on the criteria not contained in the said tender document. The Review Board ended up conducting evaluation based on criteria not set out in the Tender Document and therefore breached the clear and mandatory provisions of Section 66(2) of the PP&DA Act and Regulation 16 (5) (a) and (7) (a).
  13. The Ex Parte Applicant submits that the Review Board had no powers to make orders that violate the express provisions of the law and exceeded the requirements expressly set out in the tender document. It is the Ex parte Applicant's case that the Respondent's acts are illegal, unlawful and exceeded its jurisdiction. In support of its contention, the decision of Nyamu, J (as he then was) in **PPRB v KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR** was cited where he noted that judicial review orders were available where the Review Board committed an error of law apparent on the face of its decision. Further, that the Review Board cannot disregard mandatory provisions of the PP&DA and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void. It is the Ex Parte Applicant's case that as was stated by the learned Judge in the cited case, the procurement process was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile but the integrity of reaching there is equally important.
  14. The Applicant also cited **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300** where it was opined that procedural impropriety is when the decision maker fails to act fairly in the process of taking a decision. The unfairness may be non-observance of the rules of natural justice or failure to act with procedural fairness towards one to be affected by the decision. It may also involve failure to comply with procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.
  15. Another authority cited is **R v Northumberland Compensations Appeal Tribunal ex parte Shain [1952] 1 ALL ER 122** in which the Court found that an inferior tribunal had made an error in computing compensation payable to the applicant in that case. The Court proceeded to quash the tribunal's decision as it was not in accordance with statutory regulations.
  16. The second ground upon which the decision of the Respondent is challenged is arbitrariness/unreasonableness/irrationality. The Ex Parte Applicant asserts it was grossly unreasonable and irrational for the Review Board to introduce extraneous evaluation requirements outside Section 66 of the PP&DA without expressly and clearly faulting the Tender Document

itself. It is the Ex Parte Applicant's case that if the Tender Document was found to be irregular, the same could not be used to award the tender to the 1<sup>st</sup> Interested Party. The Respondent purported to nullify the award of the tender and award the same to the 1<sup>st</sup> Interested Party based on only one element of the tender. This was done without showing that the 1<sup>st</sup> Interested Party was the best evaluated bidder for both technical and financial scores which was grossly unreasonable and arbitrary.

In support of this argument, the decision in **East African Railways Corp. VS Antony Sefu, Dar-Es-Salaam HCCA No. 19 of 1971, [1973] EA 327** was cited. In that case, the Court observed that it is empowered to look into the question whether a tribunal has stepped outside its field of operation and it may declare a tribunal's decision a nullity if the tribunal did not follow the procedure laid down by a statute in arriving at a decision.

17. The Ex Parte Applicant averred that the Respondent essentially rendered the Tender Document null and void. It faulted the Procuring Entity for employing criteria meant for request for proposals as opposed to open tenders. Having impugned the Tender Document and effectively declared it unlawful, there was no basis upon which the Respondent could award the tender to the 1<sup>st</sup> Interested Party. For this reason, the Ex Parte Applicant contends, that the Respondent's decision was rendered arbitrary, unreasonable and irrational. In support of this argument, **Macfoy v United Africa Co. Limited [1961] 3 All ER 1169** was cited. In that case the Court stated that if an act is void, it is a nullity in law and every proceeding which is founded on it is also bad and incurably bad and nothing will come out of it.
18. It is the Ex Parte Applicant's contention that by awarding the tender contrary to the criteria set out in the Tender Document which all the bidders had relied on to submit their bids, the Respondent acted contrary to Section 2(b), (c) and (e) of the PP&DA. This requires that procedures for public procurement help in promoting competition and ensuring that competitors are treated fairly, promoting the integrity and fairness of procurement procedures and increasing public confidence in those procedures.
19. Further, that the Respondent was in violation of Article 47 (1) of the Constitution which states that every person has the right to administrative action that is efficient, lawful, reasonable and procedurally fair.
20. The Ex Parte Applicant argued that there is no provision under the PP&DA which confers the Respondent with jurisdiction to disregard the tender document and to award a tender to an unsuccessful bidder based on criteria not contained in the tender document. The Ex Parte Applicant asserts that such conduct by the Respondent constitute unreasonableness and irrationality.
21. The Ex Parte Applicant submitted that the PE in awarding the tender followed the tender criteria as required. There was no evidence that the PE evaluated the bids outside the criteria set out in the Tender Document nor was there evidence presented before the Review Board indicating that the evaluation criteria was not applied uniformly, consistently and objectively to all the bidders.
22. It is therefore the Ex Parte Applicant's case that a tender can only be awarded using the criteria set out in the tender document. In support of this assertion the decision in **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, was cited where the Court stated that the Review Board cannot introduce new matters into a tender document.
23. The Ex Parte Applicant submitted that under Section 52 of the PP&DA procuring entities are required to prepare tender documents containing enough information to allow fair competition among bidders including the procedures and criteria to be used to evaluate and compare the tenders. Section 55 makes provision for preparation of tenders, while Section 71 makes provision for international tenders. Under these sections, there are express provisions on minimum time for the preparation of tenders which for purposes of the present tender herein was thirty days.
24. It is the Ex Parte Applicant's case that all the bids in the tender were prepared with reference to the clear terms of the Tender Document. The bidders were duly guided by the clear terms of the Tender Document. As such, a legitimate expectation was created in the minds of all tenderers that the evaluation process would comply strictly with the Tender Document and that both financial and technical competence would be considered in accordance with the formula provided in the

- Tender Document.
25. The Ex Parte Applicant contends that the attempted improper evaluation of the tender outside the criteria set out in the tender document flies in the face of express provisions of the PP&DA. This is a manifestation of the Review Board's failure to appreciate the legal parameters set by law. In the event, its decision can only be found to be contrary to statute and hence shrouded in illegality.
  26. Although the 2<sup>nd</sup> Interested Party/PE did not categorically state that it supported the application, its pleadings and submissions clearly shows that it supports the Ex Parte Applicant's case. For that reason I will state its case at this stage.
  27. The PE responded to the application through the Replying Affidavit sworn on 19<sup>th</sup> May, 2015 by its Acting Corporation Secretary, Stanley K. Manduku. Through the said affidavit, the PE's case is that on 14<sup>th</sup> November, 2014, it advertised an international EPC Tender for the Construction of an Aviation Fuel Depot at Jomo Kenyatta International Airport, Nairobi being Contract No SU/QT86N/14/7 also known as 'Greenfield'. The tenders were closed on 16<sup>th</sup> February, 2015 and 17 bidders submitted their bids which were subjected to preliminary evaluation. The Ex Parte Applicant and the 1<sup>st</sup> Interested Party were among the 17 bidders. On 17<sup>th</sup> March, 2015, after preliminary evaluation, technical evaluation and financial bid opening, the 2<sup>nd</sup> Interested Party's Tender Processing Committee recommended the award of the Tender to the Ex Parte Applicant. Consequently, on 18<sup>th</sup> March, 2015 the PE sent out letters to both the successful and unsuccessful bidders.
  28. On 24<sup>th</sup> March, 2015, the 1<sup>st</sup> Interested Party filed a Request for Review at the Review Board challenging the decision of the 2<sup>nd</sup> Interested Party's award of the tender to the Ex Parte Applicant. At the hearing of the Request for Review, the 1<sup>st</sup> Interested Party argued that by awarding the contract to the Ex Parte Applicant, the 2<sup>nd</sup> Interested Party had contravened Article 227 of the Constitution as well as sections 2, 34, 52, 53, 62, 63, 66, 67 and 82 of the PP&DA.
  29. The Respondent crystalized the issues for determination as twofold, namely:
    - i. Whether the Request for review was incompetent under the provisions of Regulation 73 of the Public Procurement and Disposal Regulations, 2006; and
    - ii. Whether or not the Procuring Entity contravened the provisions of Sections 2, 34, 52, 53, 62, 63, 66, 67, 82 and 98 of the PP&DA.
  30. In the decision dated 21<sup>st</sup> April, 2015 the Respondent: annulled the decision awarding the EPC Tender to the successful bidder—the Ex parte Applicant herein, substituted the decision of the 2<sup>nd</sup> Interested Party and awarded the tender to the 1<sup>st</sup> Interested Party on the ground that they were the lowest evaluated bidder; and directed the 2<sup>nd</sup> Interested Party to issue a letter of award and conclude procurement proceedings with the 1<sup>st</sup> Interested Party.
  31. It is the 2<sup>nd</sup> Interested Party's case that the Respondent's decision in its entirety was made in error and the orders granted are beyond the Respondent's powers. According to the PE, the Respondent erred in relying on Section 66 of the PP&DA as this was not read together with Regulation 16 as amended by Legal Notice No 106 of June 2013 which provides that the tender processing committee is to submit, in the report to the tender committee, a recommendation to award the lowest evaluated bidder or the proposal with the highest total score.
  32. The 2<sup>nd</sup> Interested Party's submits that whereas Section 66 of the PP&DA provides that the award should be to the bidder with the lowest evaluated price, the 1<sup>st</sup> Interested Party was not the lowest evaluated bidder as their financial bid was not complete or accurate due to crucial omissions. The omissions were discovered during line by line evaluation of the bid thereby raising the inference that the bid was neither complete nor accurate. The PE states that this information was placed before the Respondent.
  33. The PE asserts that Respondent did not take into consideration the fact that even though the 1<sup>st</sup> Interested Party had attained the minimum technical score by scoring 86.25%, the technical and financial bids it presented had glaring deficiencies which would result in price variations due to the 1<sup>st</sup> Interested Party's bid in the event that they were awarded the contract; possible rejection of fuel by its intended users on account of the 1<sup>st</sup> Interested Party's failure to demonstrate its ability to conform to internationally accepted standards during engineering procurement and construction of the depot; possible loss of lives due to errors and omissions occasioned by the 1<sup>st</sup> Interested

- Party's modest technical capacities during engineering procurement and construction of the depot; and possible loss of funds as the project may not be realized owing to design deficiency and its acceptability by international aviation inspectors namely JIG/IATA.
34. It is the Procuring Entity's case that although the foregoing facts were brought to the attention of the Respondent, the Respondent contrary to the 2<sup>nd</sup> Interested Party's expectation failed to take into account its earlier decisions made in favor of the 2<sup>nd</sup> Interested Party in similar circumstances. Among the decision of the Review Board which were cited by the 2<sup>nd</sup> Interested Party was **PPARB Application No 26/2014 of 20<sup>th</sup> June 2014 Civicon v Kenya Pipeline Company Ltd** in which an open tender that had used the weighted score was upheld on the ground that the bidder was aware that this is the criteria used by the 2<sup>nd</sup> Interested Party for highly technical tenders. The second decision that was cited is **PPARB Application No 16/2012 of 23<sup>rd</sup> April 2012 Linscan Advanced Tank ender Services v KPC** where the Respondent determined that the 2<sup>nd</sup> Interested Party was justified in its use of weighted score in a highly technical tender.
  35. The 2<sup>nd</sup> Interested Party's averred that the Respondent overlooked the Tender Form signed, stamped and accepted by the 1<sup>st</sup> Interested Party. The 2<sup>nd</sup> Interested Party would not be obligated to award the tender to the lowest bidder. The Respondent did not take into consideration several key technical omissions and irregularities in the bid by the 1<sup>st</sup> Interested Party which were relevant in the decision not to award the tender to the 1<sup>st</sup> Interested Party.
  36. Under evaluation criterion 2 (b), it was a requirement that a bidder illustrates their understanding of JIG/IATA requirements by providing a process flow diagram for the purpose of controlling the quality of JET A1 product before delivery to the aircraft. The 1<sup>st</sup> Interested Party omitted a very crucial facility in the quality control process i.e. an Anti-Static Additive (ASA) or static dissipator required to reduce static electricity hazards, static generation due to movement of fuel through pipeline hoses and filters could result in a spark discharge capable of igniting flammable/air mixtures. It is the PE's case that the 1<sup>st</sup> Interested Party's failure to provide for the ASA injection facility would negate the project's objective of construction of a Jet 1A fueling depot. If the omission is not addressed the depot would be rendered an (illuminating) kerosene loading facility as opposed to a Jet A1 facility. That if the 1<sup>st</sup> Interested Party was to execute the project as proposed there would be dire consequences on the safety of the depot facility and aircrafts. Further the facility would not be approved by JIG/IATA. It was shown that the Respondent ignored Clause 3.4.3 of the JIG Manual that makes it mandatory to have ASA injection facility.
  37. The Procuring Entity asserted that the Respondent also overlooked the fact that under evaluation criteria 5, bidders were required to prove ownership or ability to hire equipment through a written agreement. This was not demonstrated by the 1<sup>st</sup> Interested Party. Further, that under evaluation criteria 6(b)(vi) bidders were required to provide a methodology for installation of key equipment for the operation of the depot. In this regard the 1<sup>st</sup> Interested Party failed to demonstrate the methodology for the installation of pumps. The Respondent also overlooked the fact that the 1<sup>st</sup> Interested Party had in contravention of evaluation criteria 6(b) failed to provide a clear methodology on how they would adequately cover the depot against fire hazards. In addition, the Respondent overlooked the fact that the 1<sup>st</sup> Interested Party had not provided a methodology for preventing current interference from existing CP system at the point the three KPC pipes will be running in parallel to each other. This was an express requirement under evaluation criteria 6(b) (ix). The Respondent also ought to have noted that the 1<sup>st</sup> Interested Party had proposed Ms Stella Oirere as an EIA Associate expert yet the proposed expert has less than 5 years' experience on EIA matters in the oil and gas industry contrary to the requirements under evaluation criteria 7(iii).
  38. The PE also stated that though it was brought to the Respondent's attention, the Respondent overlooked the fact that in their financial bid, the 1<sup>st</sup> Interested Party was required to allow for the supply and transportation of start-up, commissioning and two years' commercial operation spares of the facilities in accordance with the contract. Each element was to be priced separately. The 1<sup>st</sup> Interested Party did not quote for this item neither did they provide a list as required. Even though Clause 3.10.2 of the tender document allows for items which no rate or price entered to be deemed to be covered by the rates of other items and prices in the bills of quantities, the 1<sup>st</sup> Interested Party did not list the spares to be provided.

39. The PE contended that all the omissions explained why the 1<sup>st</sup> Interested Party's quoted price of USD 68.4 Million was the lowest. The Respondent ought to have considered the fact that the price quoted was lower than the market trend i.e. 75% of the bids received ranged between USD 73 Million and USD 91 Million, 16.7% quoted above USD 91 Million with the highest being USD 134 Million.
40. The PE's parting shot is that the Respondent acted beyond its powers in purporting to award the contract to the 1<sup>st</sup> Interested Party whereas such power is the preserve of a procuring entity.
41. Turning to submissions, the 2<sup>nd</sup> Interested Party submitted that the Respondent's decision dated 21<sup>st</sup> April, 2015 is unreasonable, unlawful, *ultra vires*, an abuse of power and violates legitimate expectation. The Respondent acted *ultra vires* by awarding the tender to the 1<sup>st</sup> Interested Party whereas the PP&DA does not give it powers to award tenders and neither does it have powers to evaluate bids and determine a winning bidder. According to the Procuring Entity, the Respondent did not take into consideration relevant factors that it ought to have taken into account hence the decision is unreasonable and contrary to the legitimate expectations of the parties. Further, that the decision was founded on the wrong and erroneous application of the relevant law hence illegal. The Respondent erred in relying on Section 66 of the PP&DA but disregarding Regulation 16 which entitled the tender processing committee to recommend the award of a tender to the lowest evaluated bidder or the proposal with the highest total score. It is illegal for the Respondent to purport to impose evaluation criteria under Section 82(5). The decision of the Respondent is founded on a misapprehension of the law by erroneously concluding that the 2<sup>nd</sup> Interested Party awarded the tender pursuant to Section 82(5) of the PP&DA. The decision of the Respondent to award the tender to the 1<sup>st</sup> Interested Party is contrary to public policy due to the glaring safety hazards and sustainability threats posed to the proposed depot by the Technical Proposal of the 1<sup>st</sup> Interested Party.
42. The Respondent purported to annul the tendering process then proceeded to award the 1<sup>st</sup> Interested Party the tender. This equates to the Respondent usurping the powers of the procuring entity and thereby purporting to evaluate the bids afresh and drawing the conclusion that the 1<sup>st</sup> Interested Party was the successful bidder to the exclusion of other bidders. The effect of the holding by the Respondent is to eliminate the participation of other bidders from a new process which ought to ensue following the annulment of the tendering process. The Respondent has no power to do so. On this submission the 2<sup>nd</sup> Interested Party relied on the decision in **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** where it was stated that a public body has to exercise its powers within the four corners of the statute creating it.
43. It is the 2<sup>nd</sup> Interested Party's argument that assuming that the decision to annul the 2<sup>nd</sup> Interested Party's decision was correct, it was then not within the Review Board's power to award the tender to the 1<sup>st</sup> Interested Party. Such an order is *ultra vires* and a nullity.
44. The Respondent acted *ultra vires* in purporting to impose on the tender process an evaluation criterion that was never contemplated, set out in the tender documents or pleaded by the parties. The 2<sup>nd</sup> Interested Party cited the case of **Republic v Public Procurement Administrative Review Board Ex-Parte Kenya Medical Supply Agency & 3 others Misc Application 491 of 2009** in which the Court found that the Review Board had no jurisdiction to waive obvious statutory requirements as such action would be *ultra vires*.
45. According to the PE, it may well be surmised that the Respondent deliberately bent the rules and conjured up an evaluation basis that would favor the 1<sup>st</sup> Interested Party to the detriment of the other bidders. The result would be to unfairly eliminate competition and compromise the integrity of the tender process and jeopardizing the safety of the intended fuel depot project.
46. The PE faulted the Review Board for failing to take into account relevant considerations thus rendering its decision irrational. This argument is supported by the decision in **EX Parte Olive Telecommunication PVT Limited (supra)** in which the Court noted that it had jurisdiction to intervene in the decision of the Review Board where it fails to consider relevant evidence and considers irrelevant ones.
47. The PE submitted that a decision made without proper consideration of the correct law is illegal and is a nullity. The Respondent erred in relying on section 66(4) of the PP&DA as this was not

- read together with Regulation 16 as amended by Legal Notice No 106 of June 2013. It provides that the tender processing committee is to submit in the Report to the Tender Committee a recommendation to award the lowest evaluated bidder or the proposal with the highest total score. It also ought to be noted that the Tender Form signed by the bidders expressly disclosed that the 2<sup>nd</sup> Interested Party would not be obligated to award the tender to the lowest bidder. The statement of Lord Diplock in the case of **Council of Civil Service Unions v Minister for Civil Service [1984] 3 All ER 935**, is cited in support of the proposition that a decision maker must understand the law that regulates his decision-making power and give effect to that law.
48. According to the 2<sup>nd</sup> Interested Party, it is illegal for the Review Board to rewrite the evaluation criteria contrary to the criteria elected and applied by a procuring entity. In support of this assertion the Procuring Entity submits that in the case of **Republic v Public Procurement Administrative Review Board & another Ex-parte Uto Creations Studio Limited [2013] eKLR** where the Review Board had sought to apply provisions of **section 66(3)** of the PP&DA relating to open tendering to a tender in which the procuring entity had opted to use Request For Proposals. The Court held that it had fallen into error by misapplying the law as **Part V** and **Part VI** of the PP&DA are mutually exclusive as they apply to separate modes of procurement.
49. The Respondent opposed the application through the Replying Affidavit sworn on 15<sup>th</sup> May, 2015 by its Secretary Henock Kirungu. The Review Board's case is that upon receiving the 1<sup>st</sup> Interested Party's Request for Review, it heard parties, considered their submissions, determined the application for review and delivered its ruling on the 21<sup>st</sup> April, 2015 allowing the Request for Review. In the ruling the 2<sup>nd</sup> Interested Party was ordered to issue a letter of award and conclude the procurement process including signing a contract with the 1<sup>st</sup> Interested Party.
50. It is the Review Board's case that in arriving at the decision it found that the tender in question was an open tender and a winner had to be declared in accordance with the provision of Section 66(4) of the PP&DA. The Review Board's determination was supported by the case of **Kenya Airways Limited v Satwart Singh Flora (Nai CA No.54 of 2005)** where the Court of Appeal held that any action prohibited by a statute would be against public policy and that a party who had breached the provisions of the law could not benefit from such an action. The court also held that any contract or transaction arising from such a breach was illegal and was unenforceable. Further, that the Respondent held that by using the wrong method/or mixing the two methods of procurement the public stood to suffer a loss of one billion Kenya Shillings which is a colossal amount of money.
51. It is the Respondent's case that the decision was made within its mandate and the specific sections of the law in support of the decision are contained in that decision.
52. The Review Board further contended that the Ex Parte Applicant's application is therefore made in bad faith, has no merit and is only calculated to discredit the credibility of the Respondent's mandate and function, while ultimately eroding the public's confidence in procurement procedures and processes.
53. The Review Board asserts that it relied on the evaluation conducted by the 2<sup>nd</sup> Interested Party and only corrected the breach of the law by discarding the formula and applying Section 66(4) and further allowed the tender process to be completed under the correct provisions of the PP&DA.
54. It is postulated that pursuant to Section 98 of the PP&DA the Review Board has power to annul anything the procuring entity has done in procurement proceedings including annulling the procurement proceedings in their entirety; give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings; substitute the decision of the review board for any decision of the procuring entity in the procurement proceedings; and order the payment of costs as between parties to the review.
55. The Respondent relied on the following authorities: **Republic v Public Procurement Administrative Review Board & another, Ex Parte Gibb Africa Limited & another [2012] eKLR**; **Associated Provisional Picture House Limited v Wednesbury Corporation (1947) 2 ALL ER 680**; **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others, Civil Appeal No. 145 of 2011**; and **Republic v Kenya Power & Lighting Company Limited & another [2013] eKLR**.
56. The 1<sup>st</sup> Interested Party opposed the application through the Replying Affidavit of its Chief Finance Officer, Michael Wachira. The 1<sup>st</sup> Interested Party stated that it participated in an open

- tender advertised by the Procuring Entity on 14<sup>th</sup> November, 2014. As per Clause 3.12, the tender submission date was 16<sup>th</sup> February, 2015 at 10.00 a.m. while the tender validity period was 120 days from the tender submission date. The Tender Document was designed to consist two parts, namely the Technical Proposal and the Financial Proposal. Further, that the 1<sup>st</sup> Interested Party submitted a valid bid for the tender.
57. It is the 1<sup>st</sup> Interested Party's case that pursuant to Clause 3.26 of the Tender Document, technical evaluations of the bids was to be carried out first and only tenderers who garnered at least 50% in each of the seven evaluation categories and attained an overall score of 75% would qualify to have their financial submissions opened and evaluated. By a letter dated 11<sup>th</sup> March, 2015, the 1<sup>st</sup> Interested Party was advised that its technical proposal had succeeded. The 1<sup>st</sup> Interested Party was therefore invited for the opening of the Financial Proposals on 13<sup>th</sup> March, 2015. On the day of opening of financial bids, the 1<sup>st</sup> Interested Party found that it had attained a technical score of 86.25% and had passed in all the evaluation categories set by the PE in the Tender Document.
58. It is the 1<sup>st</sup> Interested Party's position that when the financial bids were opened on 13<sup>th</sup> March, 2015 it noted that it had offered the lowest financial proposal. The 1<sup>st</sup> Interested Party asserts that pursuant to Clause 3.27 of the Tender Document, the Technical Score was to be subjected to a weight of 0.7 and the Financial Score a weight of 0.3. It was further provided that the lowest evaluated financial price will attract 100%. In a letter dated 18<sup>th</sup> March, 2015, the Procuring Entity advised the 1<sup>st</sup> Interested Party that its tender was not successful since it did not attain the highest total weighted score but attained a composite score of 90.38%.
59. Immediately thereafter, the 1<sup>st</sup> Interested Party filed a Request for Review being Application Number 18 of 2015 before the Review Board and complained that it had illegally and unfairly been denied the tender in question. After hearing all parties who chose to participate in the proceedings, the Review Board upheld its complaints and determined that the 1<sup>st</sup> Interested Party's tender was the rightful winner.
60. The 1<sup>st</sup> Interested Party's submission before the Review Board was that sections 50 to 71 (both inclusive) of the PP&DA are specifically activated in an open tender. The 1<sup>st</sup> Interested Party contended in the Review Board that in an open tender Section 66(4) of the PP&DA provides that the successful tender shall be the tender with the lowest evaluated price. It relied on the Black's Law Dictionary, 9<sup>th</sup> edition for the definition of price which was defined as **"the amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold"**.
61. Before the Review Board, the 1<sup>st</sup> Interested Party argued also that in an open tender, the technical score matters only up to the point where the bidders meet the pass mark. It did not matter thereafter and has no weight once a pass mark has been achieved by a bidder. In an open tender, as soon as the technical evaluation is concluded and bidders are allowed to compete on price, the technical score is left behind and ceases to have any effect whatsoever. The 1<sup>st</sup> Interested Party convinced the Review Board that the formula of award adopted by the Respondent in the tender was the one for Request for Proposals under Section 82(5) of the PP&DA yet this was an open tender and accordingly the PE had breached the law.
62. The 1<sup>st</sup> Interested Party therefore submits before this Court that the successful bidder can only be determined by what price is offered and not how many marks the technical bid achieved. According to the 1<sup>st</sup> Interested Party, in this particular tender, a bidder who satisfied clause 3.26.1(i) of the Tender Document to the effect that **"...only Tenderers who garner at least 50% in each of the seven (7) evaluation categories and attain an overall score of 75% shall qualify to have their financial submissions opened and evaluated"** was to be the successful bidder if its evaluated financial proposal is the lowest.
63. Further, that the formula relied upon by the Procuring Entity led to an erroneous outcome that would lead to a direct loss of over Kshs. one billion of public funds.
64. As for the issue of the jurisdiction of the Review Board, it was submitted that pursuant to Section 98 of the PP&DA its powers include annulment of anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety; giving of directions to the procuring entity with respect to anything to be done or redone in the

- procurement proceedings; substitution of the decision of the Review Board for any decision of the PE in the procurement proceedings; and an order for the payment of costs as between parties to the review. It is the 1<sup>st</sup> Interested Party's case therefore that the orders issued by the Review Board on 21<sup>st</sup> April, 2015 were within the powers granted to it by the law.
65. The 1<sup>st</sup> Interested Party also took issue with the Ex Parte Applicant's decision to file the substantive Notice of Motion on 4<sup>th</sup> May, 2015 on the ground that the same was in breach of the Court's order of 24<sup>th</sup> April, 2015 which had directed the Ex Parte Applicant to file and serve the substantive Notice of Motion within seven days from the date of the grant of leave. According to the 1<sup>st</sup> Interested Party, the application herein is incompetent as the same has been filed contrary to the orders issued and without any leave as required under the Law Reform Act and Order 53 of the Civil Procedure Rules.
66. Another issue taken up by the 1<sup>st</sup> Interested Party on the validity of this matter is that the Ex Parte Applicant is not a legal entity capable of commencing proceedings in the manner done in this case as there is no express authority that was obtained from the very many entities on whose behalf Anders Dahl purported to file the matter. It was therefore the 1<sup>st</sup> Interested Party's argument that this application is incompetent and an abuse of the process of the Court.
67. The 1<sup>st</sup> Interested Party asserted that the Review Board in its decision made determinations that were within its jurisdiction. Those findings were as follows: the tender which was the subject of the Request for Review was an open tender; the 2<sup>nd</sup> Interested Party diligently proceeded with both the technical and the financial evaluation but when it reached the stage of awarding the tender, the 2<sup>nd</sup> Interested Party elected to do so under the provisions of Section 82(5) which is applicable to Requests for Proposals; the 2<sup>nd</sup> Interested Party combined the percentages attained by the various bidders in the technical and financial scores in order to come up with a winner; the financial evaluation report signed by all members of the evaluation committee demonstrated that the 1<sup>st</sup> Interested Party was the lowest evaluated bidder and was awarded 100% having offered the lowest price of USD 68,454,567.28; the tender was evaluated in its entirety; the only question for the Board is whether it was open for the 2<sup>nd</sup> Interested Party to award the tender to any other bidder other than that provided for under Section 66(4) of the PP&DA; the 2<sup>nd</sup> Interested Party erred in law in the manner in which it acted in awarding the tender as this expressly contravened the provisions of the law on open tendering which is set out in Sections 50 all the way to Section 71 of the PP&DA; and the criteria for an award of tender where the method used is an open tendering is set out under the provisions of Section 66(4) of the Act which expressly provides "the successful tender shall be the tender with the lowest evaluated price".
68. It is the 1<sup>st</sup> Interested Party's case that the Review Board's decision did not render the Tender Document null and void but the Review Board in fact sustained the same and only faulted the formula used by the Procuring Entity in selecting the winner. Further that the Review Board indeed found that the exercise of comparing and evaluating the tenders proceeded diligently except at the stage of award when the law was violated. It is therefore the 1<sup>st</sup> Interested Party's argument that the Review Board only corrected the breach of the law by discarding the formula and applying Section 66(4) and therefore allowed the tender process to be completed under the correct provisions of the PP&DA.
69. The 1<sup>st</sup> Interested Party postulated that every tender document must be designed so as to abide with the provisions of the law. Had the Review Board failed to intervene, the decision to award the tender to a party other than as provided under Section 66(4), would have offended the spirit of the PP&DA namely promotion of competition and fair treatment of the competitors.
70. The 1<sup>st</sup> Interested Party wrapped up its case by urging the Court to consider that these are judicial review proceedings which seek to ensure that a party receives fair treatment in the hands of public bodies. It is the 1<sup>st</sup> Interested Party's summation that this is an appeal disguised as a judicial review application and the same should be dismissed.
71. In support of its case, the 1<sup>st</sup> Interested Party cited the decision of the Court of Appeal in **Civil Appeal No. 145 of 2011 Kenya Pipeline Company Limited and Hyosung Ebara Company Limited and 2 others** in which it was held that "**where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it**

has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter.”

72. On the basis of the cited decision of the Court of Appeal, the 1<sup>st</sup> Interested Party contends that the decision of the Review Board was within its mandate as per Section 98 of the PP&DA and this Court would be crossing its boundaries were it to find otherwise. The 1<sup>st</sup> Interested Party urged the Court to note that the remit of judicial review is limited to the decision making process and is not an appeal and an attempt by the Court to do more than that which the law allows it to do will amount to usurpation of the power of the Respondent. The decision of the Court of Appeal in **Civil Appeal No. 234 of 1995 between The Commissioner of Lands and Kunste Hotel Limited** was cited in support of this assertion.
73. The 1<sup>st</sup> Interested Party cited the decision in **Pastoli v Kabale District Local Government Council and others [2008] 2 EA 300** in support of its contention that judicial review orders are not granted as a matter of course as an applicant, in order to succeed, must show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
74. Urging the Court to find that the Review Board properly exercised its discretion, the 1<sup>st</sup> Interested Party referred the Court to the decision in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 68** where it was stated that:

“The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law. What, then, are those principles? They are perfectly well understood. The exercise of such discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty—those, of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word “unreasonable.” It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all those things largely fall under one head.”

75. The 1<sup>st</sup> Interested Party urged the Court to find, as was found by Odunga, J in **High Court Misc. Application No. 32 of 2013, Republic v Public Procurement Administrative Review Board and others ex parte Parliamentary Service Commission** that where unreasonableness or breach of rules of natural justice have not been established, a judicial review court cannot grant any remedy.

76. According to the 1<sup>st</sup> Interested Party, this Court has no jurisdiction to delve into the merits of the Respondent's decision as that falls within the purview of an appellate court. The decision of Warsame, J (as he then was) in **Miscellaneous Civil Application 134 of 2011 Republic V Public Procurement Administrative Review Board & Another Ex Parte Cementers Limited** and that of Majanja, J in **Misc. Application No. 89 of 2012, Republic v Public Procurement Administrative Review Board and Another ex parte Uto Creations Studio Limited** were cited to support the 1<sup>st</sup> Interested Party's argument.
77. The 1<sup>st</sup> Interested Party concluded its arguments by urging the Court to find that the Ex Parte Applicant has not demonstrated any breaches of the law or procedure to entitle this Court to intervene in this matter and grant the orders sought. It has not been demonstrated that the Respondent is in breach of any statutory provision or has acted in excess or without jurisdiction or breached the rules of natural justice.
78. In response to the 1<sup>st</sup> Interested Party's Replying Affidavit, Anders Dahl averred that the entities named as the Ex Parte Applicant in these proceedings participated in the bid as a Consortium. This fact had been acknowledged by the 1<sup>st</sup> Interested Party when it filed the Request for Review with the Review Board. Further, that the Review Board in its decision of 21<sup>st</sup> April, 2015 also acknowledged that the successful bidder was a Partnership comprising of the entities named as the Ex Parte Applicant in the current proceedings. The Ex Parte Applicant averred that having had the capacity to present the bid as a Partnership/Consortium and having appeared before the Review Board in that capacity, it ought not to be denied the right to challenge the decision of the Review Board. It was deposed on behalf of the Ex Parte Applicant that there was nothing in law preventing a Consortium/Partnership such as the Ex Parte Applicant from instituting court proceedings.
79. The Ex Parte Applicant contested the averment in the Replying Affidavit of the 1<sup>st</sup> Interested Party that no express authority had been obtained from the "very many entities" on whose behalf the suit had been filed. It was deposed that these judicial review proceedings were commenced not by "very many entities" but by a single entity being the Consortium/Partnership named as the Ex Parte Applicant herein. The Ex Parte Applicant's Regional Manager stated that, in his Verifying Affidavit sworn on 24<sup>th</sup> April, 2015, he had indicated that he had authority to swear the affidavit and hence commence the proceedings. He also exhibited authority documents from the various entities making up the Consortium.
80. Although the parties herein filed extensive pleadings and elaborate submissions, I find that the key question for the determination of the Court is whether the Review Board's decision was erroneous in law and took into consideration or failed to take into consideration certain matters. If it is established that the Review Board did not discharge its mandate as required by the law, then the only other question is whether the orders sought ought to be granted to the Ex Parte Applicant.
81. Before discussing the fundamental question, I must make a finding on other issue raised by the 1<sup>st</sup> Interested Party. One of the issues raised was that the Ex parte Applicant filed the substantive notice of motion outside the seven days granted by the Court. This issue was promptly discarded by the 1<sup>st</sup> Interested Party during the hearing and I need not make a decision on the same.
82. The second issue was that the Ex parte Applicant is not an entity known to the law and was therefore incompetent to commence these proceedings. The Ex parte Applicant argued that it was properly before this Court as a consortium or partnership and that is how it participated in the tender and in the Request for Review proceedings before the Respondent.
83. I have carefully looked at the question and in my view the same is being raised late in the day. The Ex parte Applicant participated in the tender as a consortium. The 1<sup>st</sup> Interested Party did not challenge the Ex parte Applicant's participation in the tender on ground that it was an entity unknown to the law. The Ex parte Applicant also participated in the matter before the Respondent and no question was raised by the 1<sup>st</sup> Interested Party. It can therefore be said that this issue is being taken up before this court in bad faith.
84. Further, the Verifying Affidavit of Anders Dahl clearly showed that he had instructions to commence the proceedings on behalf of the Ex parte Applicant as named in the application. It cannot therefore be said that he had no authority to commence the proceedings on behalf of any of

the partners that form the Ex parte Applicant consortium. In the circumstances, I find that the Ex parte Applicant is properly before this court.

85. Moving on, I now turn to the key issue. The reach of judicial review is no longer a matter for debate. Judicial review is available where a public authority or tribunal has acted illegally, irrationally or against the rules of natural justice. This message was firmly passed across by Lord Diplock in the case of **Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6** stated that:

**“Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action are subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice. By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**

**By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp [1974] 2 All ER, [1948] 1 KB 223*. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”**

86. Justice Kasule of Uganda explained the meaning of illegality, irrationality and procedural impropriety in the case **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300** as follows:

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

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

**Irrationality is when there is such gross unreasonableness in the decision taken or act**

done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re an Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

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

87. Although the basis for grant of judicial review is illegality, irrationality and procedural impropriety, other grounds are lack of jurisdiction, error of law, error of facts, breach of legitimate expectation and the doctrine of proportionality. According to Nyamu, J (as he then was) in **Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex-parte Cecilia Mwathi and another** [2008] eKLR, judicial review orders are available where there is abuse of discretion; where the decision maker exercises discretion for an improper purpose; where the decision maker is in breach of duty to act fairly; where the decision maker has failed to exercise statutory discretion reasonably, where the decision maker acts in a manner to frustrate the purpose of the Act donating power; where the decision maker fails to exercise discretion; where the decision maker fetters the discretion given; and where the decision is irrational and unreasonable.
88. There is a clear distinction between an appeal and judicial review proceedings. In judicial review the Court is only concerned with the fairness of the process under which the impugned decision or action was reached. Once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision for to do so would amount to usurping the power of the body that was mandated by the law giver to make the decision.
89. This point was clearly brought out by the Court of Appeal, when it observed in **Municipal Council of Mombasa v Republic & Another** [2002] eKLR that in judicial review:

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

It is not the business of a judicial review court to interfere with the powers given to a public authority by the law. As already stated, where there is reason for the Court to intervene, the circumstances under which it can do so are clearly delineated.

90. This matter is centred on the allegation that the Review Board committed an error of law. What then amounts to an error of law? The learned authors of **Halsbury’s Laws of England** at paragraph 77 page 170 of the 4<sup>th</sup> Edition discuss this topic and state that:

**“There is a general presumption that a public decision making body has no jurisdiction or power to commit an error of law; thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual**

making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed.

In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete.

A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself *ultra vires*; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfill an express or implied duty to give reasons or otherwise abuses its power.”

[Footnotes omitted]

91. That judicial review orders are available where the decision maker has committed an error of law was confirmed by Mwakasendo, J in the case **Railways Corporation v Sefu** [1971] E.A. 327 when he stated at page 331 that:

“Notwithstanding that the decision is by statute made ‘final’ certiorari can still issue for excess of jurisdiction or for error of law on the face of the record. And so have the Courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the superior Courts to supervise inferior courts or tribunals is necessarily limited.”

92. The learned Judge then went ahead and cited with approval the minority judgement of Lord Morris of Borth-y-Gest in the case of **Anisminic v. Foreign Compensation Commission**, [1969] 2 A.C. 147 at pages 182 and 183 where he opined that:

“If a tribunal while acting within its jurisdiction makes an error of law which it reveals on the face of its recorded determination, then the court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a court of law. If a particular issue is left to a tribunal to decide, then even where it is shown (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters which are left to a tribunal for its decision such errors will be errors within jurisdiction. If issues of law as well as of fact are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called in question in any court of law.....

If therefore, a tribunal while within the area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or, as it is often expressed, on the face of the record) then the superior court could correct that error unless it was forbidden to do so. It would be so forbidden if the determination was ‘not to be called in question in any court of law’. If so forbidden it could not then

even hear argument which suggested that error of law had been made. It could, however, still consider whether the determination was within ‘the area of the inferior jurisdiction.’ ”

93. This position was affirmed by the Court of Appeal in **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR** where the Court drew the boundaries for reviewing the decisions of the Review Board as follows:

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

**Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1<sup>st</sup> Respondent’s tender had met the mandatory conditions. The issue whether or not the 1<sup>st</sup> Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.**

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

**The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction.”**

94. In order for an applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the applicant must demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review Court to action.

95. The parties herein are agreed that the tender in question was an open tender and as such Part V (sections 50 to 71) on open tendering was the applicable law. At the conclusion of the hearing of the Request for Review, the Respondent, in one of the issues identified for determination, delivered itself as follows:

**“The Board has considered the submissions made by the parties on the second issue and finds that it was not in dispute in this Request for Review that the tender the subject matter of this Request for Review was an open tender. This fact was admitted by Counsel for the Procuring Entity in her submissions and by counsel for the successful bidder. The Board has looked at the advertisement which was placed in the Standard and the Daily Nation Newspaper of 14<sup>th</sup> November, 2014 and finds that the**

advertisement was for an open tender. The Board has also perused both the technical and the financial evaluation reports and finds that a technical and financial evaluation were both carried out but at the end of the said exercise, the Procuring Entity combined the percentages attained by the various bidders in the technical and the financial scores in order to come up with a winner.

The Board has perused the tender opening register, the technical and the financial proposals which are dated 16/2/2015, 12/03/2015 and 16/3/2015 respectively and finds that the technical proposals for all bidders were evaluated. At the conclusion of the said exercise, the Applicant was found to have attained at least 50% in each category and an overall score of 86.5% which was above the 75% mark required under clause 3.26.1 (i) of the tender document for an Applicant to precede for financial evaluation.

The financial evaluation report which was signed by all the members of the evaluation committee on 16/3/2015 shows that the Applicant was the lowest evaluated bidder and was awarded 100% having offered the lowest price of USD 68,454,567.28.

The Board does not therefore have any doubt that this tender was evaluated in its entirety but what the Procuring Entity proceeded as earlier stated, was to aggregate the scores in the technical and the financial scores in order to arrive at the successful bidder after completing the process of evaluation.

The Applicant argued that such an aggregation could only be done if the tender in question was a Request for Proposals but not an open tender where the winner can only be the bidder which had attained the lowest evaluated price under the provisions of Section 66(4) of the Act.

The only question which the Board therefore has to decide under this issue is whether it was open for the Procuring Entity to award the tender to any other bidder other than that provided for under Section 66(4) of the Act.

The Public Procurement and Disposal Act 2005 provides for various methods which a Procuring Entity can use while advertising for goods and services. These methods which a Procuring Entity can use are; an open tender, a restricted tender, a direct Procurement, a Request for Proposals, a Request for Quotations and a Low Value Procurement Procedure.

These Procurement methods are governed by the Provisions of Section 50 to 71, 73, 74, 75, 76 to 87, 88 to 89, 90 to 91 and 92 of the Act respectively.

In the Request for Review before the Board, the Procuring Entity elected to use the open tendering method in procuring the particular services from the bidders. The Procuring Entity diligently proceeded with both the technical and the financial evaluation but when it reached the stage of awarding the tender, the Procuring Entity elected to do so under the Provisions of Section 82(5) of the Act which is applicable to Requests for Proposals. Section 82(5) of the Act and which is relevant to Requests for Review before the Board provides as follows:-

**Section 82 (5)**

*The successful proposal shall be 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 under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4)".*

The Board has looked at the Provisions of the Act and finds that the Procuring Entity

**erred in law in the manner in which it acted in awarding the tender as this expressly contravened the provisions of the law on open tendering which is set out in Section 50 all the way to Section 71 of the Act.**

**The criteria for an award of tender where the method used is open tendering is set out under the provisions of Section 66 (4) of the Act which expressly provides as follows:-**

**66 (4) “The successful tender shall be the tender with the lowest evaluated price”.**

**In the case of Landor Associates –vs- Kenya Power and Lighting Company Ltd (PPRB Application No. 42 of 2000), the Board held that where the Procuring Entity had adopted a particular method, then the eventual award should be made under the Provisions of the law governing that method but not that applicable to another method.**

**During the hearing of the Request for Review, both Counsel for the Procuring Entity and Counsel for successful bidder submitted that the Applicant’s Project Manager was aware of the contents of the tender document and the manner of scoring and ought to have complained if the Applicant found that the contents of the tender document were unfair or they alternatively ought to have sought for clarification.**

**The Board however takes the view that this would not have cured the defect in the declaration of the winner since the declaration was done in contravention of the law. It is now a well established principle of law that any action done in contravention of the express Provisions of the law cannot be cured. As the Board has already observed this was an open tender and a winner had to be declared in accordance with the Provisions of Section 66(4) of the Act and any defect in complying with the law cannot be cured by the contents of the tender document or a party’s acquiescence to the same. In the case of the Kenya Airways Limited –vs- Satwart Singh Flora (Nai CA No.54 of 2005) the Court of Appeal held that any action prohibited by a statute would be against Public Policy and that a party who had breached the Provisions of the law could not benefit from such an action. The court also held that any contract or transaction arising from such a breach was illegal and was unenforceable.**

**Turning to the issue of price, the tender price presented by the Applicant in this case was the sum of USD 68,454,567.28 while the successful bidder gave a price of USD 78,995,147.54. This represented a price differential of approximately 10,000,000 USD which is an equivalent of approximately One Billion Kenyan Shillings. By using the wrong method therefore the Public stood to suffer a loss of One Billion Kenya Shillings which is a colossal amount of money.**

**The Procuring Entity in paragraph 7 of its written response and in paragraph 9 of the Replying Affidavit sworn by Sospeter Mwakoma sought to point out certain shortcomings in the Applicant’s bid which revolved around its technical and financial ability to deliver this project.**

**The Board is however of the respectful view that the Procuring Entity evaluated both the technical and the financial proposals by the applicant and awarded it a total of 86.25% and 100% respectively. The technical score was above the pass mark of 75% required for a party to proceed to financial evaluation and thus the invitation by the Procuring Entity to the Applicant to attend the financial opening of the bid. The Board therefore agrees with the Applicant’s submissions that it has the ability to undertake the project which is the subject matter of this Request for Review.**

**One of the prayers which the Applicant sought in this Request for Review as prayer**

**C was for an order that the Board be pleased to review all records of the Procurement process particularly the technical evaluation and thereafter to substitute the decision of the Review Board for the decision of the Procuring Entity and award the Tender to the Applicant.**

**The Board has previously exercised this power in a number of cases where the facts and the law were clear. In the case of Horsbridge Network Systems (E.A) Ltd –vs- The Central Bank of Kenya [PPARB No. 65 of 2012] which was a case relating to an open tender which had gone through both a technical and financial evaluation, the Board declared the Procuring Entity’s purported termination of the procurement process illegal and substituted the same by awarding the tender to the lowest evaluated bidder as required by the law.**

**In the more recent case of Com Twenty One Ltd –vs- The Comptroller of State House and MFT Technology Solution Ltd (PPARB No. 45 of 2014) the Board substituted the decision of the Procuring Entity which had awarded the subject tender to a tenderer who was not qualified and awarded the same to the lowest evaluated bidder in accordance with the provisions of Section 66 (4) of the Act. The Procuring Entity had similarly carried out an evaluation but failed to take into account that the party earlier awarded the tender had not complied with the Provisions of the National Construction Authority Act.**

**The Board has not and will not hesitate to substitute a decision of the Procuring Entity where the circumstances of any particular case warrant it.**

**In view of this fact and in view of the urgency in the nature of the project involved and in the further public interest involved in upholding the Provisions of the Act and particularly Section 66 (4) of the Public Procurement and Disposal Act 2005, the Board finds that this is a proper case for the Board to intervene under the Provisions of Section 98 (c) of the Act and notes that other than the above considerations, the Board’s action will also save time and public cost in carrying out another process when it is clear that both the technical and the financial evaluation were properly carried out and that the mistake only arose in failing to comply with the provisions of the Act regarding the declaration of the successful winner under the law.**

**The Board wishes to state that this is a power that is expressly conferred on the Board by the Provisions of Section 98 (c) of the Act and has exercised it albeit sparingly when the case before it is a straight forward case of a Procuring Entity failing to act in accordance with the law. As the Board has already observed the Procuring Entity proceeded properly and evaluated both the technical and the financial proposals which were placed before it and determined that out of all the bidders who submitted their tenders to, it was the Applicant which offered the lowest tender price leading to a saving of approximately One Billion of tax payers money.**

## **FINAL ORDERS**

**In view of all the above findings and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Act, the Applicant’s Request for Review is therefore allowed and the Board makes the following orders on this Request for Review:-**

**That the Respondent’s decision awarding the tender for an EPC Tender for the construction of an Aviation Fuel Depot at the Jomo Kenyatta International Airport Nairobi (Greenfield) to the successful bidder M/s Tender JGH MARINE A/S WESTERN MARINE SERVICES LTD CNPC NORTHEAST REFINING & CHEMICAL ENGINEERING CO. LTD/PRIDE ENTERPRISES LTD be and is**

hereby annulled.

**In exercise of the powers conferred upon it by the Provisions of Section 98 (c) of the Act, the Board hereby substitutes the decision of the Procuring Entity to award the subject tender to the successful bidder and awards the same to the Applicant Civicon Limited on the ground that the Applicant was the lowest evaluated bidder under the Provisions of Section 66 (4) of the Public Procurement and Disposal Act 2005.**

**The Procuring Entity is hereby directed to issue a letter of award and conclude the Procurement process including signing a contract with the Applicant within 15 days from today's date.**

**In view of the orders made above, the Board directs that each party shall bear its own costs of this Request for Review."**

96. The standards for evaluating an open tender are found in Section 66 of PP&DA which states that:

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

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

**(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**

- a. . **the criteria must, to the extent possible, be objective and quantifiable; and**
- b. . **Each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.**

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

**(5) The procuring entity shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders.**

**(6) The evaluation shall be carried out within such period as may be prescribed."**

The provisions of the cited Section must be read as one. No one sub-section is to be read in isolation of the others for that would give absurd results.

97. The Ex Parte Applicant's case is that the Review Board awarded the tender to the 1<sup>st</sup> Interested Party outside the Tender Document and this was in clear breach of Section 66(2). The Ex parte Applicant asserted that the importance of evaluation and comparison of bids using the procedures and criteria set out in the tender documents and nothing else is reiterated by Rule 16(5)(a) and (7) (a) of the Regulations which insist that the technical evaluation and financial evaluation of the tenders or proposals received shall be in strict adherence to the evaluation criteria set out in the tender documents.

98. I have intentionally reproduced the decision of the Review Board in order to show that it completely failed to take into consideration Section 66(2) of the PP&DA. Not only did it fail to do so but it also ignored Clause 3.27 of the Tender Document which specifically stated that:

**"3.27. Award**

**3.27.1. The award of the tender shall be quality and cost based selection as follows:**

i. The technical score shall be subjected to a weight of 0.7

ii. The Financial score shall be subjected to a weight of 0.3

iii. The financial score shall be computed as follows: the lowest bid price, X, shall attract 100% score in Financial Evaluation. Any other bid price, Y shall attract a Financial score as below:-

$$\text{Financial score} = (\text{lowest bid price, X} / \text{bid price, Y}) * 100\%$$

vi. The bidder's final score shall be the summation of the weighted technical and the financial scores.

3.27.2 Subject to clause 3.27.3 KPC will award the Contract to the tenderer whose tender is determined to be substantially responsive to the tender documents and who has the highest evaluated combined weighted score subject to possessing the capability and resources to effectively carry out the Contract Works.

3.27.3 KPC reserves the right to accept or reject any tender, and to annul the tendering process and reject all tenders, at any prior to award of Contract, without thereby incurring any liability to the effected tenderers.

3.27.4 The successful tender shall be the tender with the highest evaluated combined weighted score.”

99. If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender. Doing so would invoke the **Macfoy** (supra) principle.

100. There are several decisions of the Review Board in which it has consistently held that a tender can only be awarded as per the criteria found in the tender document. In **Societe Generale De surveillance S.A (SGS) v Kenya Bureau of Standards (2008-2010) PPLR Page 716**, it was noted that:

“The Boards notes that this conversion was contrary to the requirements of section 66 (2) of the Act which requires that the evaluation and comparison of the tenders shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used. The Board finds that there was no criteria for conversion provided for in the tender document and the assumptions made by the Procuring Entity in the conversion were arbitrary and not based on any requirement in the tender document.”

101. In **Midroc Water Drilling Co. Ltd V National Water Conservation & Pipeline Corporation (2008 – 2010) PPLR Page 162**, the Review Board stated:

“Sections 31 (3) and 31(4) of the Act require that the criteria to be used by the Procuring Entity in determining whether a tenderer is qualified to be awarded a contract must be set out in the tender documents, and that the Procuring Entity uses that criteria in determining whether the tenderers are thus qualified. The Board notes that there were no instructions in the tender document for a bidder to prepare and submit technical proposals alongside their financial bids, and neither was there a clear criteria and procedure for the evaluation of such technical bids.”

102. The principle was also reiterated in **Richardson Company Ltd V the Registrar High Court of Kenya (2008-2010) PPLR Page 232**, when the Review Board opined that:

“The Board has examined the tender documents and noted that the financial

**evaluation parameters were not set out in the Tender Documents. At the hearing, the procuring Entity stated that those parameters are set out in the International Financial Reporting Standards (IFRS). However the tender documents did not provide that those parameters or the IFRS would apply. As the Board has held severally, a procuring Entity can only use the criteria set out in the Tender Document for Evaluation. This is clearly stated in section 66(2) which states as follows...**

103. In **Application No. 26/2014** of 20<sup>th</sup> June, 2014 between **Civicon Limited and Kenya Pipeline Company Ltd**, the Review Board was confronted with an issue similar to the one that was raised before it by the 1<sup>st</sup> Interested Party herein and this is what the Review board said:

**“The Applicant in this tender had several options open to it. If any provision in the tender document was not clear, the Applicant had the option of seeking for clarification using the time window allowed in the Tender Documents or challenging the criteria promptly through the filing of a request for review; assembling a bid through strategic partnership or not tendering on realizing it had no capacity or would not qualify.**

**The Board also reiterates that the duty to draw up a tender document and the evaluation criteria is vested in the Procuring Entity and having therefore formulated a tender document providing for the criteria for the evaluation of the tenders, the Procuring Entity cannot be said to have breached any of the Provisions of the Act or the Regulations and more particularly the Provisions of Section 64 (1) of the Act or Regulations 48(1) and 49(1) of the Regulations....**

**Once the Procuring Entity had prepared a tender document containing the relevant criteria it would not be practical for every bidder to come up with its own evaluation criteria any more than candidates in an examination would each come up with his or her own marking scheme...**

**The Board, having perused the tender documents notes that the Procuring Entity applied the criteria in the manner set out in the tender documents**

**The Board also notes that the nature of the contract in question was highly technical and it is for that reason that the procuring Entity gave more consideration in the weighting to the technical aspects as compared to the Financial. Indeed the Board observes that in projects that are highly technical, it is normal to give more weighting to the technical aspect.”**

104. The evidence placed before this Court shows that the Review Board committed an error of the law by completely failing to consider the criteria provided in the Tender Document. In doing so, it also ended up in considering irrelevant material. The Review Board’s actions amounted to acting without jurisdiction.

105. In **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, the Court found that the Review Board’s introduction of a definition not contained in the Tender Document amounted to an alteration of the bid document. The Court stated:

**“The Board further found that the ex parte applicant was not an Original Equipment Manufacturer. From the decision of the Board it is clear that this term which became so crucial in the Board’s determination was defined by the PE in the Tender Document. However the Board in its decision adopted a definition other than the one in the bid document. The Board therefore provided its own definition based on the submissions of one of the parties. 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.**

**The Board may have indeed found a shortcoming in the definition of an OEM provided by the PE. We are of the view, that in order to achieve a transparent system of procurement as required under Article 227 of the Constitution, it is important that procuring entities should set out to achieve a certain measure of precision in their language in the tender documents and not leave important matters for speculation and conjecture as was the case in this matter.”**

106. The PP&DA and the Regulations bequeath the onus of amending a Tender Document on a procuring entity. When the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances it is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it is exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the Tender Document. If the Tender Document was defective, then the only order that was available to the Board was to direct the PE to commence the tender process afresh.
107. In the circumstances of this case, I find that the Ex Parte Applicant has established a case for grant of judicial review orders. Consequently, the ruling delivered by the Review Board on 21<sup>st</sup> April, 2015 is therefore called into this Court and quashed.
108. The Ex Parte Applicant also prayed for an order of mandamus directed at the PE to enter into a contract with the consortium in respect to the tender in question. In regard to this prayer, I find that the Court would be usurping the powers of the Review Board were it to do so. I therefore decline to grant the prayer.
109. However, I agree with the Review Board that there is need to finalize this procurement without further delay. Retendering may take time and will end up delaying the project which is important to the economy of this country. In the circumstances, I will remit the matter to the Review Board so that it can review its decision in the light of the findings of this Court and make any orders it deems appropriate. In doing so, it is important for the Review Board to give an opportunity to the parties involved to highlight their cases in light of this decision. The Review Board shall proceed with the new matter within the time frame set for the disposal of a request for review.
110. As no single party has emerged a winner in this matter, I order each party to meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of July, 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**