

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E378 OF 2025[PPARB]

REPUBLICAPPLICANT

VERSUS

PUBLIC PROCUREMENT ADMINISTRATIVE
REVIEW BOARD.....RESPONDENT

KENYA AIRPORTS AUTHORITY1ST INTERESTED PARTY

SAJUCY COMPANY LIMITED2ND INTERESTED PARTY

AND

FRESQUARE INVESTMENTS LIMITED.....EX PARTE
APPLICANT

JUDGMENT

Introduction

1. The Exparte Applicant FRESQUARE INVESTMENTS LIMITED (hereinafter, the applicant), by its notice of motion dated 26th November 2025 seeks judicial review orders of certiorari, prohibition and mandamus challenging a decision of the Public Procurement Administrative Review Board (the “Board”) which upheld the rejection of the Applicant’s tender as non-responsive.
2. The rejection was premised on the Applicant’s failure to disclose the name of the auditor in the audited financial statements, contrary to the tender documents,

which expressly required compliance with ICPAK By-Law No. 38 and the International Financial Reporting Standards, IFRS.

3. The Applicant contends that the decision by the Review Board violated Articles 10, 47 and 227 of the Constitution, the Fair Administrative Action Act, 2015, the Public Procurement and Asset Disposal Act, 2015 (PPADA), and the PPAD Regulations, 2020.
4. the Respondent and interested parties oppose the application contending that the decision of the Review Board was made lawfully, rationally and in procedurally fair manner, and that the applicant was a non-responsive bidder hence, its bids could not be corrected to give it an undue advantage over the other bidders who had complied with the mandatory requirements of the tender documents.

The applicant's case

5. Before this Court for determination is the Notice of Motion dated 26th November 2025 and filed on 28th November 2025, supported by the affidavit sworn by Mary Mwiu Kivata and a statutory statement dated 21st November 2025. The applicant seeks the following orders:
 1. ***THAT this Honourable court be pleased and do hereby grant the judicial review order of CERTIORARI to remove into this Honourable Court and quash in its entirety the decision of the Public Procurement Administrative Review Board in Application No. 100 of 2025 dated 18th November 2025, which dismissed the Applicant's request for review and upheld the***

disqualification of the Applicant's bid in Tender No. KAA/OT/Kabunde/0183/2024-2025.

2. ***THAT*** this Honourable court be pleased and do hereby grant the judicial review order of **PROHIBITION** to remove into this Honourable Court and prohibit the 1st Interested Party (Kenya Airports Authority), its agents or servants, from implementing or acting upon the said decision of the Review Board or proceeding to conclude the procurement in Tender No. KAA/OT/Kabunde/0183/2024-2025 on the basis of the unlawful decision. In particular, the 1st Interested Party should be prohibited from awarding or signing any contract with the 2nd Interested Party (Sajucy Company Limited) or any other entity pursuant to the said tender, until the procurement process is lawfully re-evaluated.
3. ***THAT*** this Honourable court be pleased and do hereby grant the judicial review order of **MANDAMUS** to remove into this Honourable Court to compel the 1st Interested Party (Kenya Airports Authority) to reinstate and re-evaluate the Applicant's bid in Tender No. KAA/OT/KABUNDE/0183/2024-2025 at the technical evaluation stage, and to conduct the procurement process to its lawful conclusion in compliance with the Constitution and the Public Procurement and Asset Disposal Act.
4. ***THAT*** costs of and incidental to the application be provided for.
5. ***THAT*** such further and other reliefs that this Honourable Court may deem just and expedient to grant.

2. The applicant asserts that it participated in **Tender No. KAA/OT/Kabunde/0183/2024-2025** advertised by the 1st Interested Party, Kenya Airports Authority, for the proposed construction of the Kabunde Passenger Terminal Building and that pursuant to the Invitation to Tender and

in strict adherence to the instructions contained therein, it submitted its bid for consideration within the timelines prescribed.

3. That the Applicant participated in the said tender, obtained the Tender Document, prepared its bid and submitted an online tender by the extended submission deadline of 26th June 2025 (initially 22nd May 2025, but extended via addenda) and that upon tender opening, its bid was recorded as one of twelve (12) tenders received.
4. According to the Applicant, the Tender Document required bidders to submit various mandatory and technical documents, including audited financial statements for any 3 of the last 5 years (2021–2024) prepared in accordance with International Financial Reporting Standards (IFRS) and accompanied by audit opinions issued per ICPAK By-Law No. 38. The Applicant is said to have understood this requirement and provided in its bid five consecutive years of audited financial statements (for 2020, 2021, 2022, 2023, and 2024), which was above and beyond the minimum three years required.
5. The applicant avers that each set of financial statements was prepared in compliance with the IFRS for SMEs standard, which according to the Applicant, is an internationally recognized framework for financial reporting suitable for entities of the Applicant's size and nature and adopted by the Institute of Certified Public Accountants of Kenya (ICPAK) since 2010.

6. The Applicant states that each audited report included the requisite statements that included balance sheet, profit and loss, cash flows, notes and was signed by the external auditor, AMG Kenya-Certified Public Accountants, through its engagement partner CPA George Munga Amolo, who is said to hold a valid practicing certificate No. P/2067. That immediately below each signature in the audit opinion, the auditor's Practicing Certificate Number (P/2067) was clearly indicated as the identifier of the signing CPA.
7. It is the Applicant's further case that it was disqualified vide a letter dated 14th October, 2025 at the Technical Evaluation Stage and according to the applicant, the disqualification was based on the allegation that its audited financial statements for the financial years 2020–2024 did not meet International Financial Reporting Standards and that the audit opinions issued did not comply with By-Law No. 38 of the ICPAK Regulation, as the auditors name was missing.
8. That the disqualification letter also notified that the lowest evaluated bidder and successful tenderer was M/s Sajucy Company Limited at a price of KES 194,876,660.62 inclusive of taxes. The Applicant states that it was the first time it learned of the procuring entity's view that there was an issue with its financial statements' compliance.
9. The Applicant contends that its disqualification was misconceived and unfair, as its financial statements complied with IFRS for SMEs and the auditor was

properly identified through a signed opinion bearing a valid practising number, with the auditor's name supplied elsewhere in the bid. Further, that the tender did not prohibit the use of IFRS for SMEs, that its five years of audited accounts complied with acceptable IFRS standards in Kenya and that disqualification on this basis imposed undisclosed and unlawful evaluation criteria contrary to sections 79(2)(b) and 80(2) of the PPADA.

10. Aggrieved by its disqualification on what it viewed as a minor technical formality, the Applicant lodged a Request for Review No. 100 of 2025, arguing that it was substantively compliant and that the procuring entity introduced requirements not stated in the tender.

11. The Respondent Public Procurement Administrative Review Board is stated to have heard the matter and in its decision of 18th November 2025, it dismissed the request, upholding the disqualification on the ground that the Applicant failed to indicate the auditor's name on the audit opinions contrary to ICPAK By-Law 38, a mandatory requirement. The Review Board directed the procuring entity to proceed with the procurement.

12. The Applicant was aggrieved by the decision of the Review Board, asserting that the decision is unlawful, unreasonable and unjust, that it has been excluded from a competitive tender worth approximately Kshs.194 million, and that quashing the decision and ordering a lawful re-evaluation would better serve fairness, the rule of law and public interest.

13. It is also the Applicant's case that the Respondent committed errors of law and acted illegally and unreasonably by disqualifying the applicant's bid despite full substantive compliance with the tender requirements.
14. The Applicant reiterates that it substantially complied with ICPAK By-Law 38, as the audit opinions were signed by a duly licensed auditor whose unique practising certificate number was clearly indicated, sufficiently identifying the auditor and any omission of a typed name was, at most, a minor and non-material deviation that caused no prejudice, which the Respondent irrationally elevated into a ground for disqualification, contrary to law and the principle of proportionality.
15. The Applicant maintains that the decision is ultra vires, unreasonable, and in breach of Article 47 of the Constitution and the Fair Administrative Action Act, warranting the Court's intervention.

The Respondent's Replying Affidavit

16. Opposing the application, the Respondent filed a replying affidavit sworn on 10th December 2025, by Philemon Kiprop who introduces himself as the Secretary of the Respondent-Public Procurement Administrative Review Board.
17. Mr. Kiprop depones in contention that the Ex-parte Applicant's challenge of the Respondent's Decision dated 18th November 2025 rendered in PPARB Application No. 100 of 2025 is an appeal against the Respondent's Decision and is being disguised as a judicial review application. To this extent, he calls

on this Court to decline to allow the prayers sought in these judicial review proceedings for want of jurisdiction to hear and determine an appeal against the Respondent's Decision.

18. The respondent cited the Court of Appeal decision in **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] KECA 104 (KLR)** where the Court is said to have held that the Respondent is a specialized statutory tribunal established to deal with all complaints of breach of duty by a procuring entity and it is conferred with wide powers which include, giving directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings and as such, the administrative review envisaged under the Act is indeed an appeal that from the Respondent's nature, it follows that its decisions in matters within its jurisdiction should not be lightly interfered with.

19. It is the Respondent's defence and contention that in reaching its decision, it considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to it pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act Act.

20. The Respondent states that the Review Board framed 4 issues for determination: whether the 2nd Interested Party's Notice of Preliminary Objection was properly before it; whether the Applicant had the requisite locus

standi to approach the Board by dint of Section 167(1) of the Act on the question of pleading loss and damage; whether the Procuring Entity breached Section 80(2) of the Act in disqualifying the Applicant at the Technical Evaluation stage; and the appropriate orders to grant.

21. That on the preliminary objection, the Board is said to have at paragraphs 62–77 of its Decision considered Regulation 206 as read with Regulation 209(1) of the Public Procurement and Asset Disposal Regulations, 2020 and relevant superior court pronouncements on the matter and held that objections on points of law should be raised at the earliest opportunity. It therefore admitted the 2nd Interested Party's Notice of Preliminary Objection dated 6th November 2025 and filed on 7th November 2025 as being properly before it.

22. On locus standi which is said to have been addressed at paragraphs 88–110 of its decision, the Review Board is said to have found that the Applicant's claim of being aggrieved, prejudiced, disenfranchised and discriminated against disclosed a grievance arising from an alleged breach of duty under the Act and that this conferred locus standi under Section 167(1) of the Act. That in summation, the Review Board held that it had jurisdiction to hear and determine the Request for Review No. 100 of 2025 on its merits.

23. On the substantive issue under Section 80(2) of the Act, the Review Board is said to have considered the Applicant's argument that its disqualification amounted to the application of extraneous criteria and an immaterial

technicality, and took note of the procurement principles stipulated under Article 227 of the Constitution and Section 3 of the Public Procurement Act. It is asserted that the Respondent herein also took into account Sections 58, 60(1), and 70 of the Public Procurement and Asset Disposal Act on the requirement for an accounting officer of a procuring entity to use a standard tender document in all procurement and asset disposal proceedings containing sufficient information and specific requirements, Sections 80(1) and (2) on evaluation using stated criteria, Section 79(1) on responsiveness and settled law on mandatory requirements.

24. That upon reviewing the notification letter dated 14th October 2025 against Technical Requirement 11 of Part B – Technical Evaluation of Section III – Evaluation and Qualification Criteria, the Review Board found that bidders were mandatorily required to submit audited financial statements incorporating balance sheets (statements of financial position), profit and loss statements (statements of comprehensive income) and cash flow statements for specified years, prepared in accordance with International Financial Reporting Standards, incorporating audit opinions issued in accordance with ICPAK By-Law No. 38, and duly filled Forms 3.1 and 3.2.

25. The Board is said to have noted from the Evaluation Report that the Applicant was among seven bidders disqualified at the Technical Evaluation stage because the auditor's name did not appear on the independent audit opinion.

26. That upon perusing the Applicant's tender document under Section 67(3)(e), the Review Board detailed the documents submitted, including Forms 3.1 (pages 70–72), the auditor's Annual Practicing License (page 74), the firm's practicing license (page 75), and audited financial statements for 2020–2024 (pages 76–138). It is urged that these incorporated the Report of the Independent Auditor issued at pages 79-80 for year 2020, 92-93 for year 2021, 105-106 for year 2022, 118-119 for year 2023, and 131-132 for year 2024.
27. The Review Board is said to have at paragraphs 135–136 of its Decision, found that although the audit opinions were signed, stamped, and dated under the firm of AMG-Kenya with practicing number P/2067 appended, the name appearing below the signature was that of the firm and not the auditor personally, leading to disqualification.
28. Relying on ICPAK Guidelines on Signing Assurance Engagements under By-Law No. 38, the review Board, it is deposed, held that an auditor must sign in their own name or, if signing in the firm's name, must indicate the auditor's personal name prominently below the signature. The Review Board depones that it concluded that the Applicant's audit opinions did not comply with ICPAK By-Law No. 38 because the auditor's name did not appear and that annexing the auditor's Annual Practicing License at page 74 could not cure this non-compliance.

29. The Review Board contends that it contrasted this with the 2nd Interested Party's bid, noting that the latter's Audited Financial Statements found at pages 676–748 of its bid for the years 2024, 2023, and 2022 clearly identified the engagement partner, CPA Kabuya Julius Kingori P/1435, whose Annual Practicing License was also submitted at page 677, thereby complying with Technical Requirement 11 and promoting competitiveness under Article 227(1) of the Constitution.

30. It is the 1st Respondent's case that it noted the reference made by the Applicant to Section 79(2)(b) of the Act with regard to the effect of omission of the auditor's typed name in the submitted independent audit opinions and argument that provision of the auditor's membership number therein could be viewed as a minor deviation that does not materially depart from the tender requirement and is a harmless oversight that can be overlooked in the interest of substantive compliance and that while relying on the holding in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, it held that neither the Review Board nor a procuring entity can waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a

tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation.

31.The Review Board is said to have found that the Evaluation Committee correctly applied Section 80(2) of the Act, the Constitution and the Tender Document in disqualifying the Applicant at the Technical Evaluation stage.

32.The Respondent maintains that the Review Board's Decision of 18th November 2025 in the Request for Review No. 100 of 2025 was lawful, reasonable, procedurally fair, rational, and within its mandate, having taken into account Article 227 of the Constitution, the Act, the Regulations 2020 and the Fair Administrative Action Act.

33.It asserts that no illegality, error of law, irrationality, procedural unfairness, ultra vires conduct or abuse of power has been demonstrated, and prays that the Notice of Motion be dismissed with costs, or alternatively, that if the Decision is set aside, costs be disallowed pursuant to Section 175(7) of the Act.

The 1st Interested Party's response

34.The 1st Interested Party which is also the procuring Entity, Kenya Airports Authority filed grounds of opposition dated 5th November 2025. The 1st Interested Party contends that the application is misconceived and incapable of being granted as the Applicant has not met the threshold for the issuance of judicial review orders. It further contends that the Applicant was granted a fair

hearing by the Respondent in exercise of its powers under Section 173 of the Public Procurement and Assets Disposal Act.

35. According to the 1st Interested Party, the Applicant is undeserving of the reliefs sought having failed to demonstrate how the Respondent acted irrationally, illegally, or ultra vires to the Public Procurement and Assets Disposal Act.

36. It is the 1st Interested Party's case that the instant Application is grossly incompetent, a classic case of abuse of court process designed and prosecuted solely to delay and to frustrate the Procuring Entity's operations.

The 2nd Interested Party's response

37. The 2nd Interested Party Sajucy Company Limited filed a replying affidavit sworn on 1st December 2025 by Julius Asuma Kibagendi, who introduces himself as the Managing Director of the 2nd Interested Party.

38. In the said affidavit, Mr. Kibagendi deposes that the Ex-Parte Applicant was correctly disqualified at the technical evaluation stage and was subsequently issued with the Letter of Regret dated 14th October 2025 for failure to meet the Mandatory Requirement under Item 11 under Section III –Evaluation and Qualification Criteria Item 11. Further, that it was mandatory that the submitted financial statement was to be prepared in accordance with the International

Financial Reporting Standards (IFRS) and incorporating audit opinions issued in accordance with ICPAK By-Law No. 38.

39. The deponent contends that on perusal of the Ex-Parte Applicant's Supporting Affidavit's annexures, wherein they have attached their submitted financial statements, it is evident that they did not bear the name of the individual auditor who prepared them, which is contrary to the above-mentioned Mandatory requirement. He states that the Applicant's documents only display the firm name, firm stamp signature and practicing certificate number, without identifying the particular auditor, thereby correctly making their submitted bid to be non-responsive and non-compliant with Section 79(1) of the Public Procurement and Asset Disposal Act (PPADA), 2015.

40. Further deposition is that, during the hearing of the Request for Review in PPARB No. 100 of 2025, the Ex Parte Applicant confirmed that they had not fully complied with the above-mentioned mandatory requirement. It is also the 2nd Interested Party's case that the Board in its detailed decision, correctly applied the law under Section 79(1) and 80(2) of the PPADA, 2015 and rightfully found the Applicant's bid non-responsive for not meeting the Mandatory requirements of the Tender thereby affirming the Procuring Entity's letter of 14th October 2025 to it.

41. The 2nd Interested Party contends that the said Tender was evaluated in strict compliance of the Constitution of Kenya, the Public Procurement and Asset

Disposal Act 2015 (PPADA 2015), the Public Procurement Regulations 2020 and Evaluation criteria set out in the Tender document more specifically at **Clause 35 of the Instructions to Tenderers (ITT)** (page 21) read together with the **Tender Data Sheet** (pages 25-30) and **Section III Evaluation and Qualification Criteria** (pages 29-62).

42. It is stated that the Applicant's judicial review application is misconceived, frivolous and an abuse of court process and as such that it should be dismissed with costs.

43. The application was canvassed by way of written submissions.

The Applicant's submissions

44. The Applicant filed written submissions dated 9th December 2025. It argues that its bid was substantially and materially conforming, compliant and responsive to the tender requirements advertised by the 1st Interested Party herein, and that on the strength of the fact that the bid was materially and substantially compliant, the same ought to have been considered notwithstanding any of the alleged immaterial and or minor defects.

45. To support this position the Applicant relies on the case of **Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science &**

Technology [2019] KEHC 1935 (KLR) where the court is said to have observed that a conforming or responsive tender is one that meets all material or substantial requirements of the tender invitation and that procuring entities may evaluate tenders even when they include minor discrepancies that do not significantly change the essential terms, conditions or requirements of the tender documents, or contain errors or omissions that can be corrected without affecting the core substance of the tender.

46. The Applicant submits that the key operative words in so far as compliance is concerned are “material” and “substantial”, and that as such, a tender bid need not to be perfect as substantial compliance suffices and this is said to be in line with the finding of the court in **Norland Construction (Pty) Ltd v Chris Hani Development Agency (SOC) Limited and Another (18/2022) [2024] ZAECKMHC 10 (23 January 2024)**.

47. Further, that the Applicant’s bid was substantially responsive and compliant with the advertised tender requirements and that this has never been contested. It is also submitted that the bid passed the preliminary evaluation stage where it was declared responsive after meeting all the mandatory requirements of the advertised tender, and as such, the 1st Interested Party ought to have evaluated the bid on its merits, namely, competence, qualifications, experience and its proposed plan on executing the proposed tender.

48. It is the Applicant's further submission that as was held by the courts in the cases of **Bytewise Limited v Accounting Officer, Kenya Civil Aviation Authority; Indra Limited (Interested Party) [2020] KEPPARB 35 (KLR), Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] KEHC 2976 (KLR)** and **Republic v Public Procurement Administrative Review Board & 2 others; Ex-Parte Central Kenya Fresh Merchants Limited [2018] KEHC 1203 (KLR)**, a minor defect or error is one that is inconsequential and does not affect the substance of the tender if corrected or waived.

49. The Applicant also submits that the omission of the auditor's name in the Applicant's financial statements was a minor defect within the meaning of Section 79(2) of the Public Procurement and Disposal Act and that this defect is inconsequential and does not affect the substance of the tender when corrected or waived. That the Applicant was more than willing to correct the defect had it been invited and or given the opportunity to do so by the Respondent. Also, that the the defect was not prejudicial to the other bidders and was also immaterial because it did not have any iota as to price, quantity, quality or delivery of the proposed tender.

50. It is submitted that the true intention and purpose behind by- law 38 was to ensure that financial reports and or statements are prepared by identifiable and

authorized professional auditors, not quacks, and as such, the financial statements submitted by the Applicant proves that they were done and prepared by an identifiable and authorized professional whose unique professional identifier, the practise number, is provided in the statements. Similarly, that the said auditor is working in a recognized, regulated and reputable firm of auditors AMG Kenya Limited which is domiciled in Kenya and can be traced for purposes of identifying the concerned auditor.

51. The Applicant contends that its disqualification based on the omission of the name whose importance to the tendering process has not been explained by the Respondent is not only unreasonable but also without basis. The Applicant relies on the case of **Norland Construction (Pty) Ltd v Chris Hani Development Agency (SOC) Limited and Another (18/2022) [2024] ZAECKMHC 10 (23 January 2024)** where the court is said to have held that the bidder's letter of good standing that had not been certified by a commissioner of oaths constituted an immaterial defect, and that given the procuring entity had not explained the importance of certification to the tendering process, it was unreasonable and unfair to disqualify a bidder on such immaterial error.

52. The Applicant also relies on the case of **Minister of Social Development and Others v Phoenix Cash & Carry Pmb CC (189/06, 244/06) [2007] ZASCA 26; [2007] 3 All SA 115 (SCA); 2007 (9) BCLR 982 (SCA) (27 March 2007)**

where the court is said to have held that the prescripts and consequences of formalities must be clear if they are meant to be a mandatory requirement.

53. It is submitted that the mandatory nature and importance of the auditor's name was not only unexplained in express and clear terms by the 1st Interested Party when it advertised the tender but also that it was not demonstrated how the correction or waiver of the omission on the auditor's name would prejudice the other bidders or affect the substance of the tender.

54. The Applicant further relies on the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science Technology MS Aaki Consultants Architects and Urban Designers (Interested Party) 2019 KEHC 9313(KLR)** where the court is said to have held that a true procuring entity may condone some deficiencies.

55. The Applicant submits that the courts as was held in the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science Technology MS Aaki Consultants Architects and Urban Designers (supra)** have held that it is mandatory for a procuring entity to strictly stick to the evaluation criteria set out in the tender documents as envisaged under Section 80(2) of the Public Procurement and Disposal Act.

56. The Applicant also relies on the case of **Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All**

SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) (29 November 2007) where the court is said to have observed that the failure of the maker not signing but including his name and identification was an inadvertent mistake and that what was important was the nature of the information provided not the omitted signature.

57. According to the Applicant, the omission of the auditor's name was an inadvertent mistake and that the fact that the auditor provided his practise number and further signed the documents proves that he was complying with by law 38 by providing his identification detail as an authorized professional. Moreover, that what is important is the information contained in the financial statements speaking to the Ex parte Applicant's financial position as opposed to the auditor' name.

58. It is further submitted that the objective and purpose of the requirement on submission of financial statements by prospective bidders was never to get or identify the relevant auditor's name but to ascertain and verify the financial worthiness of the concerned bidder in relation to the execution of the proposed tender, and as such, it was preposterous and unacceptable for the 1st Interested Party to focus on the omitted name of the auditor as opposed to the contents of the statement, and that in so doing, the 1st Interested Party focused on the form, not substance.

59.To support this position, the Applicant relies on the case of **Thru Rainbow (Pty) Limited v National Treasury and Others (2024/001253) [2025] ZAGPJHC 385 (14 April 2025)** where the court is said to have observed that a Court must guard against invalidating a tender, and by extension an award, that contains minor deviations that do not materially alter or depart from the characteristics, terms and conditions and other requirements set out in tender documents.

60.The Applicant further relies on the case of **Norland Construction (Pty) Ltd v Chris Hani Development Agency (SOC) Limited and Another (Supra)** where the court is said to have observed that a fair and lawful procurement process requires bids to be evaluated on their merits, with exclusion for non-compliance justified only after considering the purpose and materiality of the requirement, the degree of non-compliance, and the wording of the RFP, in order to uphold the constitutional values of fairness, equity, transparency, competitiveness, and cost-effectiveness.

61.It is submitted that in judicial review, an applicant should demonstrate the disjunctive grounds of illegality, unreasonableness and procedural impropriety and to support this position the Applicant relies on the case of **Republic v Public Procurement Administrative Review Board Leeds Equipments Systems Limited (interested Party) Ex parte Kenya Veterinary Vaccines Production Institute 2018KEHC1996(KLR)**.

62. The Applicant further submits that the Respondent's decision to uphold the 1st Interested Party's disqualification is tainted with illegality, and that as was held in the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR** illegality has two categories that is those that, if proved, mean that the public authority was not empowered to take action or make the decision it did and those that relate to whether the authority exercised its discretion properly.
63. The Applicant argues that the disqualification was illegal and ultra vires because the 1st Interested Party relied on an undisclosed evaluation criterion not permitted under section 80(2) of the Act, a defect wrongly upheld by the Respondent, and further contends that the Respondent erred in law and fact by treating the omission of the auditor's name as a substantive defect contrary to section 79(2), which bars disqualification on the basis of minor, non-material omissions.
64. It also submits that as per the Wednesbury unreasonableness, the decision lacks legal basis, it offends the law, defies logic, and falls outside the range of possible justifiable outcomes a decision maker properly directing his mind to law and facts can reasonably arrive at. Reliance is placed in the case of **Republic v National Hospital Insurance Fund Board of Management & another Ex parte Law Society of Kenya [2019] KEHC 11051 (KLR)** where the court is said to have restated the unreasonable test.

65. The Applicant further submits that the Respondent ought to have afforded it an opportunity to explain and correct the omission on the auditor's name on the financial statement as part of procedural fairness. That at the core of procedural fairness is the time-honoured principle that no man should be condemned unheard and no decision should be made behind his back, and to support this submission reliance is placed in the case **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553** where the court is said to have reiterated the same.

66. The Applicant also relies on the case of **Metro Projects CC v Klerksdorp Local Municipality 2004 (1) SA** where the South African Court is said to have held that fairness must be decided on the circumstances of each case and that it may be fair to ask the tenderer to explain an ambiguity in its tender, may be fair to allow a tenderer to correct an obvious mistake, and that in a complex tender it may also be fair to ask for clarification or details required to its proper evaluation.

67. The Applicant submits that as was held by the court in the case of **Republic v Public Procurement Administrative Review Board Principal Secretary State Department of Interior Ministry of Interior and Coordination of National Government (Interested Party) Ex Parte Applicant CMC Motors** the decision to award a tender is an administrative one which is governed by

Article 47 of the Constitution and the established principles of judicial review, and as such the application for review is properly placed before this honorable court.

68. The Applicant while relying on the case of **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment)** submits that judicial review is no longer a creature of common law or the statute but has been elevated to a constitutional imperative by the 2010 Constitution under Article 47 of the constitution of Kenya. Also, that it is no longer limited to the process review and the three traditional reliefs of prohibition, certiorari and mandamus, and that where the right to fair administrative action is alleged to have been violated, a court of law will be duty bound to conduct a merit review of the impugned decision and issue appropriate reliefs as envisaged under Article 23 of the constitution of Kenya. The Applicant also relies on the case of **Opiyo, Chairperson & 5 others v Migori County Assembly & 6 others [2024] KECA 529 (KLR)** to support this position.

69. According to the Applicant, the application before this court is far from an appeal, and that by the very essence that the application pleads the violation of Article 47 of the Constitution, this Court is not jurisdictionally enjoined from

engaging the merits of the Respondent's decision and to issue appropriate reliefs.

The Respondent's submissions

70. The Respondent filed written submissions dated 11th December 2025. It relies on the case of **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte GIBB Africa Ltd & Another [2012] eKLR** on the scope of judicial review and the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** for the grounds for judicial review.

71. It also relies on the cases of **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** and **Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another [2014] eKLR** where the courts are said to have emphasised that judicial review exists to ensure that an individual receives fair treatment from the authority making a decision and that its purpose is not to allow the courts to replace the judgment of the lawfully constituted decision-making authority with their own views.

72. The Respondent submits that its Decision dated 18th November 2025 in the Request for Review No. 100 of 2025 was sound, reasonable, lawful, procedurally fair and rational. Further, that it lawfully discharged its administrative duty by upholding the principles that govern procurement

proceedings and asset disposal as provided in the Constitution of Kenya, 2010, the Public Procurement and Asset Disposal Act and the Public Procurement and Asset Disposal Regulations, 2020.

The 1st Interested Party's submissions

73. The 1st Interested Party's submissions are dated 5th November 2025.

74. In the submissions, it is argued that the Applicant was granted a fair hearing, and that the right to fair administrative action was never violated or breached by either the Respondent or the Interested Parties.

75. The 1st Interested Party submits that at the heart of the 1st Respondent's decision, which decision is the subject of the instant application pending determination, is the question whether the Applicant complied with all the mandatory requirements of the tender documents. Further, that the Applicant's request for review was dismissed for no other reason than the finding that it did not comply with mandatory requirements of the tender documents.

76. The 1st Interested Party reiterates that the requirements stipulated under Part B- Technical Evaluation Section 11 ought to have been met by all bidders. Further that the tender document used under the procurement in question is indeed a standard tender document issued by the Public Procurement Regulatory Authority for procurement of civil works as stipulated under Section 58 of the Public Procurement Asset Disposal Act.

77. Further submission is that that pursuant to the definition under Section 79(1) of the Act a responsive tender is one that conforms to all the eligibility and mandatory requirements in the tender document. The 1st Interested Party relies on the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR** where the court is said to have observed that public procurement must be conducted on the basis of strict compliance with disclosed tender conditions, such that only responsive and conforming bids are considered, in order to uphold fairness, equality of treatment, legitimate expectation, objectivity, and a level playing field among bidders, and to prevent unfair advantage through circumvention of tender requirements. Further reliance is placed in the case of **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** where the court upheld the above position

78. The 1st Interested Party submits that a responsive tender must, by definition, meet all mandatory requirements prescribed in the Tender Document and this was according to the court's decision in the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; Page 5 of 10 M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] KEHC 9313 (KLR)**. That having

reviewed the relevant precedents alongside the Applicant's submitted bid documents, it is evident that the Applicant did not comply with Part 11 of the Technical Requirements, thereby rendering the bid non-responsive.

79. It is the 1st Interested Party's submission that technical specifications are mandatory and form the basis of responsiveness, and having found that the Applicant failed to meet a mandatory technical requirement, the Respondent lawfully evaluated the bid strictly in accordance with the procedures and criteria set out in the tender documents as required by section 80(2) of the Act.

80. Reliance is placed on the case of **Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR** where the court is said to have observed that the requirements of a tender are not merely internal prescripts that may be disregarded at whim.

81. The 1st Interested Party further submits that the Applicant was bound to strictly comply with the tender specifications and, having failed to submit properly certified audited accounts in accordance with ICPAK By-Law No. 38 and applicable professional standards, the Respondent's decision was lawful, not ultra vires, constitutionally compliant, and does not warrant judicial intervention. It is urged that the procurement process must be allowed to come to an end.

82. It is also submitted that by seeking to overturn the findings of the Respondent on grounds that go to the merits, the Applicant is inviting this Honourable Court to step into the shoes of an appellate body, which is contrary to the established principles governing judicial review. The case of **Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR** is relied on, where the court is said to have set out the established reach of judicial review.

83. The 1st Interested Party reiterates that the Respondent followed all statutory procedures and made its decision within its jurisdiction. Further, that the Applicant has not shown the un-reasonability, illegality, or procedural impropriety of the decision made by the Respondent. According to the 1st Interested Party this court should resist the invitation by the Applicant to interfere with the decision of the Respondent and to support this position the case of **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others (supra)** is relied upon.

84. It is submitted that the Respondent's mandate under Section 173 of the PPADA was lawfully exercised, and the determination in question does not meet the threshold for intervention under the established judicial review principles articulated in **Republic V Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR**.

The 2nd Interested Party's submissions

85. The 2nd Interested Party filed written submissions dated 14th December 2025.

86. The 2nd Interested Party relies on the case of **Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] KEHC 5570 (KLR)** where the court is said to have emphasised that mandatory requirements in a bid document must be complied with, and that deviations from mandatory bid requirements should not be permissible.

87. The Court in the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** is said to have emphasised the same and held that any bidder that is unable to satisfy basic requirement of the invitation is deemed to be incapable of performing the contract.

88. The 2nd Interested Party submits that it was the legitimate expectation of all bidders that the Procuring Entity would apply the mandatory requirements uniformly and consistently in the evaluation of bids, as required under Section 79(1) and Section 80(2) of the Public Procurement and Asset Disposal Act, 2015, and that in this regard, all bidders, including the Applicant, were required to satisfy all mandatory requirements in order to qualify for further evaluation. It is further submitted that the Applicant failed to meet these mandatory

requirements and consequently did not qualify to proceed to the subsequent stages of evaluation.

89. That the Evaluation of the subject tender was done strictly in accordance with the evaluation criteria set out in the Tender Document as required by Section 80(2) of the PPADA 2015 and hence the Board's decision on the matter ought not to be disturbed.

90. The 2nd Interested Party relies on the case of **Kenya Pipeline Company Ltd vs Hyosung Ebara Company Limited & 2 Others [2012] eKLR** where the court is said to have held that the Review Board, by its very design and expertise, is more suitably positioned than the High Court to address disputes arising from alleged breaches of duty by a procuring entity.

Analysis and Determination

91. Having considered the pleadings, affidavits, and submissions, this Court finds the main issue for determination to be whether the Originating Motion is merited.

92. However, there are many other questions that this Court will answer in the determination of this main issue and these questions as discussed in the body of this judgment include:

a. does the Originating motion seek the court's exercise of legitimate judicial review jurisdiction or is an appeal in disguise;

- b. should this Court engage in merit review of the Review Board's decision, applying the Dande decision by the Supreme Court;***
- c. is the decision of the Review Board tainted with illegality, irrationality and or procedural impropriety, unfairness or unconstitutionality as alleged by the applicant;***
- d. is the omission of the name of the auditor and therefore the noncompliance with ICPAK By-law 38 by the Auditor in the financial statements supplied render the applicant's bid non-responsive or whether the omission was curable by clarification;***
- e. Is the applicant entitled to the orders sought; and***
- f. What orders should this Court make, including an order on costs of these proceedings.***

93. In resolving the above questions, this Court finds some of the questions cross cutting and overlapping and therefore they are not answered in a particular chronological order.

94. On the first question of whether the Notice of Motion before this court is disguised as an appeal in the name of a judicial review application, the Respondent in opposing the application by the applicant contends that the application before this court challenges the merits of the decision of the Review Board and not the illegality, procedural impropriety or irrationality of the decision rendered by the Review Board on 18th November, 2025.

95. The Respondent maintains that the Review Board exercised its statutory mandate under Sections 167 and 173 of the Public Procurement Asset Disposal Act, considered all evidence and submissions, and rendered a reasoned decision

in strict accordance with the tender documents, the Act, Regulations 2020, and ICPAK by-Law No. 38. The Respondent relies on **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] KECA 104 (KLR)** to emphasize that the Review Board is a specialised tribunal whose decisions should not be lightly interfered with.

96. The 1st Interested Party on its part contends that by seeking to overturn the findings of the Respondent on grounds that go to the merits, the Applicant is inviting this Honourable Court to step into the shoes of an appellate body, which is contrary to the established principles governing judicial review.

97. On behalf of the Applicant, it is pleaded and argued that the application is far from being an appeal, as by its very essence, the application pleads the violation of Article 47 of the Constitution, and as such this Court is not jurisdictionally enjoined from engaging the merits of the Respondent's decision and issue appropriate reliefs as was held in the Dande Case.

98. At the centre of the dispute before this Court is the Respondent's and 1st Interested Party's determination on the issue of the audited Financial Statements, specifically the requirement under Technical Requirement 11 of Part B – Technical Evaluation of Section III of the Evaluation Criteria that such statements be prepared in accordance with International Financial Reporting

Standards, incorporating audit opinions issued in accordance with ICPAK By-law No. 38 and duly filled Forms 3.1 and 3.2.

99. The question of whether the challenge is an appeal in disguise as raised by the Respondent and the 1st Interested Party is critically important because it seeks to define the scope of the Court's jurisdiction and the limits of intervention by this court in public procurement matters.
100. This question will be answered together with the second question of whether this Court can or should engage in merit review of the decision of the Review Board.
101. Traditionally, Judicial review is a public law remedy concerned mainly with the legality, rationality and procedural fairness of administrative action. It does not extend to correcting errors of fact or law made by a specialized tribunal where the decision falls within its statutory mandate. The Court must therefore examine the parties' positions on this preliminary issue to determine whether the application is properly framed within the ambit of judicial review, or whether it impermissibly seeks to challenge the merits of the Review Board's decision hence an appeal, and to what extent or when can this court venture into the merit review in judicial review proceedings.
102. The fundamental distinction between an appeal and judicial review is that an appeal challenges the merits (correctness) of a court's decision, while a judicial review scrutinizes the lawfulness and fairness of the process applied by an

administrative body. Strictly speaking, and even going by the *Dande* decision by the Supreme Court, Judicial review initiated under Order 53 of the Civil Procedure Rules does not permit the Court to re-evaluate evidence, reassess factual findings or substitute its own view for that of a specialized statutory body. Rather, it is concerned with the lawfulness, procedural propriety, rationality and compliance with constitutional and statutory mandates. This principle was enunciated in the landmark case of **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) UK** which introduced the "*Wednesbury unreasonableness*" standard, a ground for judicial review, wherein the Court stated that Judicial review focuses on legality and reasonableness, not re-evaluation of facts or merits like an appeal.

103. This principle was extensively restated by the Supreme Court of Kenya in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** wherein the Supreme Court discussed the distinction between judicial review and an appeal in the following terms:

"100. The considerations for judicial review were aptly captured by G V Odunga, J in the case of Republic v Chesang (Ms) Resident Magistrate & 2 others ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others [2017] eKLR where he held as follows:

"25. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary

(adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the court through proceedings brought nominally by the Republic. See R v Traffic Commissioner for North Western Traffic Area Ex parte Brake [1996] COD 248.

26. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set

about forming its own preferred view of the evidence. See Reid v Secretary of State for Scotland [1999] 2 AC 512.”

101. Article 47 of the Constitution of Kenya, 2010 and subsequent enactment of the Fair Administrative Action Act No 4 of 2015 have sought to allow the courts to consider certain aspects of merit when considering an application for judicial review. The Court of Appeal in the case of Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] KLR attempted to reconcile this expanded context as follows:

54. The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of article 47 of Constitution as read with the Fair Administrative Action Act of 2015. The Act establishes statutory judicial review with jurisdictional error in section 2(a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision-making process in articles 47 and 10(2)(c) of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in *Martin Nyaga Wambora v Speaker of the Senate* [2014] eKLR it is clear that they - articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases. An issue that was strenuously urged

by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, section 7(2)(l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in article 24(1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit

review of administrative action. Section 7(2)(f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; section 7(2)(j) identifies abuse of discretion as a ground for review while section 7(2)(k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7(2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7(2)(i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in section 7(2)(i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in section 7(2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act. In Mbogo & another v Shah (1968) EA 93 at 96, this court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed

to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo v Shah (supra) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review. The essence of merit review is the power to substitute a decision. Under the Fair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)(e) and (h) of the Fair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)e/act/2015/4 Fair Administrative Action Act}} permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.”

102.Despite the shift from common law to codification in the Constitution and the Fair Administrative Action Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision. In this regard we cite

the decision of Lord Hailsham LC in Chief Constable of North Wales Police v Evans (1982) 3 All ER at pg 141 said of the remedy of judicial review as follows: It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a “Court of Appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power.” [Emphasis added].

104. The above decision of the apex Court is clear on the distinction between judicial review and an appeal and warns that a court exercising judicial review jurisdiction should not convert itself into an appellate Court.

105. The Applicant contends that this Court is entitled to examine the merits of the Board’s decision, citing Article 47 and the Supreme Court decision in the **Dande & Another v Minister for National Treasury & 2 Others**, (supra) case which recognized that judicial review under Article 47 may consider whether administrative action was fair, reasonable, and lawful.

106. however, while Article 47 and the Fair Administrative Action Act permit scrutiny of administrative action, the scope of judicial review does not extend to substituting the Court's own assessment of the merits for that of the administrative decision-maker, unless the decision is shown to be illegal, procedurally flawed, irrational, or disproportionate.

107. This Court, upon assessment of the application as filed and the arguments in support, finds that the issue raised by the Applicant, whether the omission of the auditor's name constituted a minor error that could be overlooked, is a purely merits question since the requirement under ICPAK By-law 38 is one mandated by the Accountants' Professional Body, ICPAK and not one that the Review Board had discretion to demand that the procuring entity waives for the applicant. That is a merits question which concerns the technical compliance of the tender with mandatory requirements, not a procedural irregularity, illegality, or irrationality in the Board's process.

108. I therefore have no hesitation in finding and holding that the judicial review application herein is a disguised appeal.

109. On the questions of whether the decision of the Review Board is laced with illegality, irrationality, procedural impropriety and or unconstitutionality and whether the omission of the Auditor's name in the applicant's audited financial statements rendered its bid non-responsive or curable by way of

clarification or correction as a minor error, the ICPAK By-law 38 provides as follows:

Practice

38. “Members in practice shall sign on their assurance engagements in their own names on behalf of their firm whether they are sole proprietorships or partnerships. They may however sign using the name of the firm provided the name of the person signing is indicated in a prominent place below the signature.”

110. From the above by-law, no doubt, the Professional body ICPAK is the one that imposes a duty and strict requirements on disclosure of the auditor’s name, prominently in the place below the signature and compliance with these requirements is non-discretionary on the part of the procuring entity or the Review Board and therefore, neither does it constitute a minor or curable irregularity. It follows that the Review Board’s decision to reject the tender on account of noncompliance with ICPAK By-law 38 was procedurally and substantively justified.

111. Accordingly, the Applicant’s reliance on Dande case does not confer authority on this Court to substitute its judgment for that of the Review Board or the procuring entity on matters of tender requirements and compliance.

112. Even before the **Dande** decision, the Court of Appeal in the case **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others**, [2016] eKLR had pronounced itself in similar terms as follows:

“Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator. Lastly, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights.”

113. The decision above captures the letter and spirit in the **Dande case** where the Supreme Court discussed when the High Court excising its judicial review jurisdiction could carry out a merit review of a case and therefore whether the High Court could conduct a merit review where in a judicial review matter, there were claims of violations of constitutional provisions and whether the scope of judicial review under the Constitution included a merit review as opposed to a strict process review on the manner in which a decision was made or an action was undertaken.

114. It is however, important to understand the circumstances under which the Supreme Court made its decision in the **Dande case**. In **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated))** [2023] KESC 40

(KLR) (16 June 2023) (Judgment), the appeal was against the judgment of the High Court in **Judicial Review Misc. Application No 435 of 2014** where the Court of Appeal dismissed the appeal and agreed with the findings of the High Court that the settled standards of judicial review known to Kenya's realm limit a judicial review court's intervention in any application for a merit review. In addition, it determined that, since no decision had at that point in time been made to charge the appellants, any such findings by the High Court would not only have been prejudicial but also in direct contravention of the constitutional provisions on the independence of the Inspector General and DCI in the investigation of crimes.

115. On when the High Court in exercising its judicial review jurisdiction could carry out a merit review of a case, the apex Court held, as summarized by Kenya law:

“When a party approached a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party filed a suit under the provisions of order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of the Constitution, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se.

The appellants invoked the judicial review jurisdiction of the High Court alleging that their rights to among others, fair administrative action under

article 47 of the Constitution were violated, and applied for judicial review orders under article 23 of the Constitution. The appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, that required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided.

A court could not issue judicial review orders under the Constitution if it limited itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review existed but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings.

116. Verbatim, the Supreme Court stated as follows in its holding at issue iii paragraphs 73 to 87 of the Judgment:

“iii. Whether the scope of judicial review has evolved to include determinations of merit review of an administrative decision.

73. The appellants faulted the Court of Appeal for holding that the High Court had no basis to reconsider the evidence obtained from investigations in the Judicial review proceedings yet it noted that there have been advancements in judicial review allowing courts to do merit review of decisions in administrative or other actions.

74. The Black’s Law Dictionary, 9th Edition defines judicial review as:

' A court’s power to review the actions of other branches or levels of government; esp., the court’s power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court’s review of a lower courts or an administrative body’s factual or legal findings.

75. *Mark Ryan, in his book, 'Unlocking Constitutional and Administrative Law', (3rd ed Routledge/Taylor & Francis Group, 2014) on page 506 defines Judicial Review as:*

'The constitutionally justified as a legal control on the misuse of public law powers, including both statutory and common law prerogative powers.'

76. *We note that judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the Law Reform Act, cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court of Kenya. Under this system, the High Court could issue orders of mandamus, prohibition, and certiorari. The grounds for the issuance of such orders were borrowed from common law.*

77. *Prior to the promulgation of the Constitution in 2010 there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan courts found in sections 8 and 9 of the Law Reform Act cap 26, which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand.*

78. *However, the entrenchment of judicial review under the Constitution of Kenya 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, article 47 provides that 'every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

79. Furthermore, section 7 of the Fair Administrative Actions Act provides that:

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–

(a) A court in accordance with section 8; or

(b) A tribunal in exercise of its jurisdiction conferred in that regard under any written law.

80. Fundamentally also, article 23(3) of the Constitution provides that:

(3) In any proceedings brought under article 2, a court may grant appropriate relief, including–

(a) A declaration of rights;

(b) An injunction;

(c) A conservatory order;

(d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;

(e) An order for compensation; and

(f) An order of judicial review.

81. The entrenchment of judicial review in the Constitution has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opine that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.

82. In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others SC Petition No 14 Consolidated with 14A,

14B, & 14C of 2014 [2014] eKLR this court in resolving the controversy stated as follows:

'[355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of the Constitution. [emphasis added]

83. Also, this Court in SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR observed as follows:

' [40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.'

We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of

mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner.'

84. More recently in Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others) (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) Praxedes Saisi case this court stated that:

'It is our considered opinion that the framers of the Constitution when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.'

85. It is clear from the above decisions that when a party approaches a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of the Constitution, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.

86. Turning back to the instant case, we note that the appellants invoked the judicial review jurisdiction of the High Court alleging that their rights to among others, fair administrative action under article 47 were violated, and applied for judicial review orders under article 23 of the Constitution. In that context, the Court of Appeal in Civil Appeal No 246 of 2016 stated as follows:

' 28. While this may have been relevant and pertinent information, the question that arises is whether the judicial review court was the proper forum to determine and direct the information and evidence that was

gathered during the investigations, and the manner of its collection by the 1st and 2nd respondents. In our view, it was not, in light of the standards of review which limit a judicial review court's intervention in merit review. It was emphasized by this court in Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 others, (2016) KLR that while article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator.'

87. With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under the Constitution if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal.”

117. As earlier stated in this judgment, at the core of the dispute before this Court is the Respondent's and 1st Interested Party's determination on the issue of the audited Financial Statements, specifically the requirement under

Technical Requirement 11 of Part B – Technical Evaluation of Section III of the Evaluation Criteria that such statements be prepared in accordance with International Financial Reporting Standards, incorporating audit opinions issued in accordance with ICPAK By-law No. 38, and duly filled Forms 3.1 and 3.2.

118. This Court's careful reading of the Applicant's pleadings reveals that the central grievance is that the Respondent ought to have reached a different conclusion on the same facts namely, that International Financial Reporting Standards for SMEs should have sufficed and that the inclusion of the auditor's practice number amounted to substantial compliance with ICPAK By-Law No. 38, even if the auditor's name was omitted.

119. The question is whether these are jurisdictional or procedural complaints or attacks on the merits of the Review Board's evaluative conclusions agreeing with the procuring entity that the applicant's bid was non-responsive for non-compliance with the tender requirements or whether the procuring entity introduced requirements not stated in the tender as contended by the applicant.

120. In my humble view, the question of omission of the auditor's name and therefore the finding that the tender was non-responsive has nothing to do with introduction of new requirements not stated in the tender documents. Neither does rejection of the bid documents which are non-compliant with mandatory requirements amount to violation of constitutional rights under Article 47 or violation of Articles 10, 27 and 227 of the Constitution.

121. I hasten to add that citing of constitutional provisions and alleging violation of those provisions require proof of violation and not mere allegations. This Court has not been shown how those provisions of the Constitution as cited by the applicant have been violated or even threatened with violation by adherence to the mandatory requirements of the tender documents applicable to all bidders.

122. Even when clothed in the language of Article 47 of the Constitution, a court is required to interrogate the substance of the grievance rather than the form in which it is presented. A challenge does not cease to be an appeal merely because it alleges unconstitutionality, illegality or unfairness. The decisive question is whether the Applicant is, in truth, inviting the Court to reconsider the correctness of the decision reached.

123. In the present case, the Applicant's complaint that the omission of the auditor's name was minor, curable, non-prejudicial to other bidders, or insufficiently emphasised in the tender documents, squarely invites the Court to reassess the weight, materiality and impact of that omission. These are evaluative determinations entrusted by statute to the procuring entity and the Review Board, and not to this Court in the exercise of its supervisory jurisdiction.

124. Thus, if this Court were to accept the Applicant's invitation, it would require the Court to substitute its own assessment of compliance with tender

requirements for that of a specialised statutory tribunal, contrary to the well-settled principle that courts must exercise restraint and avoid encroaching into areas of technical expertise reserved for procurement bodies.

125. As earlier stated, even where an application is framed as one alleging violation of Article 47 of the Constitution, the Court must look beyond the labels employed and interrogate the true substance of the dispute. A party cannot, by mere invocation of constitutional language, convert a merits-based grievance into a justiciable issue for judicial review.

126. The Applicant's complaints that the omission of the auditor's name was minor, that the tender documents did not sufficiently emphasise its mandatory nature and that no prejudice to other bidders was demonstrated, are all directed at the correctness and proportionality of the Respondent's evaluative conclusions. These arguments do not impugn the lawfulness of the decision-making process, but rather seek to persuade the Court that the Respondent ought to have reached a different outcome on the same material.

127. To entertain such arguments would require the Court to descend into the arena of tender evaluation process and to substitute its own assessment for that of a specialised statutory body, contrary to the settled principle that judicial review is supervisory, not appellate. The Respondent was exercising a mandate expressly conferred upon it by statute, and dissatisfaction with the manner in

which that mandate was exercised does not, without more, justify judicial review intervention.

128. It is this Court's finding therefore, that the application substantially amounts to an appeal disguised as a judicial review, and that all that the applicant wants this Court to do is to determine the merits of the tender evaluation. On this ground alone, it is improperly before the Court.

129. Assuming, that these proceedings fall within the ambit of judicial review, the Applicant was still required to demonstrate that the impugned decision is vitiated by illegality, irrationality, or procedural impropriety or unconstitutionality as pleaded and that the omission of the name of the auditor as required by ICPAK By-law 38 is curable by clarification under the Act and Regulations.

130. Upon a careful examination of the record and the applicable law, this Court is not persuaded that this threshold has been met. The Applicant's complaints largely invite the Court to reassess the Respondent's conclusions on compliance with tender requirements, a function that lies squarely within the mandate of the statutory review Board and not this Court. the reasons are provided fro in the analysis that follow below.

131. The Applicant contends that the Respondent acted illegally and in error of law by upholding its disqualification despite its use of International Financial Reporting Standards for SMEs, which it argues is an acceptable financial

reporting framework in Kenya and was not expressly prohibited by the tender document. It further maintains that its audited financial statements substantially complied with ICPAK By-Law 38, as the audit opinions were signed by a duly licensed auditor whose practising certificate number was clearly indicated, and that the omission of a typed name amounted, at most, to a minor and curable deviation under section 79(2)(b) of the Public Procurement and Asset Disposal Act.

132. On the other hand, the Respondent maintains that the tender requirements relating to audited financial statements were mandatory and that compliance had to be assessed strictly as stated. It contends that ICPAK By-Law 38 requires clear identification of the auditor issuing the opinion and that failure to indicate the auditor's name on the face of the audit opinion rendered the bid non-responsive. The Respondent further asserts that it acted within its statutory mandate under section 173 of the Act and did not introduce any extraneous or undisclosed evaluation criteria.

133. The question is, how does treating the alleged error as minor undermine Article 227 of the Constitution and the various provisions of the PPAD Act and Regulations made thereunder? I will briefly address this aspect here before venturing into the South African decisions relied on by the applicant in trying to cite what it calls a minor error or deviation.

134. In the view of this Court, treating the Applicant’s omission as a “minor error” would directly undermine Article 227 of the Constitution and the statutory architecture of the PPADA in several interconnected ways as stated below.

135. Article 227 of the Constitution provides:

227. Procurement of public goods and services

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

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

(a) categories of preference in the allocation of contracts;

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

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

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

136. Article 227(1) requires procurement systems to be fair and equitable, transparent, competitive and cost-effective. Therefore, treating a substantive omission as minor would inter alia, confer an undue advantage on the Applicant; penalise bidders who strictly complied with the tender requirements;

and introduce unequal treatment. Fairness in procurement is not subjective or outcome-based. It is achieved by uniform application of the rules to all bidders.

137. Secondly, Article 227 also demands transparency. It follows that if a mandatory requirement can later be re-classified as “minor,” bidders cannot predict which rules will be enforced and as a result, tender requirements lose normative force thereby making the procurement process opaque and discretionary, contrary to the constitutional design. Transparency requires that bidders know in advance what will disqualify them and that those rules will be enforced as written.

138. Thirdly, public procurement competitiveness and cost effectiveness depends on a level playing field. Therefore, permitting post-submission curing of substantive omissions allows bidders to submit incomplete tenders, knowing they may later rectify them, it disincentivises diligence and compliance and distorts genuine competition, ultimately undermining cost-effectiveness.

139. Fourthly, Section 79 draws a bright line between responsive and non-responsive tenders. The Section provides:

79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

140. Section 79(1) requires compliance with all mandatory requirements and Section 79(2) allows only non-material deviations. Treating the omission as minor would in my view collapse this statutory distinction, convert mandatory requirements into optional ones and undermine section 79 of the Act thereby rendering the section nugatory.

141. In the view of this Court, once a requirement in the tender documents is mandatory, materiality is already legislatively determined and *therefore the procuring entity or the Review Board cannot make it discretionary to favour one bidder against the other bidders who have complied with the requirement.*

142. Fifth, Section 80 of the Act mandates that evaluation be conducted strictly in accordance with the tender documents. The section provides:

80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and

statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

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

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations.

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The valuation report shall be signed by each member of evaluation committee

143. in view of the above provision, re-characterising a mandatory requirement as minor at evaluation stage would Amount to re-writing the tender documents by introducing undisclosed evaluation criteria and as a result, violate the principle that bidders must be evaluated on pre-disclosed rules only.

144. Sixth, Section 82 of the Act and Regulation 74 of the 2020 Regulations permit correction and clarification only where such clarification does not introduce new information or change the substance of the tender.

145. Section 82 provides:

82. Correction, revision, adjustment or amendment of tender

(1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity.

(2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.

146. Although the section refers to the tender sum, where the error is not a typo or clerical error, allowing disclosure of the auditor's name post-submission would introduce new material information, cure a substantive omission and convert clarification into post-tender compliance. This would directly defeat the statutory limits placed on clarification.

147. On the other hand, Regulation 74 provides:

74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

(c) any tender security submitted is in the required form, amount and validity period, where applicable;

(d) the tender has been duly signed by the person lawfully authorised to do so through the power of attorney;

(e) the required number of copies of the tender have been submitted;

(f) the tender is valid for the period required;

(g) any required samples have been submitted; and

(h) all required documents and information have been submitted.

(2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affect.

148. Seventh, is that Section 95 requires procurement to be conducted in accordance with applicable professional standards. The section provides:

95. Approval of pre-qualified candidates

(1) The evaluation committee shall, in writing, record the results of its evaluation of applications for pre-qualification using the evaluation criteria in the pre-qualification documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.

(2) The record of results prepared under subsection (1) shall be submitted with

recommendations of the evaluation committee and the professional opinion of the head of procurement function to the accounting officer for approval.

(3) A procuring entity shall invite tenders from only the approved persons who have been pre-qualified.

(4) A procuring entity shall notify every candidate who submitted an application for pre-qualification but did not qualify.

149. Thus, where tender documents expressly incorporate ICPAK By-Laws, compliance ceases to be optional and therefore treating non-compliance as minor undermines professional regulation and weakens accountability mechanisms embedded in public procurement.

150. Eighth is that the Review Board being a creature of statute, if it were permitted to re-classify substantive omissions as minor or waive mandatory requirements, this would act ultra vires its mandate and usurp the legislative role reserved to Parliament under Article 227(2) of the Constitution.

151. Lastly, at a systemic level, treating substantive omissions as minor deviations would encourage strategic non-compliance by bidders, increase procurement disputes and litigation, introduce subjectivity into evaluation, and thereby eroding public confidence in procurement processes.

152. Public procurement law exists precisely to restrain discretion, not to expand it. It follows that a procurement process is rendered unfair not by strict enforcement of tender requirements, but by selective relaxation of those requirements in favour of one or another of the bidders.

153. Thus, the constitutional and statutory framework requires, rather than prohibits, strict rejection of tenders that fail to meet mandatory requirements.

154. The Fair Administrative Action Act, No. 4 of 2015, has enshrined the recognized grounds for judicial review. It states under section 7 as follows:

“7. Institution of proceedings.

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

- (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;*
- (h) the administrative action or decision was made in bad faith;*
- (i) the administrative action or decision is not rationally connected to-*
 - (i) the purpose for which it was taken;*
 - (ii) the purpose of the empowering provision;*
 - (iii) the information before the administrator; or*
 - (iv) the reasons given for it by the administrator;*
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;*
- (k) the administrative action or decision is unreasonable;*
- (l) the administrative action or decision is not proportionate to the interests or rights affected;*
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;*
- (n) the administrative action or decision is unfair; or*
- (o) the administrative action or decision is taken or made in abuse of power.*

155. The Court of Appeal has reaffirmed this position as seen in the cases below namely- **Webb Fontaine Group FZ – LLC v Public Procurement and Administrative Review Board & 3 others [2020] eKLR**, **Henry Asava Mudamba v Institute of Certified Public Accountants of Kenya [2015] KECA 171 (KLR)** and **Pharmacy and Poisons Board v George Wang’anga & 5 others [2020] KECA 775 (KLR)**.

156. As correctly observed by the Applicant, under Article 23 of the Constitution, Judicial review is one of the remedies for violation of constitutional rights.
157. Having considered the rival positions on this question of omission of the name of the auditor, this Court is not satisfied that the Respondent in any way acted illegally, ultra vires or irrationally or that there was any violation of the applicant's right to fair administrative action or any other right guaranteed under the Constitution.
158. From the material placed before this Court, I find that the Respondent addressed itself to the tender requirements and the applicable professional standards governing audit opinions and reached a conclusion on compliance that fell within its evaluative jurisdiction. Whether or not another decision-maker might have reached a different conclusion is immaterial in judicial review.
159. Similarly, the Applicant's arguments regarding lack of prejudice to other bidders and the alleged technical nature of the omission do not disclose any ground for judicial review. Whether a deviation is minor or material, whether it goes to the substance of the bid and whether strict compliance with the bid documents is justified in the circumstances are matters of judgment and evaluation. The Respondent considered these questions within the framework of the tender documents, the Public Procurement and Asset Disposal Act and ICPAK By-Law No. 38, and reached a reasoned conclusion. Judicial review

does not permit this Court to revisit those conclusions simply because the Applicant disagrees with them.

160. Absent evidence that the Respondent relied on extraneous considerations, ignored relevant law, acted in bad faith or reached a decision so unreasonable as to defy logic or that the decision reached was in violation of the applicant's constitutional rights, this Court has no basis to intervene.

161. as earlier stated, the Applicant's case, at its core, amounts to a request for this Court to re-evaluate the merits of the tender and reach a different outcome. That invitation must be declined, as judicial review is a supervisory, not appellate jurisdiction.

162. Similarly, this Court is unable to find that the decision was irrational or unreasonable. The Respondent gave reasons for its conclusion and those reasons cannot be said to be so outrageous or devoid of logic as to defy acceptable legal standards. The mere fact that the Applicant considers the omission to be minor or technical does not, without more, render the Respondent's determination irrational or unconstitutional.

163. As regards procedural fairness, no evidence has been placed before this Court to demonstrate that the Applicant was denied a fair hearing before the Respondent or that the decision-making process was procedurally flawed. The record shows that the Respondent considered the material placed before it and rendered a reasoned decision taking into account each of the respective parties' positions.

Needless to say, that the Public Procurement and Asset Disposal Act does not impose a duty upon a reviewing body to accord parties the benefit of doubt or to permit post-bid clarifications where the tender documents prescribe clear mandatory requirements, as was in the instant case.

164. I emphasize that the argument that the tender documents did not explicitly emphasize the mandatory nature of the auditor's name and that no prejudice to other bidders has been shown, does not in itself constitute a ground for judicial review.

165. In the view of this Court, the Review Board's finding regarding compliance with ICPAK By-Law 38 falls squarely within its statutory mandate under Sections 79 and 80 of the PPADA and no evidence was placed before the Review Board or before this Court to show that the Review Board acted outside its powers, ignored relevant law or acted unreasonably. Therefore, this observation, while potentially relevant in an appeal or reconsideration of the merits, cannot independently justify interference with the decision of the Review Board under Judicial review.

166. In the result, even on the assumption that the application is properly before the Court as a judicial review, the Applicant has failed to persuade this Court that it is deserving of Court's interference with the Respondent's decision. The challenge, in substance, amounts to a disagreement with the merits of the

Respondent's evaluation, which is not a proper basis for the grant of judicial review remedies.

167. On reliance upon other cases outside Kenya's jurisdiction and the purpose of Article 227 of the Constitution, the applicant heavily relied on South Africa cases to support its assertions on minor errors. However, it is common ground that the tender documents required bidders to submit audited financial statements prepared in accordance with IFRS and incorporating audit opinions issued in compliance with ICPAK By-Law No. 38.

168. It is also not disputed that the Applicant's audited financial statements did not disclose the name of the individual auditor, although the audit firm was identified.

169. There is no allegation before this Court that the tender documents were ambiguous, contradictory, or incapable of compliance. The requirements were clear and applied uniformly to all bidders.

170. The ICPAK By-Law No. 38 requires disclosure of the identity of the individual auditor responsible for the audit opinion. This requirement serves the purpose of accountability and professional responsibility. The omission of the auditor's name cannot therefore be described as a clerical or typographical error. It goes to the substance of the audit opinion and whether the financial

statements can be said to have been audited in accordance with the prescribed professional standards.

171. Section 79 of the Public Procurement and Asset Disposal Act draws a clear distinction between responsive and non-responsive tenders. Therefore, a tender that does not meet mandatory requirements is non-responsive and must be rejected. ►

172. The argument that the omission was minor and capable of cure cannot be sustained and, in any case, clarification under the public procurement framework cannot be used to permit a bidder to rectify a substantive omission or to introduce information that was required at the time of tender submission.

173. To allow such rectification would amount to preferential treatment and would undermine the constitutional principles of fairness, equity, transparency, competitiveness, and cost-effectiveness under Article 227 of the Constitution.

174. On comparative Jurisprudence, the Applicant relied on **Norland Construction (Pty) Ltd v Chris Hani Development Agency (SOC) Limited** and other South African Cases to argue that tender documents need not be perfect and that compliance should be assessed in light of purpose and materiality.

175. While comparative jurisprudence may be persuasive, it must be applied contextually and consistently with Kenyan law.

176. In the present case, there was no imperfection in the tender documents. The non-compliance arose solely from the Applicant's omission.

177. Even applying the tests articulated in **Norland Construction**, namely the purpose of the requirement in the tender, the degree of non-compliance and the wording of the request for proposals, the omission in this case was material and went to the core of the requirement.

178. Additionally, in the above cited **Phoenix Cash & Carry** case, the South African Court held that a tender may not be rejected for minor or technical deviations that do not affect the substance, fairness, or competitive integrity of the procurement process. However, the Court emphasized that the focus must be on whether the deviation affects the substance of the bid which, in this case, this Court agrees with the respondent and the interested party that the requirement was one set by the professional body's by-law and therefore the procuring entity and the Review Board could not waive in favour of the applicant yet all other bidders had complied with the said requirement. to do otherwise would give the bidder an unfair advantage, prejudice other bidders and ultimately undermine the purpose of the tender requirement thereby

affecting the integrity, fairness or transparency of the procurement process, in violation of Article 227 of the Constitution.

179. Furthermore, the South African jurisprudence cited does not support the proposition that clear and mandatory requirements may be waived where a bidder has failed to comply. This is so, considering that the Review Board considered the tender requirements, the nature of the omission and the applicable law and found that the applicant's bid was non-responsive.

180. This Court finds no evidence that the Board misdirected itself, acted irrationally, exceeded its statutory mandate or acted unconstitutionally.

181. Therefore, where the Board has correctly applied the law, this Court will not interfere merely because the outcome appears harsh to the unsuccessful bidder.

182. On whether any of the Judicial Review Remedies sought are available to the applicant, the applicant seeks for certiorari to remove into this Court and quash the decision of the Review Board rendered in Application No. 100 of 2025 dated 18th November 2025, which dismissed the Applicant's request for review and upheld the disqualification of the Applicant's bid in Tender No. KAA/OT/Kabunde/0183/2024-2025, in view of my analysis above, I find and hold that Certiorari only lies where a decision is illegal, irrational, procedurally improper (**Pastoli v Kabale District Local Government Council [2008] 2 EA**

300) and or unconstitutional or in violation of the constitutionally guaranteed rights of the applicant bidder. This Court's finding is that the Board acted within its jurisdiction, applied the law correctly provided reasons for its decision and acted within its statutory mandate without violating any of the constitutionally guaranteed rights of the applicant. Certiorari is therefore not available.

183. On whether prohibition sought can issue, Prohibition cannot issue to restrain a lawful procurement process conducted in compliance with statutory and constitutional principles (see **Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji [1997] eKLR**).

184. On whether mandamus can issue, Mandamus cannot compel the procuring entity to admit a non-compliant or non-responsive tender, as that would contravene the Public Procurement and Asset Disposal Act and Regulations made thereunder as well as the constitutional public procurement principles espouse in Article 227 of the Constitution as elaborated above. Therefore, mandamus is unavailable.

Final orders

185. This Court therefore holds:

- i. That the judicial review application is a disguised appeal on the merits of the decision of the Review Board*
- ii. that the omission of the auditor's name was a substantive non-compliance with the mandatory tender requirement. and therefore, constituted a material breach of mandatory Tender requirements for Tender No. KAA/OT/Kabunde/0183/2024-2025.*
- iii. that the omission was not a minor deviation curable under Section 79 of the public procurement and Asset Disposal Act, as the tender documents were clear.*
- iv. That the procuring entity and the Review Board had no discretion to waive or cure the omission by the applicant, of the auditor's name.*
- v. That the Applicant has not demonstrated any of the traditional, statutory or constitutional grounds warranting the grant of judicial review orders sought.*
- vi. that the Review Board's decision was consistent with Articles 10, 47, and 227.*
- vii. that the Review Board's decision was lawful, reasonable and proportionate; and*
- viii. that the remedies of certiorari, prohibition and mandamus as sought are not available.*

186. Accordingly, the Notice of Motion dated 26th November 2025 is hereby dismissed.

187. Each party shall bear its own costs.

188. This file is closed.

189. I so order.

Dated, Signed & Delivered virtually during recess this 7th Day of January 2026

(Via Microsoft Teams Meeting)

**R.E ABURILI
JUDGE**