**Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KECA 184 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL E012 OF 2024**

**M NGUGI, F TUIYOTT & JM MATIVO, JJA**

**FEBRUARY 23, 2024**

**BETWEEN**

**SINOPEC INTERNATIONAL PETROLEUM SERVICE CORPORATION ..... APPELLANT**

**AND**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD .... 1ST RESPONDENT**

**THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC ..... 2ND RESPONDENT**

**KENYA ELECTRICITY GENERATING COMPANY PLC ..... 3RD RESPONDENT**

**JV LEX OIL FIELD SOLUTIONS LIMITED & EPCM CONSULTANTS SA (PTY) LIMITED ..... 4TH RESPONDENT**

***(Being an appeal against part of the judgment and decree of the High Court of Kenya at Nairobi (Chigiti, J.) dated 4th January 2024 in Nairobi Judicial Review Misc. App. No. E128 of 2023)***

## JUDGMENT

1. Sinopec International Petroleum Service Corporation (the appellant) is aggrieved by part of the judgment and decree of the High Court of Kenya; Nairobi delivered on 4th January 2024 (Chingiti, J.) in JR Miscellaneous Application No. E128 of 2023, Sinope International Petroleum Service Corporation vs Public Procurement Administrative Review Board.

2. The 1st respondent, the Public Procurement Administrative Review Board (the Review Board), is a central independent procurement appeals Review Board established under section 27 of the *Public Procurement and Asset Disposal Act* (the Act). Its functions pursuant to section 28 of the Act are

reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to it by the Act, Regulations or any other written law.

3. The 3rd respondent was the procuring entity in the tender the subject of this dispute while the 2nd respondent was its Accounting Officer. The appellant and the 4th respondent were tenderers in the procurement process, which triggered the dispute before the Review Board. It's the decision of the Review Board that gave rise to the proceedings before the High Court which culminated in this appeal.

4. The factual chronology of the events, which triggered the proceedings before the Review Board and the Judicial Review Application before the High Court, are essentially common ground or uncontroverted. Briefly, on 21st March 2023, the 2nd respondent published an invitation to tender at the 3rd respondent's website and at the e-procurement portal inviting qualified and interested tenderers to submit bids for Tender No. KGN-GDD-056-2023 for connection of Make Up Wells OW-50A, OW-50B & OW-50C to Olkaria LAU Power Plant (the tender) using an open international competitive tendering method. The initial deadline for the tender submission was Wednesday 12th April 2023 at 10am. However, on various dates, the tender was extended with the final directions extending the deadline to 13th June 2023.

5. The tender opening was carried out on 13th June 2023. At the completion of the Preliminary and Technical Evaluation stages, both the appellant and the 4th respondent qualified to proceed to the Financial Evaluation stage. The appellant's tender was ranked the lowest of the two tenders prior to the application of the Margin of Preference. However, following the application of the Margin of Preference, the Evaluation Committee determined the 4th respondent's tender price of Kshs.1,138,200,012.34 as the lowest evaluated tender price. By a Letter of Regret dated 16th October 2023, the 2nd & 3rd respondents notified the appellant that its bid was unsuccessful because it was not the lowest evaluated bidder after application of the margin of preference. The tender was awarded to the 4th respondent at Kshs.1,138,200,012.34.

6. Aggrieved by the decision to award the tender to the 4th respondent, the appellant filed Request for Review Application Number 84 of 2023 at the Review Board on 27th October 2023 seeking orders, inter alia, that the decision to award the tender to the 4th respondent be set aside, and that it be awarded the tender.

7. In opposition to the request for review, the 2nd and 3rd respondents filed a notice of preliminary objection dated 6th November 2023 citing two grounds. One, it objected to the Review Board's jurisdiction to entertain the matter, contending that the request for review did not fall within the purview of section 167 (1) of the act nor did it comply with the provisions of Regulation 204 (1) of the Public Procurement and Asset Disposal Regulations, 2020 (the Regulations). Two, they contended that the request for review was incompetent because the applicant failed to deposit the equivalent of 15% of the applicant's tender sum as required under Regulation 204 (1).

8. The 4th respondent also filed a notice of preliminary objection dated 6th November 2023 citing three grounds, namely: (a) the applicant lacked locus standi for failing to bring the request for Review within the purview of section 167 (1) of the act; (b) the request for Review did not conform with the mandatory provisions of Regulation 203 (1) & (2) (b) and the Fourth Schedule to the Regulations; (c) the supporting affidavit of Mr. Jiawei was fatally defective because the deponent was not authorized to swear the same on behalf of the applicant.

9. On 9th November 2023, the Review Board directed that the preliminary objections shall be determined in the request for review in line with Regulation 209 (4). After hearing the parties, in its decision dated 17th November 2023, the Review Board held that the appellant's Request for Review was filed outside

the 14 days prescribed by the law. Specifically, it held that the claim ought to have been filed within 14 days from 13th June 2023 when the appellant became aware that the 4th respondent had submitted its bid in both Kenya Shillings and US Dollars contrary to the instructions in the bid document which only provided for Kenya Shillings.

10. Aggrieved by the said decision, the appellant, pursuant to leave of the High Court granted on 23rd November 2023, instituted Nairobi HCJR Misc. App No. E128 of 2023 seeking orders of certiorari to quash the said decision, mandamus to compel the Review Board to re-hear the request for review afresh and to be heard by a different panel, and prohibition to bar the procuring entity from awarding the tender to the 4th respondent pending the hearing of the judicial review application. It also prayed for any other relief the court could grant plus costs of the suit.

11. In support of its judicial review application, the applicant contended that the Review Board issued draconian orders in dismissing its Request for Review, effectively shutting the doors of justice to the applicant. It also claimed that the Review Board took into account irrelevant considerations, and that the decision violated its rights to legitimate expectation that a tender cannot be rejected before determining its responsiveness. In addition, the appellant contended that the decision offends Articles 10, 47, 159

    (2) (d), 201 and 227 of *the Constitution* and the principles of public procurement provided in section 3 of the Act. The appellant also claimed that the Review Board misinterpreted section 167 (1) of the Act and arrived at an irrational and unreasonable decision. Lastly, the appellant contended that the Review Board elevated Regulation 204 above Article 159 (2) (d) of *the Constitution*.

12. The High Court (Chingiti, J.), in the judgment delivered on 4th January 2024, the subject of this appeal, affirmed the decision of the Review Board that the cause of action arose on 13th June 2023 and time began to run from the said date, therefore the 14 days lapsed on 27th June 2023. The trial court also agreed with the Review Board that by the time the request for review was filed on 27th October 2023, the claim based on the currency bid was time barred. Lastly, the learned judge affirmed the Review Board's finding that the effluxion of time took away the jurisdiction of the Review Board.

13. However, the learned judge overturned the Review Board's finding that the appellant lacked locus standi to file the Request for Review. This finding explains why the appellant, in its Memorandum of Appeal, states that it is appealing only against part of the judgment. However, in the prayers sought in the memorandum of appeal, the appellant seeks to overturn the entire judgment, despite clearly stating that its appealing only against part of the judgment. Nevertheless, we will proceed on the basis that the appellant is aggrieved by part of the judgment as clearly stated in its notice of appeal dated 8th January 2024.

14. In its memorandum of appeal dated 10th January 2024, the appellant cites 5 grounds of appeal which we have condensed to three:

    (a) Whether the learned Judge erred in finding that the Review Board lacked jurisdiction to entertain the Request for Review, and or whether the request for review was filed out of time;

    (b) Whether the learned judge misapprehended section 78 of the Act on what transpires during tender opening thereby arrived at a wrong conclusion; (c) Whether the learned judge erred in finding that the cause of action arose on 13th June 2023 during tender opening.

15. The 2nd and 3rd respondent filed a notice of grounds affirming the decision stating:

(i) the applicant's application dated 24th November 2023 and the judicial review proceedings were incompetent, defective and bad in law, and therefore the suit was rightfully dismissed;

(ii) prayer (c) in the memorandum of appeal cannot be sustained, there being no appeal challenging the High Court's refusal to entertain the prayers for orders of mandamus and prohibition.

16. In support of the appeal, Mr. Mogire, the appellant's counsel, addressing the question whether the appellant's request for review was time barred, thereby divesting the Review Board of its jurisdiction, cited section 78 of the act and argued that the said section prescribes what occurs during the tender opening stage and the role of the tender opening committee. Counsel underscored that a tender opening committee is not the tender evaluation committee, therefore no evaluation takes place at this stage, nor does the tender opening committee have a role in evaluation of the tenders. Mr. Mogire submitted that section 78 (7) of the Act is unequivocal that no tenderer shall be disqualified during the tender opening stage. Consequently, there was no breach during the opening of the tenders on 13th June 2023. Therefore, the appellant could not be expected to file a Request for Review at that stage. Counsel submitted that the finding by the learned Judge that the cause of action premised on currency was time barred is erroneous. He underscored that section 167(1) is unequivocal that the breach complained of is breach by the procuring entity and not a tenderer.

17. Mr. Mogire contended that if the High Court judgment is left undisturbed, it would mean that it will be the duty of a tenderer to evaluate and ensure compliance with the tender conditions during the tender opening stage, which is tantamount to amending section 167(1) of the Act, which stipulates who commits a breach. This, he argued would encroach the mandate of the tender evaluation committee which is not subject to control by any person or authority. Counsel added that the role of the tender opening committee is restricted to reading out the sums quoted by each tenderer and ascertaining whether the tenderers had provided security.

18. Mr. Mogire submitted that the appellant had a legitimate expectation that the 4th respondent's tender would be declared non-responsive and rejected on account of not adhering to the bid requirements. However, vide the letter dated 16th October 2023, the appellant learnt that the 4th respondent had been awarded the tender yet its tender was non-responsive. It is the appellant's case that its request for review was filed within time pursuant to section 87 of the Act, which is within 14 days from the date of the said letter.

19. The appellant's counsel argued that suggesting that the breach occurred at the tender opening stage is tantamount to arguing that the 4th respondent's bid ought to have been disqualified at the tender opening stage for non-compliance on the issue of tender currency. Counsel argued that such a view offends section 78 (7) of the Act which bars the disqualification of any tenderer at the tender opening stage since it is not the mandate of the tender opening committee to evaluate tenders.

20. As to whether the failure to comply with tender conditions during tender opening stage amounts to breach by a procuring entity as contemplated under section 167 of the Act, Mr. Mogire maintained that the breach contemplated under section 167(l) of the Act is breach or wrongdoing by the procuring entity, but not breach by a tenderer. Therefore, the remedy for this breach, according to the Act, lies with the tender evaluation committee during evaluation of tenders by rejecting the non-responsive tender. Counsel maintained that the procuring entity had not committed any breach, which the 1st respondent could be required to review administratively. Counsel cited the Review Board's decision in Elijah Nabea Mukaria vs The Accounting Officer, Kenya Broadcasting Corporation, Application No. 26 of 2020 in support of the holding that any request for review filed before conclusion of evaluation

of the tenders is baseless and a fishing expedition. Mr. Mogire insisted that had the appellant filed a request for review before the evaluation of the tenders, the same would have been baseless as was held by the Review Board in the above case.

21. To bolster his submissions, Mr. Mogire cited this Court's decision in Space Contractors & Suppliers Investment Limited and the Public Procurement Administrative Review BOARD & 23 others, Civil Appeal No. E169 of 2023 which held:

> "... the determination of when time begins to run will depend upon an examination of the alleged breach, and at what stage the aggrieved tenderer had knowledge of the said breach, or ought to have reasonably known of it."

22. On behalf of the 1st respondent, learned counsel, Mr. Munene Wanjohi, associated himself with the written submissions filed by the 2nd, 3rd and 4th respondents. Counsel maintained that the appellant's request for review was based on allegations of breaches by the 2nd, 3rd and 4th respondents. Therefore, the appellant ought to have filed the Request for Review at any stage of the procurement process. Mr. Wanjohi further submitted that judicial review orders are discretionary in nature and a court may decline to grant the orders, even when they are deserved. He added that the appellant has not demonstrated that the learned judge improperly exercised his discretion and occasioned injustice.

23. Learned counsel for the 2nd and 3rd respondents, Mr. Mogaka, pointed out that in his request for review and in the affidavit in support thereof, the appellant acknowledged that during the tender opening process on 13th June 2023, it learnt that the 4th respondent quoted their bid in both Kenya Shillings and US Dollars. Consequently, the statutory time limit began to run from 14th June 2023. Hence, by operation of the law, the 14- day period expired on 27th June 2023. Consequently, the request for review filed on 27th October 2023 was time-barred.

24. Mr. Mogaka maintained that time began to run when the appellant learnt that the 4th respondent had quoted Kenya Shillings and US Dollars in its bid documents as opposed to Kenya Shillings only. Mr. Mogaka cited the finding in Space Contractors & Suppliers Investment Limited vs Public Procurement Administrative Review Board & 23 Others [supra], which held that determination of when time begins to run depends upon an examination of the alleged breach, and at what stage the aggrieved tenderer had knowledge of the said breach, or ought to have reasonably known of it.

25. In response to the appellant's prayer seeking reinstatement of its request for review before the Review Board, Mr. Mogaka submitted that no appeal was preferred against the learned judges' refusal to consider the reliefs of mandamus and prohibition, therefore, the said prayer cannot be granted in this appeal. Lastly, learned counsel submitted that this appeal lacks merit because timelines under the Act are mandatory and have a bearing on the jurisdiction of the Review Board.

26. On behalf of the 4th respondent, Mr. Kiprono, submitted that the appellant having admitted that he learnt that 4th respondent submitted its tender price in two currencies during the tender opening on 13th June 2023, it cannot be heard to say there was no breach. He relied on the High Court decision in Republic vs Public Procurement Administrative Review Board & 2 Others Ex Parte Kemotrade Investment Limited [2018] eKLR in support of the finding that time starts to run when an aggrieved party learns about the breach. Further, there would have been no need for the Act to create three instances if a complaint was only to be filed only after the issuance of the notification to enter into a contract.

27. Lastly, the 4th respondent's counsel submitted that even if this Court were to set aside the impugned judgment, it cannot grant the writ of mandamus remitting the Request for Review to the 1st

respondent for re-hearing because the appellant did not appeal against the High Court decision striking out the prayer for mandamus and prohibition.

28. We have considered the Record of Appeal, the diametrically opposed submissions by the parties' counsel, the authorities cited, and the law. In our view, this appeal turns on one issue, namely whether the appellant's Request for Review was time barred, thereby divesting the Review Board of its jurisdiction to entertain the case.

29. As was held by this Court in National Social Security Fund Board of Trustees vs Kenya Tea Growers Association & 14 Others [2023] KECA 80 (KLR):

> "Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A Court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and, (c) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The above three ingredients must co-exist in order to infuse jurisdiction in a Court. Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity."

30. The key question here is whether the High Court erred in affirming the Review Board's finding that the appellant's request for review was filed outside the 14 days statutory period stipulated by section 167 (1) of the Act as read with Regulation 203 (1). Section 167(1) of the Act provides:

> "(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative Review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed."

31. The cornerstone of the appellant's argument is that the above section only refers to breach of a duty imposed on a procuring entity by the act, but not a duty imposed on a tenderer. Buttressed by this section, the appellant contends that the breach complained of, (which is, the 4th respondent quoted its bid in both Kenya and US dollars contrary to Clause 34.1 of the Bid Documents) cannot be attributed to the procuring entity. This is because it was a breach by the 4th respondent. The appellant argued therefore that it could not lodge a valid complaint and cited a decision by the Review Board in support of the said position. It was the appellant's case that had it filed a Request for Review at this stage, it would have been premature. The appellant maintained that at the tender opening stage, the Tender Opening Committee was only required to read the prices and no more because the law does not permit rejection of bids at this stage.

32. The appellant's argument is premised on sections 78 (7) and 167(1) of the Act. Section 167 (1) specifically talks of a breach, by the procuring entity. The appellant also relied on section 78 (7) which expressly states that a tender cannot be rejected at the tender opening stage. The appellant's counsel faulted the Review Board and the High Court for hoisting Regulation 203 (3) (c) high above the clear provisions of the parent statute. Counsel added that regulations cannot override express statutory provisions. Undeniably, regulations give practical effect to law by (a) providing the stepwise detail

necessary to enforce the law and (b) the mechanisms for monitoring such enforcement. Provided the Regulations promote the purposes of the parent statute and are not inconsistent with the parent statute, they cannot be ignored.

33. Regulation 203 (1) & (2) provides that:

    1. A request for Review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

    2. The request referred to in paragraph (1) shall—

        a. state the reasons for the complaint, including any alleged breach of *the Constitution*, the Act or these Regulations;

        b. be accompanied by such statements as the applicant considers necessary in support of its request;

        c. be made within fourteen days of— (i) the occurrence of the breach complained of, where the request is made before the making of an award; (ii) the notification under section 87 of the Act; or (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

34. The issue at hand is an invitation to us to interpret the previsions od section 167 (1). The starting point of interpreting a statute is the language itself. In the absence of an express legislative intention to the contrary, the language must ordinarily be taken as conclusive. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. Courts decide what the law is and not what it should be. The court of course adopts a construction, which will carry out the obvious intention of the legislature but cannot, itself, legislate.

35. In construing a statutory provision, the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning, the Court is precluded from speculating.

36. Section 167(1) provides in clear terms that the breach to be challenged by way of an Administrative Review is "...a breach of a duty imposed on a procuring entity by this Act or the Regulations'. Clearly, the section only talks of a breach by the procuring entity. Undeniably, when Parliament was enacting the said provision, it was aware that there are other participants in a procurement process. However, in its wisdom, Parliament did not mention any other person or a party to a procurement process.

37. Regulation 203 reproduced above cannot override the express provisions of the parent statute. In any event, it is the law that Regulations cannot override clear provisions of the mother statute and in the event of a conflict, the provisions of the statute prevail. Section 78 (7) bars the Tender Opening Committee from rejecting a bid. Therefore, the procuring entity cannot be said to have committed a breach at this stage. Accordingly, we agree with the appellant that it could not have properly invoked the jurisdiction of the Review Board at this stage. This is because, as at this point, no breach by the procuring entity had occurred.

38. Our above finding determines this appeal in the appellant's favour. However, we find it necessary to address a pertinent point of law which none of the parties addressed in these proceedings either before us or before the High Court or before the Review Board. This is whether the procuring entity's Evaluation Committee violated the law by declaring the 4th respondent's bid to be responsive,

notwithstanding the glaring discovery by the Tender Opening Committee that the bid did not comply with Clause 34-1 of the bid documents.

39. The question whether an appellate Court can suo motto raise and address a point of law that was not addressed in the lower courts has been addressed by this Court in several decisions. In Harun Meitamei Lempaka vs Lemanken Aramat & 2 Others [2014] eKLR the Supreme Court cited with approval decided cases affirming that it is firmly settled law that issues of jurisdiction or competence of a court to entertain or deal with a matter before it is very fundamental. It is a point of law and therefore, a rule of court cannot dictate when, and how, such point of law can be raised. Being fundamental and threshold issue of jurisdiction, it can be raised at any stage of the proceedings in any court including this Court. The apex court proceeded to state as follows:

> (176) Consequently, where such a jurisdictional question is raised, a challenge of parties being bound by their proceedings cannot rightly lie. The law is the preserve of the courts which courts take judicial notice of. A party does not have a 'monopoly' of the law. The court does have this monopoly as it applies the law to a set of facts in reaching its decision. Hence, a court of law can rightly raise a legal question of jurisdiction even where no party raises such a question."

40. This Court in Barclays Bank of Kenya vs Pyritic Guards Limited [2015] eKLR, confronted with a similar issue stated:

> "It is also trite law that a point of law can be raised at any stage, even though not raised before the court of first instance. The Court can also on its own motion raise a point of law at any point and make a determination based on the same even where such point has not been canvassed by the parties. The learned judge did not therefore do anything outrageous by raising the issue of non-compliance with Regulation 79 of Table A of the *Companies Act* and acting on it." (Emphasis added)

41. Clause 33.3 and 34.1 of the tender documents stipulated as follows:

> 33.3. Tenderers shall be notified of any errors detected in their bid during the notification of award.
>
> 34. 1 Tenders will be priced in Kenya Shillings only. Tenderers quoting in currencies other than Kenya shillings will be determined non-responsive and rejected.

42. The Tender Opening Committee on 13th June 2023 announced to the parties that the 4th respondent had quoted its bid both in Kenya Shillings and US Dollars. This was in violation of Clause 34.1. The law does not permit rejection of tenders at this stage. Therefore, the bids proceeded for evaluation. Regulation 47(1) outlines what should be examined for purposes of section 79(1) of the Act in order to determine whether a bid is responsive. Notably, the Evaluation Committee passed the 4th respondent's bid through the Preliminary Stage, the Evaluation Stage, the Financial Evaluation Stage and the post qualification. Ultimately, the bid was declared successful and the award was granted to the 4th respondent.

43. Bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria. A bid only qualifies as a responsive bid if it meets all requirements as set out in the bid documents. Bids found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness is thus the first important hurdle for bidders to overcome.

44. The Evaluation Committee appointed by the Accounting Officer of the procuring entity pursuant to section 46 of the Act is required to evaluate and compare the responsive tenders other than tenders rejected under section 82(3). In addition, the Evaluation Committee is required to conduct a Technical

Evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document.

45. More importantly, *the Constitution* lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer at Article 227. The Article requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be fair, equitable, transparent, competitive and cost effective. As the decision to award a tender constitutes administrative action, it follows that that the provisions of the *Fair Administrative Action Act* apply to the process.

46. An acceptable tender under the Act is any tender, which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that the procuring entity, or the Review Board or even this court may disregard at whim. To hold otherwise would undermine the dictates of Article 227 of *the Constitution* and section 3 of the Act and the *Public Finance Management Act*.

47. The legislative framework for procurement policy under Article 277 of *the Constitution* provides the context within which judicial review of state procurement decisions must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review in a given case. The facts of each case will determine whether any shortfall in the requirements of the procurement system may lead to either procedural unfairness, irrationality, unreasonableness or any other review ground. The judicial task is to assess whether the evidence justifies the conclusion that any one or more of the review grounds do in fact exist. It is the above yardstick that the High Court was constitutionally required to apply in reviewing the decision of the Review Board.

48. In accordance with the constitutional and legislative framework discussed above, we will now consider whether the evidence on record establishes the factual existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that there was a breach on the part of the procuring entity as contemplated by section 167 (1). Section 79 of the Act provides as follows:-

> 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.

49. As was stated by the High Court in Republic vs Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] eKLR, the requirement of responsiveness operates in the following manner:

"a. A bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid documents. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements.

b. Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities, which bidders often overlook at their peril."

50. Such formalities are usually listed in the bid documents as mandatory requirements – in other words, they are a sine qua non for further consideration in the evaluation process. Clause 34.1 reproduced above is couched in mandatory terms. The word " shall" is used in the said clause.

51. In public procurement regulation, it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the purpose of supplying information to bidders for the preparation of tenders and amount to injustice if some bidders were allowed to bypass tender conditions. It is imperative for bidders to compete on an equal footing. Furthermore, tenderers have a legitimate expectation that the procuring entity will comply with its own tender conditions.

52. Under section 79 (2) (a) (b), a procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents, or if it contains errors or oversights that can be corrected without touching on the substance of the tender. The World Bank Procurement Guidelines similarly provide (that a procuring entity:

> " Shall ascertain whether the bids (a) meet the eligibility requirements specified in paragraph 1.8, 1.9, and 1.10 of these Guidelines, (b) have been properly signed, (c) are accompanied by the required securities or required declaration signed as specified in paragraph 2.14 of the Guidelines, (d) are substantially responsive to the bidding documents; and (e) are otherwise generally in order. If a bid, including with regard to the required bid security, is not substantially responsive, that is, it contains material deviations from or reservations to the terms, conditions and specifications in the bidding documents, it shall not be considered further. The bidder shall neither be permitted nor invited by the Borrower to correct or withdraw material deviations or reservations once bids have been opened." (Emphasis added)

53. A bid that contains minor informalities is not considered non- responsive. However, in the case of material nonconformities, it is immaterial whether the nonconformity is deliberate or occurs by mistake, or whether the bidder is willing to correct or modify the bid to conform to the terms of the invitation. It is very important to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level which determines the fate of the tender. In this case, the bid documents contained clear instructions to bidders. As stated above, Clause 34.1 is couched in mandatory terms. By declaring the 4th respondent's

bid to be responsive, the procuring entity outrightly disregarded its own bid conditions and violated section 79 of the act. A procuring entity is bound by its bid documents. Mandatory conditions cannot be waived. The Evaluation Committee had no choice but to evaluate the bids in accordance with the eligibility and mandatory requirements of the tender documents by examining the documents before it.

54. We are clear in our minds that the Evaluation Committee erred by failing to declare the 4th respondent's tender as non-responsive. This was a breach of section 79, an issue of law, which this Court cannot ignore. In fact, the Review Board and the High Court erred by overlooking such a glaring breach of the law. It is irrelevant that the issue was not canvassed before the two courts. As we underscored earlier, there are ample authorities supporting the position that a court of law can, on its own motion, determine an issue of law arising from the pleadings or the facts as pleaded.

    This becomes even more important where the issues touch on jurisdiction or the competence of the suit before the Court.

55. There is a long-standing common law principle, that courts will not assist a party whose case is based upon an immoral or illegal act. This principle can be traced back to a very old case, Holman vs Johnson [1775] 1 Cowp 341 where, in the words of Lord Mansfield:

    > "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".

56. This common law principle, is known as the principle of "Ex Turpi Causa Non Oritur Actio" meaning that "No action can arise from an illegal act". It is also presented as the "Illegality Defence Principle" or the "Defence of Illegality." Simply put, defendants raise as a defence, to defeat the claim, the illegality on which the claim is based.

57. The general position of the law is that whenever a Court or Tribunal finds that a cause of action was premised on an illegality, or the originating process of any matter before it is incompetent or it is not initiated in accordance with the law, such a suit or proceeding is invalid and a nullity and should be struck out.

58. For the reasons discussed above, we find merit in this appeal to the extent that both the Review Board and the High Court failed to appreciate the proper meaning of section 167(1) of the Act, in that there was no breach by the procuring entity at the Tender Opening Stage. Further, the Review Board and the High Court fell into a grave error by failing to appreciate that the Tender Evaluation Committee violated section 79 of the Act by declaring as responsive the 4th respondent's bid which clearly had failed to comply with a mandatory bid term. The ensuing award of the tender to the 4th respondent is founded on an illegality. It would be unconscionable and a dereliction of duty for this Court to endorse the award of the tender to the 4th respondent on the face of the manifest violation of section 79. Accordingly, reverse the High Court decision and set aside the award of the subject tender to the 4th respondent in its entirety for the reasons herein above stated. Each party shall bear its own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.**

**MUMBI NGUGI**

**.....**

**JUDGE OF APPEAL**

**F. TUIYOTT**

**.....**

**JUDGE OF APPEAL**

**J. MATIVO**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**