



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 337 OF 2013**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE PUBLIC PROCUREMENT**

**ADMINISTRATIVE REVIEW BOARD .....RESPONDENT**

**EX PARTE**

**NOBLE GASES INTERNATIONAL LIMITED**

- 1. KENYATTA NATIONAL HOSPITAL**
- 2. BOC KENYA LIMITED**

**INTERESTED PARTIES**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 27<sup>th</sup> September, 2013, the *ex parte* applicant herein, **Noble Gases International Limited**, seeks the following orders:
  1. **AN ORDER OF CERTIORARI to remove to this Honourable Court to be quashed the decision of the Public Procurement Administrative Review Board signified through its Decision dated 16<sup>th</sup> September, 2013 in Review No.31/2013 of 5<sup>th</sup> September, 2013 (In the matter of Tender No.KNH/T/43/2013-2014 for the supply and delivery of Medical Gases) conveyed to the Applicant and purporting to annul the award of the tender to the Applicant in respect medical Liquid Oxygen, directing the 1<sup>st</sup> Interested Party to re-evaluate all the bids in respect with Item No.3 (Medical Liquid Oxygen) in accordance with the Act, the Regulation and the Tender Document and further directing the said 1<sup>st</sup> Interested Party to ensure that the process is complete within the next fifteen days in accordance with Leal Notice No.106 of 18<sup>th</sup> June 2013 and within the Tender validity period.**
  2. **Costs.**

**EX PARTE APPLICANT'S CASE**

2. The application is based on the following grounds:
  - a. **The decision sought to be impugned is disproportionate, subjective and unreasonable.**
  - b. **The decision sought to be impugned is unjust and unfair to the Applicant.**

- c. **The decision sought to be impugned was based on extraneous, irrelevant and improper considerations.**
  - d. **The decision sought to be impugned is contrary to the mandate and jurisdiction contemplated within the provisions of the Public Procurement and Disposal Act, 2005.**
  - e. **The decision sought to be impugned is contrary to the Applicant's legitimate expectations, ultra vires, unlawful and null and void.**
  - f. **The 2<sup>nd</sup> Interested Party will implement the decision sought to be impugned, an act which will greatly hamper the business of the Applicant.**
  - g. **The decision sought to be impugned is detrimental to the Applicant's constitutional right to fair administration action that is lawful, reasonable and procedurally fair.**
  - h. **On the whole, the decision sought to be impugned is capricious, oppressive and unfair and has the deliberate consequence of shattering the applicant's legitimate business without cause.**
3. The same application is based on Statutory Statement filed on 24<sup>th</sup> September, 2013 and the verifying affidavit sworn by **George Omamo**, the Sales Manager of the applicant on 24<sup>th</sup> September 2013.
  4. According to the deponent, on or about 18<sup>th</sup> April, 2013 the 1<sup>st</sup> Interested Party advertised for annual tenders among them tender number KNH/T/18/2013-2014 for supply of and delivery of medical gases which was later cancelled because there was error in the tender document which was pointed out on the open day. The error was in the Standard newspaper advertisement where it was indicated that the tender would open on 9<sup>th</sup> May, 2013 yet on page 12 of the tender document the date of opening of tender was indicated as 10<sup>th</sup> May, 2013. Since only the Applicant and the 2<sup>nd</sup> interested party deal with the subject product of this matter, the tender committee of the 1<sup>st</sup> interested party approved a restricted tendering method and the Applicant and the 2<sup>nd</sup> interested party bidders were given 14 days to submit their bids. The bids were opened on 29<sup>th</sup> May 2013 and evaluated accordingly. The two bidders (Applicant and 2<sup>nd</sup> interested party) failed in the preliminary evaluation and the tender was therefore deemed non-responsive by the 1<sup>st</sup> Interested Party's Tender committee and thus fresh bids were called from the two bidders. The 2<sup>nd</sup> Interested Party had been a previous supplier of various medical gases to the 1<sup>st</sup> Interested Party including medical liquid oxygen and for which it had usually charged a separate cost for rental of the tank. It is averred that the 1<sup>st</sup> Interested Party cancelled the original tender so as to expressly provide in Clause 2(i) Section 7 of the new tender document that the successful bidder for liquid oxygen must provide storage tank at no extra charge and that that bidder should charge for contents only. However, the 2<sup>nd</sup> Interested Party did not meet the conditions in Clause 2(i) Section 7 of the tender document and therefore failed. On the 16<sup>th</sup> July 2013 the tender (the new tender) was re advertised (tender number KNH/T/43/2013-2014) in the local dailies and twenty-one (21) days given for the Applicant herein and the 2<sup>nd</sup> Interested Party herein to respond. The Tender was opened on 2<sup>nd</sup> August 2013 and both the Applicant and 2<sup>nd</sup> interested party passed the preliminary evaluation. During stage 2 (Technical evaluation stage) and in accordance with the express stipulations of the tender document, the Applicant herein indicated clearly on the tender document that it would provide a 20,000 litres storage tank free of charge to the 1<sup>st</sup> Interested Party, that the storage tank would attract absolute zero rental charges and that all gas cylinders supplied would not attract any monthly charges while the 2<sup>nd</sup> interested party in breach of the above stated conditions in the tender document did not indicate whether they would provide a storage at no extra cost and rental charges. It also failed to indicate if the product supplied in cylinders would be charged fees for the cylinders and as a result the 2<sup>nd</sup> Interested Party was not successful in its bid in respect with Item No.3 (Medical Liquid Oxygen) which was awarded to the Applicant herein and the 1<sup>st</sup> interested party notified the Applicant and the 2<sup>nd</sup> interested party of the said outcome of the tender vide letter dated 22<sup>nd</sup> August 2013. Thereafter, the 2<sup>nd</sup> Interested Party lodged before the Respondent its request for review against the said decision of the Interested Party on 5<sup>th</sup> September 2013.

5. It is however the applicant's position that despite review application by the 2<sup>nd</sup> Interested Party being time barred having been filed after the expiry of the mandatory 7 days from the date of notification which notification expired on 2<sup>nd</sup> September, 2013, the Respondent proceeded to hear it and the Respondent proceeded and purported to make a decision annulling the award of the tender to the Applicant herein in respect of Item No.3 (Medical Liquid Oxygen) in accordance with the Act, The Regulation and the Tender Document and further purporting to direct the 1<sup>st</sup> Interested Party to ensure that the process is complete within the next fifteen days in accordance with Legal Notice No.106 of 18<sup>th</sup> June 2013 and within the Tender validity period.
6. Based on legal advice from the applicant's advocates, the applicant believes that Respondent's aforesaid decision is not only bad in law but is also contrary to the principles of natural justice, is disproportionate, subjective, unfair and unjust to the Applicant; that the said decision was based on extraneous irrelevant and improper considerations; that said decision is contrary to the Applicant's legitimate expectations, ultra vires, unreasonable, unlawful and null and void; that it was contrary to the mandate and jurisdiction contemplated within the provisions of the **Public Procurement and Disposal Act, 2005** (hereinafter referred to as the Act); and that the said decision is detrimental to the Applicant's constitutional right to fair administrative action that is lawful, reasonable and procedurally fair.
7. It is the applicant's case that it should not suffer prejudice in consequence of the unreasonable decision herein hence it is therefore fair and just that this matter should be heard as a matter of urgency and the orders sought herein granted.

### **RESPONDENTS' CASE**

8. In opposition to the application, the respondent filed a replying affidavit sworn by **Pauline O. Opiyo**, its secretary on 25<sup>th</sup> September, 2013.
9. According to the deponent, the Respondent received the Applicant's Request for Review on the award of Tender NO.KNH/T/43/2013-2014 for supply of Medical Gases on 5<sup>th</sup> September, 2013 and that the respondent heard both parties on 14<sup>th</sup> September, 2013, considered their submissions, determined the application for review and delivered its ruling on 16<sup>th</sup> September, 2013 allowing the Request for Review by the Applicant therein and ordered that the award of the tender to the Successful Bidder in respect to Medical Liquid Oxygen be annulled; that the Procuring Entity re-evaluates all the bids in respect with Item No.3 (Medical Liquid Oxygen) in accordance with the Act, the Regulations and the Tender Document; and that the Procuring Entity should ensure that the process is completed within the next fifteen days in accordance with Legal Notice no.106 of 18<sup>th</sup> June 201 and within the tender validity period.
10. According to the deponent the Respondent's decision was based on the finding that there was no requirement in the Tender Document that Bidders were to expressly state in their bids that they would not charge for storage tanks; that Clause 2.10.3 in the Tender Document clearly protected the Procuring Entity from possible extra charges since it clearly stated that quoted prices would not be subject to variation during the contract period; that the Applicant had attached a duly signed form of tender in its bid document supporting its bid price meaning that it was bound by its price; that the Procuring Entity, in breach of Section 66(2) of the Act, erred in invoking an extraneous criterion which subsequently led to improper disqualification of the Applicant at stage 2 of the evaluation; that the letter sent to the Applicant informing it of the success of its bid in relation to the three items cannot suffice as a letter of notification for all the items; that the Applicant only got the proper notification of the award of item No. 3 (Medical Liquid Oxygen) on 29<sup>th</sup> August; and that the subject Request for Review, having been filed on 5<sup>th</sup> September 2013, was filed within time and hence was properly before the Respondent.
11. It is averred that in making its decision, the Respondent considered only the proviso of the Act, the Regulations, the Tender Documents and the facts presented before it by the Parties and no extraneous issues whatsoever were considered and that the Respondent in making its decision was within its mandate, and the specific sections of the law on which the Respondent's decision was pegged have been expressly pronounced in its decision hence the Applicant's presentation that the Respondent acted ultra vires in making its decision is vehemently opposed. Further, it is contended that the Respondent had jurisdiction to hear and determine the dispute since the

Request for Review was filed within time hence the Applicant's application is made in bad faith, has no merit and is only calculated to discredit the credibility of the Respondent's mandate and function, while ultimately eroding the public's confidence in procurement procedures and processes.

### **1<sup>ST</sup> INTERESTED PARTY'S CASE**

12. The 1<sup>st</sup> interested party respondent to the application by way of an affidavit sworn by **Calvin Nyachoti**, its Corporation Secretary on 1<sup>st</sup> October, 2013.
13. According to the deponent, the procurement of medical gases commenced on 18<sup>th</sup> April 2013 after the user department of the 1<sup>st</sup> Interested Party raised a requisition on the annual requirements of the medical gases. According to him, in the initial bid, the bidders were given the statutory twenty-one (21) days to respond and the bids opened on 9<sup>th</sup> May 2013 and that the Agenda was presented for cancellation to Tender Committee because there was an error on the tender document which the 2<sup>nd</sup> Interested Party pointed out in regard to the opening day where on the invitation newspaper advert it indicated that the tender would open on 9<sup>th</sup> May 2013 but the tender document on page 12 read 10<sup>th</sup> May 2013 which contradiction would have led to confusion thus the cancellation. Since only two local bidders deal with the product, the Tender Committee approved the restricted tendering method to the two known firms and the two bidders were informed via the 1<sup>st</sup> Interested Party's official telephone to collect their bid documents on 16<sup>th</sup> May 2013 and pursuant thereto the ex parte Applicant herein and the 2<sup>nd</sup> Interested Party indeed collected their respective documents which was recorded in the tenders register on 16<sup>th</sup> May 2013 as is the procedure. The bidders were given fourteen (14) days to respond to this bid which bids were opened on 29<sup>th</sup> May 2013 by an opening Committee and were evaluated accordingly. The agenda was presented to Tender Committee for deliberation on 24<sup>th</sup> June 2013 but the two bidders failed in preliminary evaluation and the tender was therefore deemed non-responsive and bids called afresh from the two tenderers.
14. According to the deponent, the 2<sup>nd</sup> interested party having been previous suppliers of various medical gases including medical liquid oxygen and for which it had introduced a separate cost for rental of the tank and which charge the 1<sup>st</sup> Interested Party found unacceptable, the tender was thus cancelled to include a specific Clause to demand tenderers to charge for the contents only. After deliberations on 24<sup>th</sup> June 2013, the Tender Committee resolved that the tender should be re-advertised with clear terms on the storage tanks or alternatively for the 1<sup>st</sup> Interested Party to acquire its own tank which decision was communicated to the firms on 3<sup>rd</sup> July 2013. Thereafter on 16<sup>th</sup> July 2013 the tender was re-advertised in the local dailies and given twenty-one (21) days for bidders to respond which tender opened on 2<sup>nd</sup> August 2013 by an Opening Committee and an Evaluation Committee of the 1<sup>st</sup> Interested Party was appointed and submitted a preliminary technical and financial report which report was that both bidders passed preliminary evaluation. On stage 2 evaluation, the 2<sup>nd</sup> Interested Party did not indicate whether they would provide storage at no extra charge therefore they failed because the Technical Evaluation committee could not establish from any part of their documentation if they would charge rental fees or not considering they had previously indicated that they would charge rental costs. The other bidder (ex parte Applicant herein) clearly elaborated that their facility would be provided at no extra charge to the 1<sup>st</sup> Interested Party and even indicated the size of storage tank they would install if awarded the tender and was thus deemed the successful tender according to the requirements of the tender. Therefore, it is contended that considering that evaluation of tenders is based on documentation and statements of compliance in order to make objective decisions and avoid ambiguity, the 2<sup>nd</sup> Interested Party herein therefore failed at the 2<sup>nd</sup> stage of evaluation. Thereafter, a notification of award dated 22<sup>nd</sup> August 2013 was sent to the 2<sup>nd</sup> interested party notifying it of its success in items 2, 3, 4, 5, 7, 8, 9 and 11 (sic) of the tender which again to the 2<sup>nd</sup> respondent was a notification of its failed bid for the other items awarded to the 2<sup>nd</sup> interested party for that

- particular item among the seven others. Similarly, a notification of award dated 22<sup>nd</sup> August, 2013 was sent to the applicant notifying it of its success in items 2, 3, 4, 5, 7, 8, 9 and 11 of the tender which was a notification of its failed bid for the other items awarded to the 2<sup>nd</sup> interested party. On receipt of the notification, on 26<sup>th</sup> August 2013, the 2<sup>nd</sup> Interested Party herein wrote to the 1<sup>st</sup> Interested Party thanking it for the award in the three and enquiring only about the medical liquid oxygen gas and a response was given on 28<sup>th</sup> August 2013 detailing the reasons why the bid for that particular item was not successful. The 2<sup>nd</sup> interested party also requested for a meeting with the 1<sup>st</sup> interested party and this was held on 28<sup>th</sup> August 2013 and the same was explained to them were advised that the decision was final.
15. It is deposed that while the tender was still undergoing evaluation, considering medical gas is a critical supply and the 1<sup>st</sup> Interested Party's operations must go on, the 1<sup>st</sup> interested party on 6<sup>th</sup> August 2013 through a direct procurement invited 2<sup>nd</sup> interested party to quote as the immediate last supplier whose contract had expired on 30<sup>th</sup> June 2013 and following this process, the 1<sup>st</sup> Interested Party procured sixty (60) cylinders of nitrous oxide from the 2<sup>nd</sup> Interested Party as a stop gap measure to keep services running in the 1<sup>st</sup> Interested Party. Thereafter, the 1<sup>st</sup> interested party again approached the 2<sup>nd</sup> interested party on 28<sup>th</sup> August 2013 to give the price of the nitrous oxide product in order to replenish stocks that were running low to avoid loss of lives since patients in theatre and ICU solely depend on oxygen to survive and based on the price given, the 1<sup>st</sup> Interested Party directly procured 100,000 litres of liquid oxygen once again as a stop gap measure to keep services running as the notification period was still on and even after that the awarded bidder would need to install their tank before they could start supplying to the 1<sup>st</sup> Interested Party.
16. It is averred that the Technical Evaluation Team wholly relies on documents submitted to carry out the evaluation and since the 2<sup>nd</sup> Interested Party's did not state whether would provide a storage tank at no extra cost and therefore, the Evaluation Team could not have assumed that the 2<sup>nd</sup> Interested Party would not subject the 1<sup>st</sup> Interested Party to an Independent charge later on after the contract was signed or alternatively require the 1<sup>st</sup> Interested Party to provide its own tank and that the condition for bidders to indicate whether storage tanks would attract rental charges was meant to protect the 1<sup>st</sup> Interested Party from introduction of any other charges midway through the contract period and/or require the Procuring Entity to provide its own storage tank especially because the 2<sup>nd</sup> interested party had previously stated a charge and had in fact indicated in the previously cancelled bid that the said charge would apply. According to the deponent, from the documentation submitted by the 2<sup>nd</sup> Interested Party, it was not possible to tell why it was silent on the size of rental charges and provision of the free storage yet it was clearly indicated that it was the second stage of evaluation after the preliminaries and thus the 1<sup>st</sup> interested party avoided all kinds of ambiguities which move was to protect it from any further charges that would later arise. Besides, having previously cancelled tender in order to specifically include a clause on rental charge on the tank, nothing would have been easier than equally stating in the subsequent document that no charge would accrue. In his view, the 1<sup>st</sup> Interested Party Procurement team was dealing with new conditions that needed to be met for tender KNH/T/43/2013-2014 after learning from past experience and occasioning the 1<sup>st</sup> Interested Party to further unwarranted costs arising from the extra charges of the storage tanks and in all events, the 1<sup>st</sup> Interested Party evaluated the tender in line with the Act section 64 and its regulations 2006 section 49 (1), (2) and the fact that the 2<sup>nd</sup> Interested Party has been the sole supplier for over two decades did not necessarily entitle it to win the bid based on the historical facts and which guided it to file an Application for Review at the Respondent herein.
17. It is contended that it is after the determination of the Respondent culminating in its decision of 17<sup>th</sup> September, 2013 that has occasioned this Application and that the 1<sup>st</sup> interested party also did notify the 2<sup>nd</sup> interested party about the fate of their tender vide letter of notification dated 22<sup>nd</sup> August 2013 which clearly excluded the award on medical liquid gas as it had been awarded to the applicant hence the said Application for Review to the Respondent herein was time barred as it was lodged after the mandatory 7 days' period required to file the Review had expired and the

Respondent erred in interpreting the construction of the letter notifying the 2<sup>nd</sup> Interested Party of its failed bid for item number 3 and in fact the 2<sup>nd</sup> Interested Party took the letter dated 22<sup>nd</sup> August, 2013 as the notification for its other failed bids as it never complained of any breach in law in regard to them. Further, it is contended, the Respondent erred in law in treating the 11 items as independent tenders and thus separated item 3 and thus the only option available to the Respondent in this regard would have been to cancel the entire tender and not an order for re-evaluation of only one item as such a decision would have offered both entities equal treatment in law as well as equal protection in law and that it was not open to the Respondent under the provisions of section 98(b) of the Act to split the items tendered for in one bid and order a re-evaluation in respect of only one item as opposed to re evaluation of the entire tender, and there is no proviso in law which authorized the Respondent to make orders on individual items of the tender. It is the deponent's view that having found there was a breach of section 67 of the Act by the Procuring Entity, then the said breach affected the entire tender and it could not have been open to the Respondent to apply the said breach only on one item of the tender and which led to a bad precedent that needs to be corrected by this Honourable Court.

18. The deponent avers that considering that no stay was granted by this Honourable Court in regard to the decision of the Respondent, the 1<sup>st</sup> interested party duly re-evaluated the tender in regard to item 3 within 15 days as ordered and in line with the Technical Evaluation Committee's recommendation, the Tender Committee of the procuring entity has proceeded to cancel the award of the said item 3 to the ex parte Applicant as well as the entire tender for item number 3 and both tenderers have been advised as much.

### **THE 2<sup>ND</sup> INTERESTED PARTY'S CASE**

19. On the part of the 2<sup>nd</sup> interested party, a replying sworn by **Arthur Kamau**, its General Manager-Finance and Administration on 26<sup>th</sup> September 2013.
20. According to the deponent, despite the fact that the tender for the supply of Medical Liquid Oxygen was annulled and the 1<sup>st</sup> Interested Party was ordered by the Respondent to re-evaluate the bids, the Applicant has proceeded to install a storage tank for the supply of medical liquid oxygen at the 1<sup>st</sup> Interested Party's premises and is supplying medical liquid oxygen to the 1<sup>st</sup> Interested Party hence it is clear that the application for a stay of the Respondent's decision has been brought in bad faith as the Applicant is seeking a stay from this Honourable Court so that it can continue supplying medical liquid oxygen to the 1<sup>st</sup> Interested Party and circumvent the decision of the Respondent. The applicant has not come before this Honourable Court with clean hands. Further, the 2<sup>nd</sup> Interested Party has also received a letter from the 1<sup>st</sup> Interested Party informing it that the entire tender has been nullified yet the Respondent only annulled the tender in respect of Medical Liquid Oxygen. To the deponent, by allowing the Applicant to install a storage tank and supply medical liquid oxygen despite its bid having been annulled, it is clear that the 2<sup>nd</sup> Interested Party which is the procuring entity is not acting independently or in good faith.
21. It is deposed that the Respondent was correct in holding that there was no requirement in the Tender Document requiring bidders to expressly state that they would not charge for storage tanks and that clause 2.10.3 protected the Procuring Entity from varying its price so that the Applicant was bound by the price stated in its bid document. To him the applicant by failing to exhibit its own bid or that of the 2<sup>nd</sup> Interested Party and is therefore guilty of material non-disclosure. Further, the Respondent was correct in holding that the 2<sup>nd</sup> Interested Party was only properly notified by way of a decision dated 28<sup>th</sup> August 2013 which was only received by the 2<sup>nd</sup> Interested Party on 29<sup>th</sup> August 2013 and the 2<sup>nd</sup> interested party's appeal was therefore filed within time. To him, the Respondent only ordered that the tender in respect of the supply of medical liquid oxygen be re-evaluated and the Applicant should wait the outcome of the re-evaluation process.
22. There was a further replying affidavit sworn by the same deponent on 8<sup>th</sup> October 2013, in which he deposed that prior to the subject tender, the 1<sup>st</sup> Interested Party had invited bids for the supply of medical gases which tenders were cancelled by the 1<sup>st</sup> Interested Party and in respect of one of

the cancelled tenders the 2<sup>nd</sup> Interested Party had charged separately for the storage tank and cylinders. The 1<sup>st</sup> Interested Party then invited fresh bids for the supply of medical gases by way of a tender which is the subject matter of these proceedings. The Evaluation criteria set out at page 27 of the Tender Document stated: “The successful bidder for liquid oxygen must provide a storage tank at no extra charges and no rental charges Successful bidder should charge for contents only for the product in cylinders with no rental fees for the cylinders.” Pursuant thereto, the 2<sup>nd</sup> Interested Party submitted its bid and its price schedule which schedule did not contain any charge for a storage tank or rental fees for cylinders as no such storage charges or rental fees were quoted in the price schedule. It is therefore averred that the Respondent was correct in holding that there was no requirement in the Tender Document requiring bidders to expressly state that they would not charge for storage tanks and that clause 2.10.3 protected the 1<sup>st</sup> Interested Party from price variations so that the 2<sup>nd</sup> Interested Party was bound by the price stated in its bid document. In any event, it is deposed the 1<sup>st</sup> Interested Party awarded the 2<sup>nd</sup> Interested Party the tender for the supply of Nitrous Oxide which is supplied in cylinders hence if the tender required the 2<sup>nd</sup> interested party to specifically state that into rental charges would be applied for the supply of nitrous oxide, the 2<sup>nd</sup> Interested Party would not have been awarded the tender for Nitrous Oxide. The 1<sup>st</sup> Interested Party cannot apply its argument selectively. It is averred that the 2<sup>nd</sup> interested party’s bid was the lowest and yet the Applicant was informed on 22<sup>nd</sup> August 2013 that it had been awarded the tender for supply of Medical Liquid Oxygen. To him, the 1<sup>st</sup> Interested Party was required by Section 67(2) to inform the 2<sup>nd</sup> Interested Party that its bid in respect of medical liquid oxygen was not successful and in the letter dated 22<sup>nd</sup> August 2013 to the 2<sup>nd</sup> Interested Party, the 1<sup>st</sup> Interested Party did not inform the 2<sup>nd</sup> Interested Party that its bid in respect of Medical Liquid Oxygen was not successful hence the Respondent was correct in holding that the 2<sup>nd</sup> Interested Party was only properly notified by way of a decision dated 28<sup>th</sup> August 2013 which was only received by the 2<sup>nd</sup> Interested Party on 29<sup>th</sup> August 2013 and the 2<sup>nd</sup> Interested Party’s appeal was therefore filed within time. Since the 1<sup>st</sup> interested party acknowledged that the 2<sup>nd</sup> interested party had a storage tank at the hospital, it cannot therefore state that they were not aware that there was a storage tank which has been there since 1993.

23. Based on legal advice from his advocates, the deponent states that the Applicant has not set done any legal basis for quashing the Respondent’s decision and that in any event the Respondent only ordered that the tender in respect of the supply of Medical Liquid Oxygen be re-evaluated.

### **APPLICANT’S SUBMISSIONS**

24. On behalf of the applicant, it was submitted that since section 67(2) of the Act provides that “at the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful”, the Respondent erred and considered extraneous and irrelevant matters and was unreasonable in coming to the conclusion that the letter of the 1<sup>st</sup> Respondent dated 28<sup>th</sup> August 2013 and addressed to the 2<sup>nd</sup> interested party in response to a query from the 2<sup>nd</sup> interested party was the “proper notification” under section 67(2) of the Act. It is therefore submitted that under the said section there is no notification upon a query by an unsuccessful party or at any other time other than at the time of the notification of the successful bidder. Accordingly it is submitted that for the purposes of computing time within which a request for review must be lodged the period ran from 22<sup>nd</sup> August 2013 when the 2<sup>nd</sup> interested party was notified of its success in the 3 items and not 30<sup>th</sup> August 2013 as it did hence the Respondent ought to have found that the request for review was outside the 7 days period provided under the law. In entertaining the review, it is submitted the Respondent acted outside its jurisdiction. By so acting it is submitted that the Respondent acted in a manner that was not a fair administrative action that is lawful and procedurally fair to the applicant. It is further submitted that since there were only two bidders in respect of the subject tender and the applicant was successful in items numbers 2, 3, 4, 5, 7, 8, 9 and 11 while the 2<sup>nd</sup> interested party was successful in items numbers 1, 6 and 10, the notification that the applicant was successful in the 8 items could only have been a notification that it was unsuccessful in the

- three other items while the notification that the 2<sup>nd</sup> interested party was successful in the 3 items could only have been a notification that it was unsuccessful in the other 8. It is submitted that there was only one tender being Tender No: KNH/T/43/2013-2014 for supply and delivery of medical gases and not eleven separate tenders.
25. It is further submitted that no reasonable body faced with the clause Stage 2(i) in the tender document would have arrived at the decision which was arrived at by the Respondent hence the Respondent acted unreasonably and disproportionately in annulling the award of the tender to the applicant in respect of the Medical Liquid Oxygen. In support of its submissions the applicant relies on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223.**
26. These submissions were highlighted by **Mr Obok**, learned counsel for the applicant who was of the view that the prayers sought ought to be granted.

### **RESPONDENT'S SUBMISSIONS**

27. On behalf of the Respondent, **Ms Sirai**, learned counsel submitted that the Respondent had jurisdiction to handle the application placed before it since the letter dated 22<sup>nd</sup> August 2013 only informed the 2<sup>nd</sup> interested party on the bids which were successful but never informed it of the unsuccessful ones and it was only on 28<sup>th</sup> August 2013 that the 2<sup>nd</sup> interested party was notified of the unsuccessful bids. According to her, the law is clear that both successful and unsuccessful bids are to be notified hence the time for appeal started running on 28<sup>th</sup> August 2013 when the unsuccessful bids were notified hence the time for requesting for review would have lapsed on 5<sup>th</sup> September 2013 when the appeal was filed. It was her submission that the Respondent followed the law and the principles of natural justice were adhered to. It was further submitted that the applicant is challenging the merits and not the procedure that was followed hence there was no evidence of impropriety, illegality or ultra vires. Relying on **Republic vs. Commissioner of Customs Services ex parte K Link [2012] eKLR** it was submitted that the applicant is asking the Court to replace the decision of the Respondent with its own hence sitting on appeal against the decision of the Respondent and urged the Court to dismiss the application with costs to the Respondent.

### **1<sup>ST</sup> INTERESTED PARTY'S SUBMISSIONS**

28. On behalf of the 1<sup>st</sup> Interested Party, **Mr Muruiki** submitted that the letters of notification to both parties was dated 22<sup>nd</sup> August 2013 and whereas the 2 bidders bided for 11 items each got a letter notifying them of their success on various items bided which served as a notification of the failure of other items which were excluded in the notification. It was his contention that by only seeking the position of one item vide its letter dated 28<sup>th</sup> August 2013, it was an indication that the parties had been notified of the position of the rest of the items. It therefore follows that the review was filed out of time and ought not to have been entertained by the Respondent. If there was breach by the 1<sup>st</sup> Respondent, it was submitted that all the items were affected and the Respondent could not split the order and re-evaluate only one item as there was only one tender hence the Respondent acted in excess of its jurisdiction by treating the items as 11 different tenders in breach of section 67(2). It was submitted that the decision was biased, irrational and unreasonable hence the application ought to be allowed. He cited the decision in **Republic vs. Public Procurement and Disposals Review Board ex parte Avante International Technology Inc. Judicial Review Application No. 451 of 2012** in support of his submissions.

### **2<sup>ND</sup> INTERESTED PARTY'S SUBMISSIONS**

29. On behalf of the 2<sup>nd</sup> interested party it was submitted that there was no condition and or requirement in the tender document for bidders to expressly state that their prices did not include charges on storage tanks and cylinders other wise it would have been expressly stated so. Since with regard to Nitrous Oxide which is similarly supplied in cylinders, the 2<sup>nd</sup> interested party was

- awarded the tender without stating that it would not charge extra rental charges for cylinders, the argument cannot be applied selectively. It was therefore submitted that it was in consideration of this that the Respondent correctly found that the 1<sup>st</sup> interested party failed to evaluate the bid in accordance with the evaluation criteria which was a decision on merit. Citing **Republic vs. Commissioner of Lands ex parte Somken Petroleum Company Limited [2005] eKLR** and **COTU (K) vs. Nzioki and Others [1990-1994] EA 64**, it was submitted that there was no merit in the submission that the decision was contrary to the principles of natural justice; that it was disproportionate, subjective, unfair and unjust to the applicant; that it was contrary to the applicant's legitimate expectation, ultra vires, unreasonable, unlawful and null and void and that it was detrimental to the applicant's constitutional rights and to fair administrative action.
30. On jurisdiction, it was submitted that the decision made by the Respondent was within its jurisdiction under section 98 of the Act. It was submitted that contrary to the provisions of section 67(2) of the Act the 2<sup>nd</sup> interested party was only informed of the bids which were successful and not those ones in which it was unsuccessful until the letter dated 28<sup>th</sup> and received on 29<sup>th</sup> August 2013 upon enquiry by the 2<sup>nd</sup> interested party. It was therefore submitted that the request for the review was made within 7 days as required and the Respondent had jurisdiction to entertain, hear and determine the request for recording to the 2<sup>nd</sup> interested party the application is a disguised appeal and based on the decision in **Republic vs. Judicial Service Commission ex parte Pareno [2004] KLR 203** ought to be dismissed with costs.
31. In her oral address to court, **Miss Malik**, learned counsel for the 2<sup>nd</sup> interested party submitted that the reason why the 2<sup>nd</sup> interested party filed a request for review in respect of Medical Liquid Oxygen, was because that was the item it was most interested in and had complete discretion to choose which item to file such a request for thus the Respondent did not act ultra vires in dealing only with one item. According to learned counsel the purpose of notification is to inform the tenderers whether they are successful or not and that in the letter dated 22<sup>nd</sup> August 2013 there was no reference whatsoever to the bids in respect of Medical Liquid Oxygen. To expect the 2<sup>nd</sup> interested to make an inference that its bid in respect of that item was unsuccessful without it being expressly stated, learned counsel submitted would have been manifestly unfair and that it was precisely for that reason that the draftsmen of the Act enacted section 67(2) of the Act. In her view the purpose of the Act is to ensure that the public procurement and disposal is efficient and tax payers get value for money hence the reason why section 67(2) mandates the entity to notify the parties to the tender of their unsuccessful bids and to argue otherwise would be to perpetuate an illegality. It was submitted that the only letter that can be treated as notification was the letter dated 28<sup>th</sup> August 2013 which notified the 2<sup>nd</sup> interested party that its bid in respect of the Medical Liquid Oxygen was unsuccessful and reason therefor. It was further submitted that Regulation 66 as amended specifically states that the reasons for lack of success be furnished yet in the letter dated 22<sup>nd</sup> August 2013 there was neither the information with respect to the unsuccessful items nor the reasons therefor hence there would have been no basis upon which the request would have been made.

#### **REJOINER BY THE APPLICANT.**

32. In his rejoinder **Mr Obok** submitted that the 2<sup>nd</sup> interested party should have opted for other remedies if the reasons were not furnished.

#### **DETERMINATIONS**

33. Having considered the foregoing, this is the view I form of the matter.
34. In **Republic vs. Public Procurement and Disposals Review Board ex parte Avante International Technology Inc.** (supra) I express myself *inter alia* as follows:

**“That brings me to the issue whether the Court is entitled to reverse a decision of the Board where there is no irregularity in its decision-making process but the order made by itself is irrational and unreasonable. Where for example the Board finds that the Procuring Entity**

was wrong in its decision but concludes that it would not interfere because that was the first time the Procuring Entity erred it would be an abdication of the Court's supervisory powers to allow such irrational decision to stand. I therefore disagree with the stand taken by the respondents that as long as the decision-making process is proper the Court ought to close its eyes to the actual decision arrived at."

35. What amounts to the 3I's (that is irrationality, illegality and procedural impropriety) was dealt with in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, in which the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at 479 held:

**"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

36. In this case it is submitted that based on the clause in Stage 2(i) of the tender document the Respondent's decision to nullify the award of the tender by the 1<sup>st</sup> Respondent was irrational. Irrationality as stated herein above is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Accordingly irrationality is not just being unreasonable but exhibiting gross unreasonableness. In my view a decision may be irrational where it is based on no ground at all or where it is based on extraneous or irrelevant grounds or failure to consider relevant ground.

37. Section VII – Evaluation Criteria Stage 2(i) – Other Conditions, provided as follows:

***"The successful bidder for liquid oxygen must provide a storage tank at no extra charges and no rental charges.... Successful bidder should charge for contents ONLY for the product in cylinders with no rental fees for the cylinders."***

38. The 2<sup>nd</sup> interested party's bid for Medical Liquid Oxygen was found to have been unsuccessful because it did not specifically state that the 2<sup>nd</sup> interested party would not impose rental charges for the cylinders. The 2<sup>nd</sup> interested party has countered this by stating that it won the tender for Nitrous Oxide which is similarly supplied in cylinders hence the ground relied on by the 1<sup>st</sup> Interested Party to deny it the tender was applied selectively. Further it was contended that from the terms of the tender document the 1<sup>st</sup> interested was protected against any charges outside the tender documents. From the said clause, it cannot be said with certainty that it was a condition that the bidders expressly state that they would not charge rental for the cylinders in order to warrant an omission to do so to justify the disqualification from the award of the tender. That, taken together with the argument in respect of the Nitrous Oxide would make the basis of disqualification of the 2<sup>nd</sup> interested party from being awarded the tender for Medical Liquid

Oxygen ring hollow. In the premises even if this Court was minded to reach a different decision from that of the Respondent on the matter, it cannot be said that the Respondent's decision on the issue was irrational as there surely was material upon which the Respondent could arrive at the decision as it did.

39. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

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

40. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60*.
41. Therefore to quash the Respondent's decision on that ground would amount to this Court sitting on appeal against the decision of the Respondent and that is not the object of judicial review proceedings.
42. It is further contended that the Respondent entertained the request for review outside the 7 days period provided under the Public Procurement and Disposal Regulations. That a request for review to the respondent ought to be made within 7 days of the date of notification is not in dispute.
43. In my view, the dispute is what constitutes a notification for the purposes of the request for the review? Section 67(2) of the Act provides:

***At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.***

44. It is not in dispute that the letter dated 22<sup>nd</sup> August 2013 did not expressly notify any of the parties that its bid in respect of any items were unsuccessful. It is noteworthy that each of the bidders was notified via a separate letter. The letters did not mention which bids had been given to the opposite party in order for the particular bidder to deduce that its bid in respect of the other items were unsuccessful. Could the 2<sup>nd</sup> interested party reading the letter dated 22<sup>nd</sup> August 2013 necessarily deduce that its bid in respect of the other items was unsuccessful? I am not prepared to say so. It may be that the other items were still under consideration and had the 2<sup>nd</sup> interested party made a request for review without getting a clear picture of the fate of the other items, its request for review may well have been found to be premature if it turned out that no decision had as yet been made with respect to the other items. It was therefore only reasonable that the 2<sup>nd</sup> interested party seeks clarification as what was the fate of the other items for which there was no express indication that it had succeeded in bidding. Therefore the failure to expressly notify the parties that their bids were unsuccessful was an error on the part of the 1<sup>st</sup> interested party. That error in my view did not take away the bidders' right to request for review. In my view with respect to the unsuccessful bids, the 2<sup>nd</sup> respondent's time for making a request to the Respondent started running from the date that it was communicated to it either impliedly or expressly that its bid was

- unsuccessful. I have already held that there was no implied notification in the letter dated 22<sup>nd</sup> August 2013 that the 2<sup>nd</sup> interested party's bids in respect of the other 8 items were unsuccessful since the letter did not indicate that the applicant was the successful bidder in respect thereof. May be if there had been such an indication or if the letters to the bidders were copied to the other bidder, the situation might have been different.
45. I however do not accept that the failure to give reasons for declining a bid makes the decision not a decision for the purposes of a request for review. Regulation 66(2) of the Regulations provides that reasons for failure to succeed are only to be furnished upon request.
46. It was contended that the Respondent had no jurisdiction to make a decision with respect to only one item and that if the decision was to be made, it had to be made in respect of all the tenders. In **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, Nyamu, J (as he then was) recognised the public interest in the enactment of the Act when he stated as follows

**“Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the Procurement Procedures for the benefit of the public. Indeed, sections 36(6) and 100(4) of the Act which are ouster clauses, were tailored to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality. The Court must look into each and every case and its circumstances and balance the public interest with that of a dissatisfied applicant.”**

47. To hold that where there is a problem or an issue with only one item in a tender, the whole tender must be thereby affected would in my view defeat the whole object of the Act which is to hasten or expedite the Procurement Procedures for the benefit of the public. It would also be unjust and unfair to the other successful bidders if the whole tender was to be annulled simply because the award of one item was found to have been improper. Whereas it is true the subject tender was one tender it was composed of several items in which awards were made to the *ex applicant* and the 2<sup>nd</sup> interested party respectively. In the circumstances of the case, I am satisfied that the Respondent was entitled to deal with and determine only the award in respect of particular items without necessarily interfering with the other items against which no complaint was made.
48. It was also submitted that since the 2<sup>nd</sup> interested party's bid was the lowest to award the tender to the applicant would have amounted to misuse of the taxpayers' money. Courts do recognize that Tribunals are specialised and in most cases have the technical knowledge of all the matters concerning the dispute between the parties before them hence the Courts ought not to interfere with their decisions on matters of merits. Accordingly, this Court would not be entitled to interfere with the decision of the 1<sup>st</sup> interested party, even if it had powers to do so in these kinds of proceedings, merely because the 1<sup>st</sup> interested party did not opt for the lowest bid.
49. It was also contended that since no stay was granted by this Court in regard to the decision of the Respondent, the 1<sup>st</sup> interested party duly re-evaluated the tender in regard to item 3 within 15 days as ordered and in line with the Technical Evaluation Committee's recommendation, the Tender Committee of the procuring entity proceeded to cancel the award of the said item 3 to the *ex parte Applicant* as well as the entire tender for item number 3 and both tenderers were advised as much. This submission was with due respect made without taking into account the provisions of section 100(1) of the Act which provides:

***A decision made by the Review Board shall, be final and binding on the parties unless judicial***

*review thereof commences within fourteen days from the date of the Review Board's decision.*

50. In my view where judicial review proceedings are commenced within fourteen days from the date of the Respondent's decision, the said decision is neither final nor binding and hence ought not to be implemented. In other words there is a statutory stay of the decision and no further stay is necessary under Order 53 of the Civil Procedure Rules. As I held in **Republic vs. Public Procurement and Disposals Review Board ex parte Avante International Technology Inc.** (supra):

**“Section 100(1) of the Act provides that a decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision. The respondents contend that since there was no stay granted by the Court and the said contract was entered into the orders sought herein are incapable of being granted. This action is justified on the ground that the Commission's action is dictated by the timelines for the conduct of the elections and therefore it had to proceed with the contract. That may be so, however, if the Commission decides to enter into a contract during the pendency of judicial review proceedings filed within the stipulated period, it does so at the risk that the Court may nullify the process leading to the tender and it would be no excuse that the tender had been entered into since it is clear that where the judicial proceedings are commenced within 14 days, the decision of the Procuring Entity is not final in which event the Court could be properly entitled to nullify the procurement. The decision of the Board having been made on 11<sup>th</sup> December 2012 and these proceedings having been instituted on 20<sup>th</sup> December 2012, the same were instituted within time hence the mere fact that the contract had been awarded and part payment made is in my view inconsequential.”**

51. Whereas in deciding whether or not to grant the discretionary relief in judicial review proceedings, the Court is bound to consider whether the remedy is efficacious in the circumstances obtaining and can withhold the gravity of the order where among other reasons the object for which application is made has already been realised or overtaken by events, if the procuring entity goes ahead to implement the decision of the Respondent during the pendency of the judicial review proceedings with a view to defeating the outcome of the said proceedings, it will be no answer to the proceedings to contend that the proceedings have been overtaken by events.

52. I have said enough to show that the Notice of Motion dated 27<sup>th</sup> September, 2013 is unmerited.

### **ORDERS**

53. In the result the Notice of Motion dated 27<sup>th</sup> September, 2013 fails and is dismissed with costs to the Respondent and the 2<sup>nd</sup> interested party.

**Dated at Nairobi this day 16<sup>th</sup> of December 2013**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Obok for the ex parte applicant***

***Miss Osoro for the 1<sup>st</sup> interested party***

***Miss Malik for the 2<sup>nd</sup> interested party***